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STATE OF MINNESOTA
COUNTY OF RAMSEY

FILED
Court Administrator

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DISTRICT COURT
SECOND JUDICIAL DISTRICT

By Deputy

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

No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,

**MEMORANDUM OF LAW IN
SUPPORT OF CONTESTEE
FRANKEN'S MOTION IN LIMINE
AND OFFER OF PROOF**

Contestants,

v.

Al Franken,

Contestee.

This Court's rulings have significantly narrowed the scope of this trial. Contestee Franken respectfully submits that, in the interest of promoting clarity and expediency, this Court should issue evidentiary rulings applying and extending these prior orders.

I. INTRODUCTION

Contestee Al Franken has consistently sought to have every legally cast absentee ballot counted in the election for United States Senate. The most accurate, efficient, and fair way to accomplish that result was during the mandatory administrative recount, with election officials using their expertise and judgment; their access to the necessary information; and their sheer numbers to carefully review all of the 12,000 election-day decisions to reject absentee ballots. Officials accomplished this Herculean undertaking in a manner that by all accounts was fair, careful, and comprehensive. Minnesota election officials and the Minnesota Supreme Court

properly decided to address the absentee ballot decisions during the recount and, so doing, they gave both candidates a full and fair opportunity to be heard as to which ballot decisions were wrong and why.

Two weeks of trial demonstrate that Contestants, however, are not asking the Court to apply the standards established by the Legislature and the Secretary of State pursuant to delegation from the Legislature but rather to go significantly beyond what the law permits. It is ironic that Contestant Coleman, who previously insisted on strict laws against voter fraud and strict construction of the laws generally, now finds it in his interest to ask for judicial activism in the cause of forgiving compliance with reasonable requirements of Minnesota law intended to facilitate the prompt resolution of elections and to avoid abuse of the privilege of absentee voting. This Court nevertheless has demonstrated appropriately that, while every legally cast vote must be counted, *only* legally cast votes must be counted and that it will not substitute its own policy judgments for those of the Legislature or its discretion for that of election officials. *See* February 3 Order on Contestee's Motion in Limine to Limit Absentee-Ballot Evidence to Ballots Pleaded in the Notice of Contest ("In Limine Order"); February 10 Order on Petitioners' Motion for Summary Judgment ("Petitioner Order").

Minnesota law imposes strict tests against which election administrators must measure every tendered absentee ballot. The Legislature has made a considered judgment to restrict the privilege of absentee voting, largely in the interest of fraud prevention. *See* February 3 Order on Contestants' Motion for Summary Judgment ("Order Denying Coleman Motion") at 5 ("The Minnesota Legislature enacted this statute in part to cut down on instances of fraud in our electoral process while allowing individuals who are legally entitled to cast an absentee ballot to do so."); *see also Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975) (identifying "the

prevention of fraud" as a central purpose of absentee ballot legislation); *Wichelmann v. City of Glencoe*, 273 N.W. 638, 639 (Minn. 1937) ("The lawmaking power, being fully cognizant of the possibilities of illegal voting, frauds and dishonesty in elections, prescribed many safeguards in the Absent Voters Law to prevent such abuses"); *cf. Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1618 (2008) (acknowledging, after referring specifically to absentee-ballot voting, that "not only is the risk of voter fraud real but . . . it could affect the outcome of a close election"). In addition, the absentee ballot rules are meant to facilitate efficient receipt and processing. *See Bell*, 227 N.W.2d at 802 (identifying "the achievement of a reasonably prompt determination of the election result" as another central purpose); *accord Matter of Contest of School Dist. Election*, 431 N.W.2d 911, 915 (Minn. App. 1988).

Minnesota's rules are deliberately strict. It is one of a minority of states, for example, that require a good reason for early or absentee voting. Reed College, Early Voting Information Center, State Summary Table, available at <http://tinyurl.com/co5lpt>. Many of Minnesota's neighbors have chosen to make absentee ballot voting easier, but the Legislature has chosen otherwise. Indeed, even by comparison to the minority of states that still require cause to vote absentee, the Legislature has imposed stricter prophylactic standards, including witnessing by another registered voter. As the Court has recognized in its orders, a citizen who exercises the privilege of voting absentee can only do so by satisfying the rules set forth in statute. *See* Petitioner Order at 10 (denying summary judgment where "Petitioners have not provided sufficient evidence to satisfy the Court that their absentee ballots complied with all the requirements imposed by Minnesota law or that any failure to comply with the law was not due to fault on the part of the voter"). Whether Contestants think Minnesota has made a wise legislative judgment in this respect is irrelevant.

The Court has now heard Contestants' evidence both from voters selected because they had tried to vote for Coleman and from election officials in jurisdictions that heavily favored Coleman. Even that one-sided presentation makes it clear that most ballot rejection decisions were correct as a matter of law. Under Minnesota Rules of Evidence 402 and 403, such evidence should be excluded.

II. ANALYSIS

A. **Minnesota Establishes a Series of Mandatory Requirements Upon Those Seeking To Vote By Absentee Ballot.**

Minnesota allows its citizens who cannot vote in person an opportunity, if they follow the rules, to apply for and cast an absentee ballot. As the Court found last week, Order Denying Coleman Motion at 5, the opportunity of a voter to vote by absentee ballot "has the characteristics of a privilege rather than of a right." *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 733, n.8 (Minn. 2003) (quoting *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975)). As the Minnesota Supreme Court held in *Bell*:

In order to preserve the purity and integrity of the elections, . . . the absentee voter statutes, so far as the acts and duties of the voter are concerned, must be held to be mandatory in all their substantial requirements. These laws are not designed to insure a vote, but rather to permit a vote in a manner not provide by common law. As a result, voters who seek to vote under these provisions must be held to a strict compliance therewith.

