STATE OF MINNESOTA
IN SUPREME COURT

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Cullen Sheehan, Norm Coleman, Cara Beth Lindell, and John Doe,

Petitioners,

vs.

Mark Ritchie, Minnesota Secretary of State, the Minnesota State Canvassing Board, Isanti County Canvassing Board and Terry Treichel, Isanti County Auditor-Treasurer, individually and on behalf of all County and Local Election Officers and County Canvassing Boards,

Respondents.

Court File No. A08-2169

**SECOND AFFIDAVIT OF JAMES K. LANGDON**

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STATE OF MINNESOTA )
) SS
COUNTY OF HENNEPIN )

James K. Langdon, being first duly sworn, hereby deposes and states as follows:

1. I am admitted to practice before this Court and am counsel to Petitioners. I submit this Second Affidavit in support of the relief requested in the Amended Petition.

2. Attached as Exhibit A is a true and correct copy of the Memorandum of Al Franken for Senate Committee and Al Franken Regarding Canvassing Board Proceedings, which was submitted by their counsel to the Canvassing Board on December 15, 2008.

3. Attached as Exhibit B is a true and correct copy of a November 17, 2008 letter from Assistant Attorney General Kenneth E. Raschke, Jr. to Secretary of State Mark Ritchie.

FURTHER AFFIANT SAYETH NOT.

James K. Langdon

Subscribed and sworn to before me
this 16th day of December, 2008.

Notary Public

# EXHIBIT A

STATE OF MINNESOTA STATE CANVASSING BOARD

*In Re*: 2008 United States Senate Election

**MEMORANDUM OF THE AL FRANKEN FOR SENATE COMMITTEE AND AL FRANKEN REGARDING CANVASSING BOARD PROCEEDINGS**

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## I. INTRODUCTION

On Tuesday, December 16, 2008, this Board will meet to canvass the results of the recount of the 2008 Minnesota U.S. Senate election. In prior hearings, members of this Board have concluded that the State Canvassing Board does not have sweeping, adjudicative powers in performing its duty to conduct the canvass, but rather is charged simply with recounting the ballots properly cast and determining voter intent with respect to individual ballots. *See* State Canvassing Board Hearing, December 12, 2008; State Canvassing Board Hearing, November 26, 2008. To be consistent with those views, this Board now must limit the types of challenges it considers in its canvass.

In preparation for the canvass, the Al Franken for Senate Committee (the "Franken Committee") has withdrawn thousands of the 3,278 challenges it initially asserted. With this brief, the Franken Committee withdraws additional challenges, leaving only 436 ballot-specific challenges for Board consideration. (The remaining ballot-specific challenges are attached as Exhibit A to this memorandum; Exhibit B identifies all of the challenges withdrawn to date). These ballot-specific challenges include only those *specific* ballots presenting serious questions of determining for whom the voter intended to cast his or her ballot in the 2008 U.S. Senate General Election (or whether a distinguishing mark on the face

of the ballot disqualifies the ballot from being counted in the recount). By the reasoning of this Canvassing Board, these are the only challenges properly before this Board.

In addition to these ballot-specific challenges, the Franken Committee is reserving, pending clarification from this Board, 339 additional challenges relating to incidents occurring in various counting centers around the state. Indeed, both campaigns have asserted mass challenges arising from specific "incidents" occurring in dozens of counting locations around the state, documented in over 90 formal "incident reports" prepared by the counties themselves and over 250 "incident reports" prepared by the Franken Committee alone. These blanket "incident-based" challenges range from the behavior of county recount officials (in one instance forcing a public repudiation of challenges, resulting in an emotional breakdown of a campaign observer), to "chain of custody" concerns arising from unsealed or loosely sealed ballot envelopes or ballots that were secured separately from other secured ballots from the same precinct, to allegations of ballot duplication errors by county election officials. The scope and range of these mass "incident based" challenges is sweeping and includes 339 challenges (identified in Exhibit C) by the Franken Committee alone.[1]

In light of the position this Board has taken in its prior hearings, the Franken Committee understands that none of these intensely fact-bound and hotly-disputed "incident-based" challenges are properly the subject of a challenge before this Board. *See, e.g.*, State Canvassing Board Hearing, December 12, 2008 (statement of Anderson, J.). When fact-based allegations of electoral irregularities or improprieties can "only be decided by a court that could call in witnesses, hear evidence, and decide questions of law and fact," the

[1] Exhibit C identifies the "incident based" challenges asserted by the Franken Campaign and replaces earlier lists of challenges. Exhibit C, in addition, corrects a number of typographical errors in earlier lists of withdrawn challenges.