227 N.W.2d at 803. *See also id.* (identifying "the prevention of fraud" and "the achievement of a reasonably prompt determination of the election result" as central purposes of absentee ballot legislation). Because absentee voting is a privilege, the legislature can "mandate the conditions and procedures for such voting." *Id.* *See also Wichelmann*, 273 N.W. 638 (obligation of absentee voter to file verified application for ballot was a material condition precedent to voting);

id. at 66 ("provisions of election laws requiring acts to be done and imposing obligations upon the elector which are personal to him are mandatory").

Under those clear and basic provisions, an absentee ballot voter must satisfy certain prerequisites. Before even reaching the stage in which officials examine the return envelopes, for example, voters must comply with the dictates set forth in Minn. Stat. § 203B.08 ("Marking and Return of Absentee Ballots"). *See also* Minn. Stat. § 203B.12, subd. 1 (incorporating Minn. Stat. § 203B.08). Then, at the examination stage, the voter bears the burden of satisfying election officials of the following:

First, the "voter's name and address on the [absentee ballot] return envelope are the same as the information provided on the absentee ballot application";

Second, "the voter's signature on the [absentee ballot] return envelope is the genuine signature of the individual who made the application for ballots";

Third, "the certificate [on the absentee ballot return envelope] 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;"

Fourth, the voter is either (a) "registered and eligible to vote in the precinct;" or (b) "has included a properly completed voter registration application in the return envelope;" and

Fifth, the voter "has not already voted at that election, either in person or by absentee ballot."

Minn. Stat. § 203B.12, subd. 2.

These statutory requirements in turn incorporate additional mandatory obligations, including those governing how a certificate must be "completed," *see* Minn. Stat. § 203B.07

subd. 3; how an absentee ballot application must be "made," *see* Minn. Stat. § 203B.04, subd. 1; and how a voter becomes "registered" or "properly [completes a] voter registration application," *see, e.g.*, Minn. Stat. 201.071. This list of requirements incorporated into Minn. Stat. § 203B.12, subd. 2 is not exhaustive. In short, while it is true that Minn. Stat. § 203B.12 sets certain reasons for rejecting a ballot at the examination stage (and, moreover, that during that stage "[t]here is no other reason for rejecting an absentee ballot"), it is misleading and improper to start or end the analysis with Minn. Stat. § 203B.12. This statute *incorporates* and *takes as prerequisites* myriad additional, specific requirements that are set forth in Minnesota's statutes and rules.

Minnesota law also identifies the decision-maker for application of these provisions: "If all or a majority of the election judges examining return envelopes find that an absent voter has failed to meet one of the [Minn. Stat. § 203B.12] requirements . . . , they shall mark the return envelope 'Rejected,' initial or sign it below the word 'Rejected,' and return it to the county auditor." Minn. Stat. § 203B.12, subd. 2; *see also id.* ("Two or more election judges shall examine each return envelope and shall mark it accepted or rejected in the manner provided in the subdivision."). A reviewing court must presume accuracy and good faith on the part of these judges. *School Dist. No. 56 Traverse County v. Schmiesing*, 66 N.W.2d 20, 26 (Minn. 1954) ("[I]n the absence of convincing evidence to the contrary, . . . the presumption of regularity of official acts applies") (citing 18 Am. Jur., Elections, § 114); *id.* (applying abuse-of-discretion standard to decisions by election officials); *Currie v. Paulson*, 45 N.W. 854, 855 (Minn. 1890) (confirming that court does not review election judges' determinations "de novo" but rather attempts "to put itself in [the judges'] place, and consider how they ought to have decided upon the evidence which they had before them").

In short, the Legislature has required that an individual seeking to vote absentee must comply with the terms of the law to have his or her vote counted. Where the Legislature felt that alternatives were sufficient, it made the exception explicit, as it did with respect to the limited circumstances in which "a person other than the voter" can apply for an absentee ballot. Minn. Stat. § 203B.12, subd. 2. When the words used are "clear, explicit, unambiguous, and free from obscurity, courts are bound to expound the language according to the common sense and ordinary meaning of the words." *State ex rel. Gardner v. Holm*, 63 N.W.2d 52, 55 (Minn. 1954). As this Court has recognized, the requirements set forth by the absentee ballot statutes are mandatory. Order Denying Coleman Motion at 5-7; *see also* Petitioner Order at 10 ("The Court refuses to order the opening and counting of any ballot without sufficient evidence that the voter who cast the ballot complied with all the relevant statutory requirements (or that any failure to comply was not due to fault on the part of the voter).").

B. In Light of Minnesota's Absentee Ballot Rules, and Pursuant to Rule 402 (Lack of Relevance) and Rule 403 (Considerations of Undue Delay and the Needless Presentation of Cumulative Evidence), Much of Contestants' Evidence Should Be Excluded.

1. **An absentee ballot must be rejected when it has been "submitted by a voter in an absentee ballot return envelope in which a voter failed to sign the certificate of eligibility on the absentee ballot return envelope where a sticker is placed by election officials obstructs (either fully or partially) the certification or signature block." [Court Question 7]**

An absentee ballot must be rejected when it is within "a non-registered voter absentee ballot return envelope on which the voter failed to sign the certification's signature box but did sign the ballot return envelope elsewhere." [Court Question 16]

Minnesota law requires that an absentee ballot certificate "[be] completed as prescribed in the directions for casting an absentee ballot" and that the voter sign "the return envelope." Minn. Stat. § 203B.12, subd. 2(2). In part, this is to allow the signature verification discussed in Section B.11 below, and in part it is to require the voter to certify compliance with the legal

requirements. *Id.* In *Bell*, the Supreme Court made clear the requirement was mandatory: "The legislature has required all absentee voters to sign and have properly witnessed an oath of residence and eligibility." 226 N.W.2d. at 804 (footnotes omitted). On February 10, this Court likewise acknowledged the requirement that the envelope be signed. Petitioner Order at 12 (addressing the ballot of Christy Revsbeck of Dakota County).

In their summary judgment motion, Contestants identified 80 ballots ("Category D-2") that they said were rejected because the voters did not sign the verification but allegedly did sign somewhere else on the return envelope. They attribute this "irregularity" to the voter, not election officials, and ask that the voter's failure to "certify on election day [that he or she] will meet all the legal requirements to vote by absentee ballot" should be ignored. Contestants' Memorandum of Law in Support of Motion for Summary Judgment ("Contestants' SJ Memo") at 36. If the voter (or the person assisting the voter, as with Voter Anderson, *see* Trial Exhibit C-236) did not read the envelope to see the proper space for signing, that individual certainly did not read the certification just above that area. Yet certification is mandatory.

In another category set forth in their summary judgment motion (D-3), Contestants argue that official error excused the lack of a voter signature due to "sticker error." The evidence shows that, in part for the convenience of the voter, election officials often placed labels with the voter's name and address on the portion of the return envelope where the voter would otherwise have to write that information. *See, e.g.*, Ex. C-51; C-237; C-238; C-241. Doing so is not an error, and it neither interferes with the voter's signature nor excuses the voter from complying with the instructions. *See, e.g.*, Jackson/2/4:00; Czech/3/9:10; Koehler/3/4:00.

Quite to the contrary, the official instructions describe the possibility of a label, but make it clear that the voter still needs to sign. *See* Trial Exhibit F-1743 ("Step 6. Print your name and

address on the back of the ballot return envelope *unless a label with your name and address has already been affixed*. Sign your name.") (emphasis added); *see also* Trial Exhibit F-1744 (instructions provided with absentee ballot). These instructions are provided to every voter. Minn. R. 8210.0500, subp. 1 ("Instructions to the absent voter shall be enclosed with the absentee ballot materials mailed or delivered to the absent voter."). The provision of these instructions precludes an argument that failure to sign the envelope is somehow not due to fault on the part of the voter. Regardless of where a sticker may be placed, the voter simply failed to follow instructions.

Where the voter has failed to sign the ballot envelope, therefore, Contestants' claims should be rejected as a matter of law. If the Court is inclined to make exceptions based on official error, it must be limited to truly exceptional cases—for example, where the lack of a signature is entirely the fault of an official and a separate signature by the voter can serve as the functional equivalent of the required signature. *See* Petitioner Order at 9 (ordering the ballots of Leona Quinlan and Thomas Quinlan to be opened); *see also* Section C.1, below.

2. **An absentee ballot must be rejected where it has been "submitted by a voter in an absentee ballot return envelope on which the voter's address is not the same as the information provided on the absentee ballot application."
[Court Question 2]**

Minnesota law requires "the voter's name and address on the return envelope" be "the same as the information provided on the absentee ballot application." Minn. Stat. § 203B.12. There are no exceptions. *Id.* On February 10, 2009, the Court recognized this requirement as mandatory. *See* Petitioner Order at 15 (discussing ballot of Dennis J. Peterson).

3. **An absentee ballot must be rejected where it has been "returned by a non-registered voter in an absentee ballot return envelope on which no box in the proof of residence portion of the absentee ballot return envelope is checked by the witness." [Court Question 1]**

If a voter is "was not previously registered" at the time he signs his eligibility certificate, then for his ballot to be counted he must "provide[] proof of residence as required by section 201.061, subdivision 3." Minn. Stat. § 203B.07. Depending on the proof of residence used, certain information must be included on the envelope. *See* Minn. R. 8210.0600 (requiring, for example, a driver's license number if a driver's license or a utility bill is provided and voucher information if a voucher is used). On February 10, 2009, this Court made clear that this requirement is mandatory. *See* Petitioner Order at 14 (discussing ballot of John Robertus, who had checked the "driver's license" box but had failed to enter the driver's license number).

4. **An absentee ballot submitted by "a non-registered voter who failed to sign voter-registration materials" must be rejected. [Court Question 10]**

An unregistered absentee ballot voter can register by "enclosing a completed registration application" with her absentee ballot. Minn. Stat. § 203B.04; *see also* Minn. Stat. § 201.054 ("Methods of Registering "). A voter registration application is only "complete," however, if it includes the voter's signature. *See* Minn. Stat. § 201.071 (requiring that the registration form include a certification and a place for the voter's signature). If the registration application for an unregistered voter lacks that voter's signature, the voter's absentee ballot cannot be counted.