Minnesota Supreme Court has held that the questions are for judicial officers. *Taylor v. Taylor*, 10 Minn. 107 (1865).

The Franken Committee is prepared to release all "incident-based" challenges (identified in Exhibit C) upon the Board's clarification and direction with respect to such challenges.[2] Consistent with this Board's prior rulings, these issues would appear to be the proper subjects of an election contest proceeding where witnesses can be called and cross-examined, evidence can be weighed, and a fact-finder can decide questions of law and fact. If, on the other hand, such issues and challenges will be considered by *this Board*, the Franken Committee will preserve and present these challenges, and – as noted below – the Franken Committee respectfully requests the right to call and cross-examine witnesses, examine polling place documentation and machines, introduce exhibits and other evidence, and to present evidence regarding both its own "incident based" challenges, and the hundreds of such challenges asserted by the Coleman Campaign.

For the remaining challenges that can be resolved upon examination of the disputed ballot itself, the Franken Committee will be asserting its right under the Administrative Recount Procedures, as passed by the State Canvassing Board on November 18, 2008, to present the basis of each challenge. It further requests leave to present the basis of each challenge orally. The Franken Committee also expects to exercise its right to respond to each challenge made by the Coleman campaign, and again requests the right to do so orally.

[2] The Coleman Campaign, too, appears to seek direction from the Board with respect to whether such "incident based" challenges are properly before the Board. Press Release, "Coleman Campaign Intends to Present Board with less than 1,000 Challenges," Dec. 14, 2008 (attached as Exhibit D).

## II. DISCUSSION

### A. Pursuant To This Board's Prior Rulings, The State Canvassing Board Is Charged Simply With Recounting the Ballots Properly Cast and Determining Voter Intent With Respect to Individual Ballots

"The scope of an automatic or administrative recount is limited to the recount of the ballots cast and the declaration of the person nominated or elected." Minn. Admin. Code § 8235.0200. *See also* CJS Elections § 380 (Anderson, J.) (describing a canvassing board as "without judicial or quasi-judicial powers," but rather as "a neutral body whose duties are ministerial in nature").

Members of this Board have already stated, on two occasions, that they are restricted in their powers. The Final Recount Plan defines the Board's function as determining the proper outcome for each challenged ballot. As the Recount Plan, as adopted by this Board, makes clear, "Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process." To properly consider "incident based" challenges arising from complex and hotly disputed factual circumstances, the Board would be forced to consider evidence and testimony beyond that limited scope. Members of the Board have previously concluded that the Board has no such adjudicative power and that the Board is not well-suited to fact-intensive adjudication.

By contrast, such questions are regularly considered by courts in election contests in Minnesota. *See, e.g.*, *Hancock v. Lewis*, 265 Minn. 519 (1963) (contestant alleged, among other things, that village clerk issued 21 absentee ballots for the election without requiring the voters to fill out the proper absentee ballot application and that election judges left the polling place at various intervals while the polls remained open for voting); *Nelson v. Bullard*, 155 Minn. 419 (1923) (court invalidated a vote in a precinct upon evidence that the

voter resided elsewhere); *McEwen v. Prince*, 125 Minn. 417 (1914) (court found that contestant failed to prove that three voters had their ballots marked by another person without first making the required oath that they were unable to mark their ballots by themselves).[3]

## B. The Mass "Incident Based" Challenges Asserted In This Recount

As noted above, in addition to ballot-specific challenges relating to voter intent or distinguishing marks on a ballot, both campaigns have asserted hundreds of additional mass or blanket "incident based" challenges. These challenges arise from disputes or occurrences within dozens of counting centers, and involve hundreds of counting center officials, election observers and other witnesses, and a wide variety of circumstances, claims and counterclaims. Consistent this Board's prior rulings, none of these challenges appear to be properly before this Board, which has expressed concerns over hearing the many witnesses and considering the ample evidence that might be necessary to resolve the myriad challenges

[3] Such allegations are addressed in election contests in other states as well, as even a small sampling of such cases demonstrates. Courts in election contests regularly consider challenges to ballots that are facially valid, together with "incidents" or other error occurring in connection with an election. *See, e.g., Middleton v. Smith*, 539 S.E.2d 163 (Ga. 2000) (election contest considered validity of ballots cast at precinct where sheriff had mailed letters to voters urging them to vote for particular candidates, campaigned for said candidates at the poll, offered to "help" a convicted felon who performed community service at the sheriff's department if he would help the sheriff's candidates, offered to "help" a voter who was facing DUI charges, and prepared and distributed 38 absentee ballot applications); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181 (Ill. Ct. App. 2004) (court found candidate's proffered testimony inadequate to establish chain of custody for three absentee ballots discovered in the wrong precinct); *Womack v. Foster*, 8 S.W.3d 854 (Ark. 2000) (upholding trial court's rejection of four absentee ballots after hearing testimony that the voters were incompetent); *Beckstrom v. Volusia County Canvassing Bd.*, 707 So.2d 720 (Fla. 1998) (in election contest, contestant claimed, among other things, that a number of absentee ballots remained absent and unaccounted for; that election officials failed to properly preserve all absentee ballots for which duplicates were made, that a number of duplicate ballots were unaccounted for; and that some absentee ballots were changed and/or misplaced, lost, or otherwise not counted as a result of fraud, gross negligence, or intentional wrongdoing); *Otworth v. Bays*, 98 N.E.2d 812 (Ohio 1951) (where first ten voters at precinct were accidentally given two ballots, court in election contest considered testimony of what had been done with extra ballot); *Helm v. State Election Bd.*, 589 P.2d 224 (Okla. 1979) (where voting machine programming error resulted in votes being recorded for the wrong candidate, court would consider voter testimony as proof of voter intent); *Bradley v. Jones*, 300 S.W.2d 1 (Ark 1957) (court in election contest, after hearing testimony that one of the candidates delivered a large brown manila envelope to an election official at the polling booth, considered voter testimony as to how each voter in precinct actually voted).

at issue. In the event that the Board is inclined to consider these mass challenges and engage in the necessary fact-finding, the Franken Committee provides the following overview of the issues that would be before the Board and the evidence that the Franken Committee would present with respect to each identified challenge.

### 1. Chain of Custody and Incident Challenges

Perhaps the most common of the mass challenges involve allegations of concerns relating to chain of custody, ballot security, and other counting and precinct-specific incidents. The counties themselves submitted over 90 incident reports to the Secretary of State during the recount process, many of them relating circumstances relevant to such allegations. The Franken Committee itself collected over 250 of its own reports regarding improper procedure, ballots that were found unsecured, ballot number discrepancies, and other issues. The Coleman Campaign, without a doubt, has its own collection of similar issues or concerns.

If the Board does wish to explore these issues, the Franken Committee provides below some of the issues that it would address to support its challenges, and the witnesses and evidence it would muster. In addition, the Franken Committee notes that some precincts will have to be re-opened to properly and consistently lodge challenges on these issues on a state-wide basis, as Deputy Recount Officials in many instances did not permit the campaigns to lodge such challenges in the first instance.

A full catalogue the incidents at issue would, of course, burden the Board with detail that is likely irrelevant and unnecessary. Nonetheless, to ensure that the Board apprehends

the range of evidence likely to be necessary to adjudicate such "incident based" challenges to otherwise entirely appropriate ballots, a short summary of a representative sample follows.[4]

- **Becker County**: Sixty-one ballots were found by the county auditor in the auditor's office after November 4th, which were then counted on November 25th. Additionally, in Holmesville Township, four ballots were found in an unsealed container. The Secretary of State's office instructed county officials not to permit challenges based on these issues, and so the county will have to be re-opened to permit the ballots to be challenged.
    - Evidence would include the precinct book, the machine tapes, and the ballots at issue.
    - Witnesses would include Ryan L. Tangen, the Auditor-Treasurer, and Josh Nussbaum and Trista Schwind, the Franken Committee representatives who observed the counting of these ballots.
- **Carver County**: There was a discrepancy regarding the number of ballots in Chaska Ward 3.
    - Evidence would include the precinct book and the machine tapes.
    - Witnesses would include Laurie Engelen, the County Auditor, and Kent Berg, the Franken Committee representative who observed the counting of this precinct.