5. **An absentee ballot must be rejected when it "has been cast by a voter where there is no independent evidence that the voter completed an absentee ballot application." [Court Question 9]**

An absentee ballot must be rejected when it "has been cast by a voter whose absentee ballot application does not contain a signature." [Court Question 8]

An absentee ballot must be rejected when it "has been cast by a voter whose absentee ballot application was signed by another unless the absentee ballot application was signed by another individual in accordance with Minn. Stat. §645.44, subd. 14." [Court Question 11]

As discussed above, Minn. Stat. § 203B.12, subd. 2(2) requires that the voter sign and submit an application on good cause for the privilege of voting absentee. *See also* Minn. Stat. § 203B.04 ("An application shall be approved if it is timely received, signed and dated by the applicant, contains the applicant's name and residence and mailing addresses, and states that the applicant is eligible to vote by absentee ballot for one of the reasons specified in section 203B.02."). This is an important tool for preventing potential fraud or abuse. *See Wichelmann*, 273 N.W. 638 (obligation of absentee voter to file a verified application for a ballot is a material condition of the absentee voting provisions and a condition precedent to voting). As with a missing envelope signature, the Court must uphold as a matter of law all election official rejections where there is no application for absentee ballot or it was unsigned (the former can be found in Contestants' Category D-1 and the latter, it appears, can be found in Category D-3, per Contestants' SJ Memo at 37). On February 10, 2009, this Court made clear that a voter's submission of (and signature on) an absentee ballot application is a mandatory requirement. *See* Petitioner Order at 12 (discussing the ballot of Marilyn Borgen of Hennepin County).

If a voter errs by failing to submit or sign an application, an official's failure to notice and correct the voter's error does not excuse the requirement. *See* Trial Exhibit F-1745 (instructions provided with absentee ballot application, instructing applicants to "[b]e sure to sign the application"); F-1731 (instructions provided to applicants in Washington County voters

emphasizing that "YOUR signature" is required to on the application). It is neither fair to election officials (whose duties are proscribed by statute, *see, e.g.*, § 203B.13, subd. 2, and do not extend to correcting at each stage of the process every possible error by a voter) nor sound public policy to require acceptance of absentee ballots that the voter somehow obtained without applying for or having failed to sign an application. To the contrary, such a regime would shift absentee ballot obligations that Minnesota has placed on the absentee ballot voter *away* from that voter, and it would provide an easy end-run around Minnesota's anti-fraud provisions.

6. **An absentee ballot must be rejected where it is "in an absentee ballot return envelope in which the witness certification is signed by a non-notary witness who failed to provide a street address." [Court Question 12]**

An absentee ballot must be rejected when it has been submitted by a voter "in an absentee ballot return envelope in which the witness certification on the absentee ballot return envelope is signed by a person identified as a notary public but no notarial seal or stamp is affixed to the absentee ballot return envelope." [Court Question 3]

Minnesota law requires that an absentee ballot certificate "be completed as prescribed in the directions for casting an absentee ballot." Minn. Stat. § 203B.12, subd. 2. It further requires that the "certificate of eligibility" printed on the back of the return envelope include "a statement to be signed and sworn by the voter indicating that the voter meets all of the requirements established by law" and contain "a statement signed by a person who is registered to vote in Minnesota or by a notary public or other individual authorized to administer oaths." Minn. Stat. § 203B.07 subd. 3. The rules officially promulgated by the Secretary of State, in turn, set forth the directions mandated by Minn. Stat. § 203B.12. The directions (which election officials must provide to all absentee voters) require the name, address, and signature of the witness. Minn. R. 8210.0500. On February 10, 2009, this Court acknowledged that certification by a qualified witness is a mandatory requirement. *See* Petitioner Order at 14 (discussing ballot of Josephine Garcia of Ramsey County).

Having a witness is another important safeguard built into Minnesota law to prevent voter fraud and mistake. *See Bell*, 227 N.W.2d at 804 (absentee voter must sign and have properly witnessed an oath of residence). Having both the witness's name and registered Minnesota address is an important and logical means by which to help to ensure that she is a registered voter. The only exception is where the witness is either a notary or an official with the authority to administer oaths. In those circumstances, and only under those circumstances, is the voter excused from having to provide the witness's address. Minn. R. 8210.0500. Instead, a notarial seal or stamp (or equivalent mark) serves as the means by which to ensure the witness is qualified and is acting in her official capacity subject to the rules established for notaries or other officials. For example, while a notary acting as such must legally verify the signer's identification, the same person acting in her personal capacity could witness a signature without doing so. Absent that seal or stamp, the Court must presume that the witness is serving in her individual capacity, and the "registered voter" witness rules therefore apply.

**7. A UOCAVA ballot must be rejected when it "has been received late."
[Court Question 13]**

Under Minnesota law, all absentee ballots must be received by election officials by Election Day and delivered to the polling place on that day for review by the election judges. Minn. Stat. §§ 203B.08; 203B.12, subd. 1 (providing that the election judges in each precinct or the judges of an absentee ballot board shall take possession of all return envelopes delivered to them in accordance with § 203B.08). The rule is the same for ballots submitted pursuant to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. § 1973ff. *See* Minn. Stat. §§ 203B.23 & 203B.24 (UOCAVA ballots).