[4] If the Board in inclined to undertake a review of these matters, the Franken Campaign would propose that the Board direct the parties to prepare and to file a comprehensive "pre-trial statement" identifying, for each of the challenges at issue, the necessary witnesses and exhibits necessary to a fair adjudication consistent with due process. Once the necessary witnesses and exhibits have been identified, the Board can scheduling the hearings necessary to entertain that evidence.

- **Clay County**: In Oakport Township, there was a discrepancy regarding the number of ballots.
    - Evidence would include the precinct book; the machine tapes; and the ballots at issue. The County also lodged an incident report.
    - Witnesses would include Lori Johnson, the Auditor-Treasurer, and Josh Nussbaum, the Franken Committee representative who observed the counting of this precinct.
- **Dakota County**: In Burnsville Precinct 7, one of the boxes of ballots temporarily went missing. Furthermore, it appears that some ballots were counted twice on election night, leading to a discrepancy between the machine totals and the actual number of ballots.
    - Evidence would include the precinct book, the machine tapes, and the ballots at issue.
    - Witnesses would include Joel Beckman, the Director of Property Taxation and Records, as well as the Franken Committee representatives present on site.
- **Dakota County**: In Inver Grove Heights Precinct 7, there was a discrepancy between the number of ballots counted on election night and the subsequent recounts, in which there appeared to be one more ballot than was originally counted on election night.
    - Evidence would include the precinct book, the machine tapes, and the ballots at issue. The County lodged an incident report that would also properly be entered into evidence.

- Witnesses would include Joel Beckman, the Director of Property Taxation and Records, and Bridget Cusick, the Franken Committee representative who observed the counting of this precinct.

- **Dakota County**: In Lakeville Precinct 5, nearly 300 ballots were missing after the first recount. They were later found. The Deputy Recount Official refused to entertain attempted challenges to these ballots based on security issues.
  - Evidence would include the precinct book, the machine tapes, and the ballots at issue. The County also lodged an incident report.
  - Witnesses would include Joel Beckman, the Director of Property Taxation and Records, and Bridget Cusick, Dan Traum, David Ralls, and Teresa Kusch, the Franken Committee representatives who observed the counting of this precinct.
- **Dakota County**: In Lakeville Precinct 10, there was a discrepancy regarding the number of ballots.
  - Evidence would include the precinct book and the machine tapes.
  - Witnesses would include Joel Beckman, the Director of Property Taxation and Records, and Bridget Cusick, Kristopher Morris, and Dan Traum, the Franken Committee representatives who observed the counting of this precinct.
- **Goodhue County**: The Franken Committee received allegations of unfair treatment by the election officials on site, which included said election officials refusing to lodge Franken challenges and permitting all Coleman challenges.

- Evidence would include all incident reports lodged by the county as well as the ballots that the officials would not permit to be challenged.
- Witnesses would include Carolyn Homsten, the Finance Directors, and Cory Kobbervig and Jeff Hauser, the Franken Committee representatives on site who observed the counting of this precinct.

- **Hennepin County**: In Brooklyn Park Ward C, Precinct 9, there were unexplained discrepancies in the ballots recounted.
  - Evidence would include the precinct book and the machine tapes.
  - Witnesses would include Sharon Knutson, the City Clerk, and Johnny Mathias, the Franken Committee representative who observed the counting of this precinct.
- **Hennepin County**: In Crystal, Ward 4, Precinct 2, there were absentee ballots that were accepted but then left sealed in their envelopes, and opened during the recount. The Coleman campaign challenged all of these ballots. It also appears that there may be a discrepancy regarding the number of ballots.
  - Evidence would include the precinct book, the machine tapes, and the ballots at issue.
  - Witnesses would include Janet Lewis, the City Clerk, and Emily Antin, the Franken Committee representative who observed the counting of this precinct.
- **Hennepin County**: In Minneapolis Ward 5, Precinct 5; Ward 7, Precinct 11; and Ward 11, Precinct 4, additional ballots were found after the conclusion of the recount in each respective precinct.

- Evidence would include the precinct book, the machine tapes, and the ballots at issue.
- Witnesses would include Cynthia Reichert, Director of Elections, and Matthew Grill, the Franken Committee representative who observed the counting of these precincts.

- **Hennepin County**: In Minneapolis Ward 8, Precinct 7, uncounted absentee ballots were discovered. The City has not yet recounted these ballots.
  - Evidence would include the precinct book, the machine tapes, and the ballots at issue.
  - Witnesses would include Cynthia Reichert, Director of Elections, and Matthew Grill, the Franken Committee representative who observed the counting of these precincts.
- **Hennepin County**: In Plymouth Ward 3, Precinct 18, there was a discrepancy regarding the number of ballots. A subsequent search of the vault and ballot machines did not yield additional ballots that would explain the discrepancy.
  - Evidence would include the precinct book and the machine tapes.
  - Witnesses would include Sandra Engdahl, the City Clerk, and Jordan Brandt, the Franken Committee representative who observed the counting of this precinct.
- **Hennepin County**: In Richfield Ward 1, Precinct 4, there was a discrepancy regarding the number of ballots.
  - Evidence would include the precinct book and the machine tapes.

- Witnesses would include Nancy Gibbs, the City Clerk, and Norah Deluhery, the Franken Committee representative who observed the counting of this precinct.

- **Hennepin County**: in Robbinsdale Ward 3, there was a discrepancy regarding the number of ballots.
  - Evidence would include the precinct book and the machine tapes.
  - Witnesses would include Tom Marshall, the City Clerk, and Rachel Wall, the Franken Committee representative who observed the counting of this precinct.
- **Itasca County**: In Grand Rapids Precinct 5, there was a discrepancy regarding the number of ballots.
  - Evidence would include the precinct book and the machine tapes.
  - Witnesses would include Marsha Goslovich, the Election Administrator, and Matt Scherer, the Franken Committee representative who observed the counting of this precinct.
- **Itasca County**: In Cohasset, a note was found that stated that four rejected absentee ballots were nonetheless counted. These rejected ballots were not subsequently identified or removed from the count.
  - Evidence would include the precinct book, the machine tapes, the note, and the ballots at issue.
  - Witnesses would include Marsha Goslovich, the Election Administrator, and Matt Scherer, the Franken Committee representative who observed the counting of this precinct.

- **Lake County**: In Beaver Bay, there was a discrepancy regarding the number of ballots.
    - Evidence would include the precinct book and the machine tapes.
    - Witnesses would include testimony from Steve McMahon, the Auditor-Treasurer, and Tony Sterle, the Franken Committee representative who observed the counting of this precinct.
- **Mower County**: In Austin Ward 1, Precinct 2, the county auditor physically altered the numbers on the election night tapes during the recount process to reflect newly-calculated voter totals.
    - Evidence would include the precinct book, the machine tapes, and the ballots at issue.
    - Witnesses would include Dave Groh, the County Auditor, and Emily Jensen and Josh Wilken-Simon, the Franken Committee representatives who observed the counting of this precinct.
- **Mower County**: During the Sergeant Township recount, and over the heated objection of Franken Committee recount lawyers and observers, the county auditor forced a Franken Committee representative to withdraw a challenge and sign a statement that she had done so voluntarily, after first requiring her to stand in the front of the room and publicly explain the basis of her challenges, which resulted in her emotional breakdown before the crowd of observers.
    - Evidence would include the precinct book and the machine tapes. The precinct must be re-opened to secure the challenge at issue.

- Witnesses would include Dave Groh, the County Auditor, Emily Jensen and Steve Keyser, the Franken Committee representatives who observed the counting of this precinct, and Emily Schmidt, the Franken Committee representative who was required to sign the statement described above.

- **Ramsey County**: During the first three days of the recount, county election officials instructed election judges to sort and count ballots simultaneously, which severely impeded the ability of campaign representatives to observe the accuracy and integrity of the recount process.
  - Evidence would include any instructions given to county personnel in Ramsey County regarding recount procedures.
  - Witnesses would include Joe Mansky, the Elections Director, and Susan Brand, Hassan Mian, Robert Yingst, and Ryan Greenwood, the Franken Campaign representatives who observed the counting at this site.
- **Scott County**: In Savage Precinct 7, there were five absentee ballots that do not appear to have been counted on election night. A box of ballots in this precinct was also found unsealed.
  - Evidence would include the precinct book, the machine tapes, and the ballots at issue in the unsealed container.
  - Witnesses would include Andy Lokken, the Elections Administrator, and John Wilken-Simon, the Franken Committee representative who observed the counting of this precinct.