Minnesota enacted Minn. Stat. §§ 203B.16 to 203B.27 to implement UOCAVA. Minn. Stat. § 203B.16, subd. 1. Except as otherwise provided by statute, “all the laws applicable to absentee ballots and absentee voters and all other provisions of the Minnesota Election Law apply to an absentee ballot board” reviewing UOCAVA ballots. Minn. Stat. § 203B.23, subd. 3. Nothing in UOCAVA purports to change the time limit for ballot receipt. *See, e.g.*, 42 U.S.C. § 1973ff-1(b)(2) (states must accept “*valid . . . absentee ballots . . . from all absent uniformed services voters and overseas voters.*” (emphasis added)). Minnesota does not allow—and UOCAVA does not require—election officials to count UOCAVA ballots received late. Otherwise, local canvassing boards could not finish their work in a timely fashion or, for that matter, ever finish their work. Because Minnesota law requires ballots to be received on election day in order to be considered for counting, and because the election judges are required to make the determinations under Minn. Stat. § 203B.12, subd. 1 on or prior to Election Day, a late ballot (UOCAVA or otherwise) simply cannot meet the requirements to be validly counted and is properly rejected.

8. A UOCAVA ballot must be rejected where "there is no evidence that the voter submitted a Federal Post Card Application or absentee ballot application." [Court Question 6]

Contestants apparently maintain that eligible overseas and military voters need not apply for absentee ballots or even register to vote; they can simply submit a ballot and it must be counted. This is incorrect. Both an application and registration are necessary.

Pursuant to Minn. Stat. § 203B.17, eligible overseas and military voters must submit an application for an absentee ballot to the county auditor where the voter maintains, or last maintained, residence in Minnesota. An application can only be accepted where the voter provides certain information under oath. Minn. Stat. § 203B.17, subd. 2. Moreover, a ballot

cannot be counted if the voter simply fails to register to vote. Minn. Stat. § 203B.24 (setting forth reasons to reject a UOCAVA ballot). Under UOCAVA, a voter can fulfill both requirements—that is, submit the voter registration application and the absentee ballot application—simultaneously through a federal post card. *See* 42 U.S.C. § 1973ff-1(a)(4). What no voter can do, however, is entirely opt out of the process. Either he submits a properly completed federal post card or otherwise complies with Minnesota's registration and application requirements. Otherwise, a UOCAVA ballot must be rejected as a matter of law.

9. **An absentee ballot must be rejected "where it has been cast by a voter registered and eligible to vote in a precinct who was issued a ballot for the wrong precinct due to official error." [Court Question 5]**

An absentee ballot must be rejected where it has been "cast by a voter who was not registered to vote in the precinct encompassing the voter's address on the absentee ballot return envelope and absentee ballot application." [Court Question 17]

An absentee ballot must be rejected where it "has been cast by a voter not registered to vote within the precinct in which he or she resides." [Court Question 19]

A voter can only vote in her own precinct, and only with her own precinct's ballot. *See* Minn. Stat. § 201.016, subd. 1 ("An eligible voter may vote only in the precinct in which the voter maintains residence"); *see also* Minn. Stat. § 203B.12, subd. 2 (indicating a ballot must be rejected if the voter is not "registered and eligible to vote in the precinct"). Though an unregistered voter can register by "includ[ing] a properly completed voter registration application in the return envelope" of his absentee ballot, *id.*, this approach likewise restricts the voter to his own precinct. Minn. Stat. § 201.054, subd. 2.

The precinct requirement is critical. If a voter is permitted to vote in a precinct other than the precinct in which he is registered, there is no practical way in which to determine whether the individual has already voted, either in person or by absentee. As confirmed by the testimony of

every election official this Court has heard thus far, officials at each precinct must check that particular location's Election Day polling roster to determine whether a given voter had already voted. If voters were permitted to vote in precincts other than their own—even where the voter had intended to vote in his own precinct—this critical check on Minnesota's voting process would be entirely defeated. Such an untenable result helps to explain the strict penalties imposed upon those who intentionally interfere with Minnesota's strict precinct rules. *See* Minn. Stat. § 201.054, subd. 2 (deeming it a felony for an individual to register in the wrong precinct, to register in multiple precincts, or to aid, abet, counsel, or procure any other individual to do the same).

10. An absentee ballot must be rejected where it "has been dropped off in-person by the voter on Election Day." [Court Question 14]

An absentee ballot must be rejected when it "has been dropped off by a proper agent on Election Day but after the statutory deadline for delivery." [Court Question 15]

Before an absentee ballot can even be considered for acceptance or rejection, it must be "delivered" to "election judges in each precinct or the judges of an absentee ballot board . . . in accordance with section 203B.08." Minn. Stat. § 203B.12, subd. 1. This statute, in turn, requires, among other things, that an "eligible voter who receives absentee ballots as provided in this chapter shall mark them in the manner specified in the directions for casting the absentee ballots" and mail them "as provided in the directions for casting the absentee ballots" or leave them "with the county auditor or municipal clerk who transmitted the absentee ballots to the voter." Minn. Stat. 203B.12, subd. 1. In certain circumstances, a voter can enlist an agent to deliver a ballot in person. *Id.* These provisions, in turn, incorporate additional rules and statutes setting forth the manner in which absentee ballots must be delivered in order to be counted. When a voter drops off an absentee ballot in person, for example, she must do so prior to

Election Day. *See* Minn. Stat. § 203B.08 (referring the voter to "the directions for casting the absentee ballots"); Trial Exhibit F-1743 ("Instructions for Absentee Voters . . . Step 7. Return your ballot by mail or an express service to the address on the ballot return envelope, allowing enough time to be delivered by election day. You may also deliver it in person by 5:00 p.m. on the day before election day or have another person return your ballot by 3:00 p.m. on election day."). An agent also must adhere to a certain, strict deadline. *See* Minn. Stat. § 203B.08 ("If delivered in person by an agent, the return envelope must be submitted to the county auditor or municipal clerk by 3:00 p.m. on election day.").