- **Stearns County**: In St. Cloud Ward 3, Precinct 1, there was a discrepancy regarding the number of ballots.
    - Evidence would include the precinct book and the machine tapes.
    - Witnesses would include Randy Schreifels, the Auditor-Treasurer, and the Franken Committee representatives who observed the counting of this precinct.
- **Wright County**: Many ballots were never properly secured in Wright County. In particular, many of the original ballot envelopes were unsealed. In some precincts, election officials unsealed an envelope of original ballots outside of the presence of Committee representatives, and then resealed the envelopes.
    - Evidence would include the envelopes with the original ballots.
    - Witnesses would include State Director of Elections Gary Poser, and Bridget Cusick, the Franken Committee's lead representative at the site.

**2. Challenges to Ballots from the Wrong Precinct**

In addition to the numerous "chain of custody" and ballot security issues of the type described above, several of the "incident based" challenges involve instances in which absentee voters received, and utilized, ballots from the wrong precinct. Of course, ballots from all precincts place the Senate election in the same position on the ballot and all Minnesota voters were entitled to vote in the U.S. Senate election. Nonetheless, because of the error in utilizing ballots from the wrong precinct, both campaigns have challenged a number of these ballots. The Franken Committee will withdraw its challenges if the Board indicates that it will not consider challenges premised on an absentee voter utilizing a ballot from the wrong precinct. If the Board does wish to consider whether these ballots were

properly cast and counted, the Franken Committee, for its part, would intend to call the county election administrators from the jurisdictions involved and to present the ballots at issue in support of its challenges to these ballots.

### 3. Duplicate / Original Numerical Mismatch Challenges

Finally, a large number of challenges to otherwise properly cast ballots are premised on allegations of errors made by election administration staff in "duplicating" ballots that, because of damage to the original, were unable to be fed through the tabulation machines on election day. Under Minn. Stat. § 206.86, subd. 5, duplicate copies of original ballots are to be made when the original ballot "cannot be counted properly by the automatic tabulating equipment." Under the Administrative Recount Procedures passed by the Board on November 18, 2008, if an envelope of original ballots is found for a precinct, all duplicate ballots shall be segregated into a fourth pile, and the original ballots shall themselves be recounted.

It became apparent during the recount process that the number of duplicate ballots found and the number of original ballots cast in a given precinct did not always match. On November 19, 2008, Deputy Secretary of State Jim Gelbmann sent the following instructions to all election officials:

> 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 separate pile. If there is an envelope of original ballots, the original 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.

Both campaigns were notified that the foregoing instruction would be issued, and neither campaign objected to the approach set forth in the Deputy Secretary of State's letter. Almost all locations correctly followed the procedure above.

Nevertheless, in some counting locations, the campaigns did challenge ballots when additional original ballots could not be matched to duplicates, or vice versa. In other locations, Deputy Recount Officials *did not permit* the campaigns to lodge challenges based on a mismatch between original and duplicate ballots. Thus, while some outstanding challenges to such ballots do exist arising from some counting centers, there are other, similarly situated counting centers, where no such challenges were permitted.

Perhaps more than any other single category of mass incident based challenges, these alleged "duplication" errors are uniquely factually based and complex and, for that reason, would require considerable testimony before this Board. For starters, of course, if the Board decides to consider whether any such challenges should be upheld, both campaigns should be permitted to reopen those precincts where Deputy Recount Officials did not permit challenges to original ballots that could not be matched to duplicates. That would, of course, entail re-sorting the original ballots in these precincts, matching the original ballots to the duplicate envelopes, and lodging additional challenges for the Board's consideration. In addition, in each instance, the local election judges and election administrators charged with conducting the duplication process will need to testify with respect to their process, their ballot duplication numbering, and the specific ballots at issue. Finally, recount officials and observers from both campaigns will be required to testify with respect to the originals and

duplicates located during the recount process and the handling and recounting of those ballots. There is, simply put, no other rational way to adjudicate these complex challenges without testimony and evidence from those with first hand knowledge of the original duplication process and the status and handling of those ballots during the recount process.