Except in truly exceptional cases, when an error is entirely beyond the control of the voter and is purely the fault of government officials, these delivery rules are mandatory. *See* Section C.1, below (addressing a narrow circumstance: when a voter has fully complied with the delivery rules but the election officials have sent the ballot to the wrong precinct on Election Day). Adherence to the rules is critical for Minnesota's system of election to function properly. *See Bell*, 227 N.W.2d at 802 (identifying "the achievement of a reasonably prompt determination of the election result" as a central purpose of absentee ballot legislation). If a voter fails to comply with the delivery rules, his absentee ballot therefore must be rejected.

11. **Absent an abuse of discretion (or clear proof confirming that the signatures on an absentee ballot application and envelope are both in fact the genuine signatures of the voter), an absentee ballot cannot be opened where election officials have determined that they cannot verify that the absentee ballot envelope signature matches the application signature.**

A key provision for the prevention of fraud, set by Minnesota statute, requires that the signature on the return envelope match the "signature of the individual who made application for ballots." Minn. Stat. § 203B.12, subd. 2(2). The statute specifically incorporates the application signature, and it does so for a number of reasons, including because it is the most current and

relevant signature available to the election judges for use in verification. The statute provides only a limited exception, where the match is not required because "a person other than the voter applied for the absentee ballot under applicable Minnesota Rules." Minn. Stat. § 203B.12, subd. 2(2). *See also*, Minn. Stat. § 203B.11 (acknowledging that assistance may be provided to certain applicants in health care facilities or hospitals); Minn. Stat. § 201.056 (addressing individuals unable to write their own names). In those situations, and those situations only, "the signature is not required to match." Minn. Stat. § 203B.12, subd. 2(2). Otherwise, the statute makes clear the requirement.

Notwithstanding the clear statutory mandate, Contestants refuse to acknowledge even the most basic point: that, except where one of the limited statutory exceptions applies, the voter's signature on the absentee ballot return envelope must be "the genuine signature of the individual who made the application for ballots." Minn. Stat. § 203B.12, subd. 2(2). Contestants instead insist that a ballot need not be rejected, for example, where it is *conceded* that someone other than the voter signed the voter's application and no statutory exception applied. *See, e.g.*, Trial Exhibit Ex. C-241 (application of Voter Thompson, which was not signed by him). This Court's ruling of February 10 helps to confirm that this particular argument is contrary to law and untenable. *See* Petitioner Order at 11 & n.6 (acknowledging the need for the voter to have signed the absentee ballot application).

Far more important, however, has been Contestants' failure to recognize the legal effect of a verification determination made by election officials pursuant to Minn. Stat. § 203B.12, subd. 2(2). Contestants' wrongheaded approach is reflected in the casual manner in which they challenge (and often simply dismiss) the rulings of these officials. Notwithstanding Contestants'

disregard, the election officials' verification decisions are entitled to the presumption of regularity and to deference.

Controlling Minnesota law requires this result. *See, e.g., School Dist. No. 56 Traverse County*, 66 N.W.2d at 26 ("[I]n the absence of convincing evidence to the contrary, . . . the presumption of regularity of official acts applies."). The presumption is particularly strong, moreover, when the decision in question was reached by a "majority of the election judges examining return envelopes" exercising their authority pursuant to Minn. Stat. § 203B.12. As set forth in Minn. Stat. § 200.02, subd. 14, an "election board" is defined as "the election judges serving in the precinct." *Id.* Each precinct's election judges are appointed pursuant to Minn. Stat. § 204B.21. They administer the election under authority granted by statute. "Generally, decisions of administrative agencies enjoy a presumption of correctness and will be reversed only when they reflect an error of law or where the findings are arbitrary, capricious, or unsupported by substantial evidence." *Cup Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 562 (Minn. Ct. App. 2001) (citing *Cable Communications Bd. v. Nor-West Cable Communications P'ship*, 356 N.W.2d 658, 668 (Minn. 1984)). Not only is the burden on Contestants to show that the signatures match, *Green v. Independent Consol. School Dist. No. 1*, 89 N.W.2d 12, 16 (Minn. 1958), but "[w]here the evidence is conflicting or more than one inference may be drawn from the evidence, findings must be upheld," *Cup Foods*, 633 N.W.2d at 562 (citing *City of Minneapolis v Richardson*, 239 N.W.2d 1987, 202 (1976)). If the administrator engaged in reasoned decision-making, a reviewing court will affirm the decision even though the court might have reached a different conclusion on its own. *Cup Foods*, 633 N.W.2d at 562 (citations omitted); *see* Exhibit F-1679 (Reply of the Coleman for Senate Campaign to the Memorandum of the Al Franken Campaign Regarding "Improperly" Rejected

Absentee Ballots) at 5 ("[a]bsent any evidence to the contrary, the decisions of local election officials should be presumed to have been accurate and correct...").

What is more, with respect to the manner in which officials compare the signatures and make a verification determination, the Secretary of State has provided clear direction. Section 12.3 of the Election Judge Guide 2008 (Trial Exhibit F-1677) requires election officials to "compare the voter's signature on the return envelope and confirm that it matches the signature on the voter's absentee ballot application" but not to reject the ballot "if middle name or initial is missing on one of the signatures" or due to "shaky handwriting of elderly and voters with disabilities, especially if witnessed by health care absentee election judges." *See also id.* at 12.4 (rejection required if no match). This interpretation has persuasive authority and deserves great weight as the agency's interpretation of the statute it administers. *See George A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988) ("[A]n agency's interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature."); *see also Risdall v. Brown-Wilbert, Inc.*, 753 N.W.2d 723, 733 (Minn. 2008) (administrative agencies are entitled to particular deference).