The Franken Committee understands that, in light of this Board's recent rulings, challenges of this sort have no place before this Board. This Board has ruled that it does not have sweeping, adjudicative powers in performing its duty to conduct the canvass, but rather is charged simply with recounting the ballots properly cast and determining voter intent with respect to individual ballots. The Board has repeatedly expressed its concerns over considering and resolving such hotly contested factual disputes. For these reasons, the Franken Committee is prepared to release such challenges and reserve these issues for adjudication in an election contest, should that be necessary.[5]

## III. CONCLUSION

When the Board meets on Tuesday, December 16, to consider the campaigns' challenges to contested ballots, it should exclude from consideration all challenges premised on "incident-based" factual allegations as set forth above. Consideration of such issues would carry the Board beyond the bounds of its previously announced duties and into a realm of factually complex and time-intensive adjudication that can still be addressed in an election contest. In performing its duty to conduct the canvass, the Board should restrict its

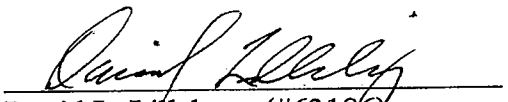
[5] In a few instances, recount locations refused to count original ballots to the extent they could not be matched with duplicate ballots, in contravention of the clear rules from the Deputy Secretary of State. In those instances, challenges to these ballots, which were initially and mistakenly placed in the "Other" pile, will be preserved by the Franken campaign, as these ballots should be counted. In a few counting locations, the Franken campaign was required by the Deputy Recount Official to challenge *all* duplicate or original ballots to preserve the issue. The Franken Campaign can see no procedural alternative but to maintain its challenges to the few Franken ballots that were challenged during this process to ensure that these votes can be counted for Franken.

focus to its previously announced prescribed task of recounting the ballots properly cast and determining voter intent with respect to individual ballots.

While the Franken Committee preserves its right to pursue "incident-based" challenges, it is prepared to waive all such challenges at this time (and to preserve them for an election contest, should one be filed by either campaign) upon clarification from this Board with respect to these mass "incident based" challenges. Alternatively, if the Board does wish to consider these issues, the Franken Committee requests access to the evidence and testimony described above, including the ability to reopen precincts where election officials did not permit challenges to be lodged on these bases.

Dated: December 15, 2008

Respectfully submitted,



David L. Lillehaug (#63186)
Steven Z. Kaplan (#53739)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street
Minneapolis, MN 55402
Telephone: 612.492.7000
Facsimile: 612.492.7077
*Attorneys for Al Franken for Senate and Al Franken*

William Z. Pentelovitch (#85078)
MASLON EDELMAN BORMAN & BRAND, LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4140
Telephone: 612.672.8200
Facsimile: 612.672.8397
*Attorneys for Al Franken for Senate 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
Facsimile: 202.654.9126
*Of Counsel, Al Franken for Senate and Al Franken*
**Pro hac vice* motions pending

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# EXHIBIT B

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON
ATTORNEY GENERAL

SUITE 1800
445 MINNESOTA STREET
ST. PAUL, MN 55101-2134
TELEPHONE: (651) 297-2040


November 17, 2008

The Honorable Mark Ritchie
Secretary of State
180 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1299

**Re: Canvass of Rejected Absentee Ballots**

Dear Secretary Ritchie:

You request legal advice as to whether Minnesota law allows returned absentee ballots that were rejected by election judges pursuant to Minn. Stat. § 203B.12, subd. 2 (2008) to be reviewed in connection with the upcoming state-wide recount of the votes cast in the November 4 election for the U.S. Senate.

## ABSENTEE BALLOT PROCESS

A person voting by absentee ballot, after marking the ballot in the presence of another registered voter, seals the ballot in a ballot envelope provided with the absentee voting materials. The ballot envelope is then placed into a return envelope, upon which is printed a "certificate of eligibility," to be signed and sworn to by the voter. The return envelope also contains a statement by the voter's witness that the unmarked ballot was displayed to the witness, the voter marked the ballot in the presence of the witness and, if not previously registered, the voter provided proof of residence required by Minn. Stat. § 201.061, subd. 3 (2008). *See* Minn. Stat. §§ 203B.07, 203B.08 (2008). The return envelope is then sealed and mailed or delivered by an agent to the county auditor or municipal clerk. Minn. Stat. § 203B.08 (2008).[1]

On election day the unopened return envelopes are delivered to the election judges. Minn. Stat. §§ 203B.08, subd. 3, 203B.12, subd. 1 (2008). Two or more judges examine each return envelope. A return envelope is "Accepted" if a majority of the judges are satisfied that:

(1) the voter's name and address on the return envelope are the same as the information provided on the absentee ballot application;

[1] Voters may also complete absentee ballots in person during the 30 days preceding the election at the office of the county auditor or other place designated by the auditor. Minn. Stat. § 203B.081 (2008).

(2) the voter's signature on the return envelope is the genuine signature of the individual who made the application for ballots and the certificate has been completed as prescribed in the directions for casting an absentee ballot, except that if a person other than the voter applied for the absentee ballot under applicable Minnesota Rules, the signature is not required to match;

(3) the voter is registered and eligible to vote in the precinct or has included a properly completed voter registration application in the return envelope; and

(4) the voter has not already voted at that election, either in person or by absentee ballot.

Minn. Stat. § 203B.12, subd. 2 (2008). The ballot envelopes are removed from the "Accepted" return envelopes and placed unopened in a separate absentee ballot container. *Id.*, subd. 4. After the last election-day mail delivery, each "Accepted" ballot envelope is opened, and the ballot contained therein is initialed by the judges and deposited in the ballot box.

If a majority of the election judges examining a return envelope find that the voter has failed to meet one or more of the above requirements, the return is "Rejected." The "Rejected" return envelopes are returned unopened to the county auditor.[2]

The procedures applicable to absentee ballots submitted by military personnel and persons residing outside the United States differ in certain respects from that described above. *See* Minn. Stat. §§ 203B.13-203B.27 (2008).[3] However, the ultimate treatment of the "Accepted" and "Rejected" ballot return envelopes is similar.

## APPLICABLE LAW

The purpose and scope of an administrative recount pursuant to Minn. Stat. § 204C.35, subd. 3 (2008) is as follows:

> **Scope of recount**. A recount conducted as provided in this section is limited in scope 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**.

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[2] The "Accepted" return envelopes from which ballots have been removed are also retained and returned to the county auditor.

[3] For example, pursuant to Minn. Stat. § 203B.23, subd. 2 (2008), an absentee ballot board examines all returned ballot envelopes immediately during the thirty days before the election, and a return envelope that is rejected at least five days before the election is treated as a "spoiled" ballot and the voter may submit a replacement in lieu thereof.

*Id.*, subd. 3 (Emphasis added). Likewise, the rules of the Secretary of State relating to recounts are directed to the recounting of "ballots cast" (Minn. R. 8235.0200) and "voted ballots" (Minn. R. 8235.0300, 8235.0700).

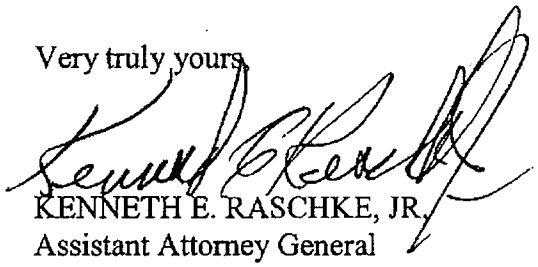
Courts that have reviewed this issue have opined that rejected absentee or provisional ballots are not cast in an election. *McDonald v. Secretary of State,* 153 Wash.2d 201, 204, 103 P3d 722, 723 (2004) (review of rejected absentee ballots not within the scope of statutory recount); *Nguyen v. Nguyen,* 158 Cal. App.4th 1636, 1665, N.27 (Cal. App. 2008) (registrar not permitted by statute to count rejected provisional ballots during recount). The Hand Count Instructions in the 2008 Recount Guide prepared by your office similarly state:

> This is an **administrative** recount held pursuant to M.S. 204C.35 and M.R. 8235. It is **not** to determine who was eligible to vote. It is **not** to determine if campaign laws were violated. It is **not** to determine if absentee ballots were properly accepted. It is **not** - except for recounting the ballots - to determine if judges did things right. It is simply to physically recount the ballots **for this race**!

(Emphasis in original.) Further, your office has not advised us of any previous recount in Minnesota that has included reconsideration of rejected absentee ballot return envelopes.

This is not to suggest that there is no remedy for the wrongful rejection of absentee ballots. Minn. Stat. ch. 209 (2008) sets forth the process for an eligible voter or candidate to commence a judicial election contest to challenge, among other things, "an irregularity in the conduct of an election."

Very truly yours,



KENNETH E. RASCHKE, JR.
Assistant Attorney General

(651) 297-1141 (Voice)
(651) 297-1235 (Fax)

AG: #2341266-v2