Indeed, "except in those rare cases in which the [official's] decision has no rational basis, it is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities in the performance of their duties." *Swanson v. City of Bloomington*, 421 N.W.2d 307, 311 (Minn.1988) (internal quotation marks omitted). Accordingly, the Court's review of official decisions must be very narrow. *See, e.g., Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 630 (Minn. 2007); *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66, 72 (Minn.1984). Indeed, in election contests in particular, the contestant bears a significant burden to demonstrate

errors on the part of election officials. *Kearin v. Roach*, 381 N.W.2d 531, 533 (Minn. Ct. App. 1986); *see also Blake v. Hogan*, 58 N.W. 867, 868 (Minn. 1894) (evidence with respect to specific votes cast must be "fairly clear and convincing").¹

In short, in the absence of either an abuse of discretion, or clear proof confirming that the signatures on an absentee ballot application and envelope are *both* in fact the genuine signatures of the voter (as defined by Minn. Stat. § 645.44, subd. 14), a ballot cannot be opened once officials have concluded the signatures do not match. *See* Petitioner Order at 9 (ordering the absentee ballot of Karen Robitz of Hennepin County to be counted, where Ms. Robitz had submitted a declaration under penalty of perjury that the signature on both the application and the envelopes was her genuine signature). In the absence of such evidence, there is simply no basis to question the election administrators' judgment as to variations in the signatures.

C. Minnesota's Absentee Ballot Rules Do Permit Further Consideration of Certain Ballots.

As explained above, this Court can, as a matter of law, uphold the rejection of some absentee ballots as the result of deficiencies that are apparent on the face of the envelope (or, more commonly, envelope and application). That is the primary topic of this motion. However, there are also certain arguable or apparent deficiencies in absentee ballot materials will *not* necessarily disqualify a given ballot. Of those raised thus far in trial, each is addressed below.

¹ Administrative law principles also require that where a voter has other evidence that might convince the election official to verify the signature the voter should present that information while the official can still act, as in the recount. Having not presented such other evidence of genuineness, Contestants can hardly contend that the official erred in not accepting it. *See Uckun v. Minnesota State Bd. of Medical Practice*, 733 N.W.2d 778, 786 (Minn. App. 2007) (exhaustion requirement "protect[s] the autonomy of" administrative agencies, "promote[s] judicial efficiency," and "produce[s] a record during the administrative process that facilitates judicial review").

1. **In certain truly exceptional cases, statutory noncompliance may be excused when the noncompliance was due to circumstances that were beyond the voter's control and the voter has performed some functional equivalent to remedy the deficiency.**

An otherwise valid absentee ballot cast by a non-registered voter should be counted "where that voter has not submitted proper voter registration materials and was not issued registration materials due to official error." [Court Question 4]

Otherwise, a ballot cast by a non-registered voter should not be counted if that voter "has failed to register to vote." [Court Question 18]

Unregistered voter envelopes should be opened to determine if they contain proper voter registration applications.

This Court has ruled that in certain truly exceptional cases, statutory noncompliance may be excused when the noncompliance was due to circumstances that were beyond the voter's control and the voter has performed some functional equivalent to remedy the deficiency. This standard is accord with the Court's prior rulings defining the scope of the trial. *See In Limine Order at 1; see also Petitioner Order at 9.*

One example of evidence possibly satisfying the statutory noncompliance bar comes with respect to certain errors in ballot delivery. Before an absentee ballot can even be considered for acceptance or rejection, it must be "delivered" to "election judges in each precinct or the judges of an absentee ballot board . . . in accordance with section 203B.08." Minn. Stat. § 203B.12, subd. 1. *See also* Section B.10, above. Yet sometimes, after a voter has properly delivered her ballot, the judges of an absentee ballot board erroneously deliver the ballot to the wrong precinct. In this circumstance, the test is met: The statutory noncompliance was due to circumstances that were beyond the voter's control and, by properly delivering the ballot in this first instance (thereby allowing officials to correct their own mistake once time permits it), the voter has performed some functional equivalent to remedy the deficiency. When this occurs, the ballot should be counted.

A second example of evidence possibly satisfying the statutory noncompliance bar comes when an unregistered voter receives absentee ballot materials for a registered voter. Minnesota has set a deliberately low and flexible bar for voter registration. It allows multiple methods of registration, including via absentee ballot and in person on Election Day. Minn. Stat. § 201.054. This relaxed standard promotes Minnesota's interest in enfranchisement of qualified voters, *see, e.g., Bell*, 227 N.W.2d at at 353, and it relies on the strict enforcement of other rules and requirements to maintain critical anti-fraud protections. When applied to absentee ballot provisions, these flexible requirements allow Minnesota to advance its goal of "cut[ting] down on instances of fraud in our electoral process while allowing individuals who are legally entitled to cast an absentee ballot to do so." Order Denying Coleman Motion at 5.

Still, an absentee ballot voter must be registered for his vote to count. This registration can occur before the voter applies for an absentee ballot or when the voter submits a proper application for registration with her absentee ballot. Minn. Stat. § 203B.12, subd. 2(3).

A complication arises, however, when an unregistered voter applies for an absentee ballot and received materials meant for a registered voter. In this case, the official has committed clear error. Minn. Stat. § 203B.06 ("Upon receipt of an application for ballots, the [official] who receives the application shall determine whether the applicant is a registered voter. If the applicant is not registered to vote, the [official] shall include a voter registration application among the election materials provided to the applicant."); Minn. R. 8210.0600, subp. 1 ("The [statement of registered absentee voter form] must be provided only to absentee voters who are registered to vote at the time of application. All other absentee voters must be provided the version found in [statement of unregistered absentee voter form]."). An unregistered voter receiving these materials has no practical means by which to correct the error, for even if she

reads and carefully follows the instructions and properly completes the materials she has been provided, her ballot will not be in statutory compliance. She will have failed provide the material that normally would be necessary to register.

In this case, the statutory noncompliance was due to circumstances that, as a practical matter, were beyond the voter's control. However, by properly completing the registered voter materials (which include an address that must match the application, a signed voter certification, and a signed witness certification), the voter has performed some functional equivalent to remedy the deficiency. As a result, the ballot should be counted.

In short, when evidence of such exceptional circumstances is presented on an individualized basis, it may be appropriate to count a ballot not in strict statutory compliance. Otherwise, however, the ballot cannot be counted, and evidence relating to that ballot should be excluded.²

As a related matter, where election officials have determined that the voter is not registered but have not verified whether a properly completed voter registration application is enclosed in the voter's submitted envelopes, that determination is premature under the mandates of the statute and checking for the application inside the security envelope is not improper. Indeed, the Legislative took pains to note that "[i]n particular, failure to place the envelope within the security envelope before placing it in the outer white envelope is not a reason to reject an absentee ballot." Minn. Stat. § 203B.12, subd. 2. As to these unregistered voter envelopes, Contestee respectfully submits that, if the envelope otherwise complies with requirements, the

² Contestee notes that Contestants still have failed to indicate, through discovery or otherwise, the specific arguments they intend to raise in conjunction with statutorily noncompliant ballots that they contend should be counted. To expedite the process, the Contestee respectfully submits that this Court should require Contestants to identify which such ballots they are still pursuing and why, specifically, they believe each is valid.

Court should direct the opening of those ballot envelopes to determine whether they also contain valid voter registration applications as permitted under Minnesota law.³

2. **An otherwise valid absentee ballot should be counted where a mismatch exists between the date by the voter's signature and the date by the witness's signature.**

Where both the voter and witness have dated their signatures on an absentee ballot application, there is no requirement that those dates match. *See* Minn. Stat. § 203B.12, subd. 2 (governing the circumstances under which an election judge may reject an absentee ballot based on examination of the ballot's return envelope); Minn. Stat. § 203B.07, subd. 3 (governing the form and content of the certifications to be signed by both the voter and his or her witness); *see also* Minn. R. 8210.0500. Under these statutes the witness need only sign the envelope and certify that she was shown an unmarked ballot by the voter, that the voter (or her designee, if the voter is disabled) marked the ballot in secret, and that the voter provided the witness with proof of residence if not previously registered.

Moreover, there is no requirement that the witness date, or even sign, the witness's certification at the same time the voter completes their own certification. *Id.*; *see also* Minn. R. 8210.0600. The witness is fully entitled to sign at a different time, as surely often happens when voters are busy or otherwise have some cause for the delay. And it is common for individuals simply to write down a date incorrectly; this is not cause for disenfranchisement.

³ This is not a process that the Court need undertake itself. It should direct local election officials, those with the relevant expertise and easy access to the original return envelopes, to open the envelopes and, if a proper registration application is found, transmit the ballots in a secure fashion to the State Canvassing Board for addition to the recount vote totals.

3. Notwithstanding the Reviewability of These Ballots, Where Contestants Fail To Prove that the Voter Had Not Already Voted at the Election, Either in Person or By Absentee Ballot, the Ballot Must Remain Unopened.

It is important to recognize, as this Court did in its February 10 order, that even where certain evidence can be consistent with the improper rejection of an absentee ballot, a party must affirmatively prove that a ballot was validly cast before that ballot can be opened. In particular, an absentee ballot can be accepted by election judges only where, among other things, it has been shown that "the voter has not already voted at that election, either in person or by absentee ballot." Minn. Stat. § 203B.12, subd. 2; *see also* Minn. Stat. 203B.25, subd. 2.

The testimony of every election official appearing before this Court has confirmed that otherwise valid absentee ballots must be—and in practice frequently are—rejected because the voter casting the ballot already voted at the election, either in person or by absentee ballot. Testimony by at least two voter witnesses, Voters Briest and Kecker, suggested that their ballots might have been rejected because officials found that they already had voted once before. Particularly when the only unopened ballots remaining are those that have received multiple layers of review over the course of several months, it is imperative that Contestants *prove affirmatively* that the absentee ballot in question is not the second ballot cast by the voter. In the absence of such proof, the ballot must remain unopened, as this Court has already ruled. *See* Petitioner's Order at 12 (discussing ballot of Mary Koenigberger of Dakota County).

III. CONCLUSION

For the foregoing reasons, Contestee Franken respectfully requests the Court rule as a matter of law that certain ballots cannot be opened and, moreover, that in the absence of individualized evidence satisfying the statutory noncompliance bar, evidence is excluded if it

relates only to ballots that cannot be counted (or in the case of missing registration, opened and checked).

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