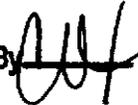


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STATE OF MINNESOTA
COUNTY OF RAMSEY

FEB 12 2009
By  Deputy

DISTRICT COURT
SECOND JUDICIAL DISTRICT
Case Type: CIVIL OTHER

File No. 62-CV-09-56

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,

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

**CONTESTANTS'
MEMORANDUM OF LAW IN
SUPPORT OF ACCEPTANCE BY
CATEGORY OF IMPROPERLY
REJECTED ABSENTEE
BALLOTS**

INTRODUCTION

The evidence adduced thus far has demonstrated that hundreds of rejected absentee ballots are in fact legally cast votes that should be counted in this election. Contestants expect additional evidence to show that thousands of rejected absentee ballots should in fact be counted. Many of those ballots can be placed in categories relating to one or more of the requirements enumerated in Minn. Stat. § 203B.12 and efficiently evaluated as a group rather than individually. Contestants accordingly welcome the Court's invitation to comment at this time on certain of those categories. We look forward to the opportunity at the appropriate time to present our position on other categories.

FOUNDATIONAL LAW

Minn. Stat. § 203B.12, subd. 2 directs election judges to accept absentee ballots if they are satisfied that:

- (1) the voter's name and address on the return envelope are the same as the information provided on the absentee ballot application;
- (2) the voter's signature on the return envelope is the genuine signature of the individual who made the application for ballots and the certificate has been completed as prescribed in the directions for casting an absentee ballot, except that if a person other than the voter applied for the absentee ballot under applicable Minnesota Rules, the signature is not required to match;
- (3) the voter is registered and eligible to vote in the precinct or has included a properly completed voter registration application in the return envelope; and
- (4) the voter has not already voted at that election, either in person or by absentee ballot.

Minnesota law does not permit an election judge to reject an absentee ballot for any other reason. *See* Minn. Stat. §§ 203B.12, subd. 2; 203B.24, subd. 1.

Minnesota law requires this Court to review, *de novo*, whether a ballot is a legally cast vote. *See* Minn. Stat. § 209.12; *Fitzgerald v. Morlock*, 120 N.W.2d 339, 352 (Minn. 1963); *Application of Andersen*, 119 N.W.2d 1, 8 (Minn. 1962). When conducting the review, the Court is not bound by what an election official concluded regarding a particular absentee ballot envelope. *See Hunt v. Hoffman*, 125 Minn. 249, 255, 146 N.W. 733, 735 (1914) (contest court has full authority to rectify canvassing board error, which is to be accorded no *res judicata* effect). In fact, this Court does not sit to determine whether an official abused his discretion or an administrative agency followed procedures that were arbitrary and capricious. Rather, this Court sits to determine whether absentee ballots that were rejected by local election officials should be accepted and counted. *See*

Erickson v. Sammons, 65 N.W.2d 198, 201-02 (Minn. 1954). In doing so, this Court ensures that the rejected absentee ballots are afforded equal treatment on a statewide basis so that similarly situated absentee ballots are reviewed under the same standard.

Although Minnesota case law provides that absentee voting is a privilege rather than a right, *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 733 n.8 (Minn. 2003), this distinction does not mean that the “privilege” to vote by absentee ballot may be afforded any lesser protection than if it were a “right.” The Minnesota Constitution confirms that privileges are afforded the same protections as rights, and that neither rights nor privileges may be deprived without due process of law. Article I, § 2; *see also State v. State Bd. of Med. Examiners*, 26 N.W. 123, 124 (1885) (noting that the phrase “law of the land” is synonymous with due process of law).¹

Indeed, Minnesota follows a “well-established policy of giving effect to the votes of legal voters regardless of irregularities in the election.” *Johnson v. Tanka*, 154 N.W.2d 185, 187 (Minn. 1967); *see also Bloedel v. Cromwell*, 116 N.W. 947, 948 (Minn. 1908); *see also* Minn. Stat. § 204C.22; *Fitzgerald v. Morlock*, 120 N.W.2d 339, 345-47 (Minn. 1963); *McEwen v. Prince*, 147 N.W. 275, 276-77 (Minn. 1914). Statutory

¹ A predicate issue facing this Court is the mounting evidence that similar ballots have been treated inconsistently in this election. This inconsistency among counties and municipalities in applying the standard for rejection of absentee ballots, as the testimony of election officials and the decisions of the Canvassing Board demonstrated, have resulted in absentee ballots being counted in some counties and municipalities while many similarly situated ballots in other areas have not. Contestants believe this has created an equal protection violation. In providing this Memorandum requested by the Court, Contestants do not waive that contention and do not waive any remedy, including the right to have counted all similarly situated ballots and, indeed, all otherwise valid absentee ballots cast by eligible voters alive on election day who did not already vote.

provisions are “mandatory in all their substantial requirements” as to the absentee voters before they cast their votes, *Bell v. Gannaway*, 227 N.W.2d 797, 803 (Minn. 1975), but are only directory as to the election officials who administer them, *see Fitzgerald*, 120 N.W.2d at 345; *State v. Erickson*, 188 N.W. 736, 737 (Minn. 1922); *Pennington v. Hare*, 62 N.W. 116, 118 (Minn. 1895), and are only directory as to any post-election review, such as this Court is conducting. *See Erickson v. Sammons*, 65 N.W.2d 198, 202 (Minn. 1954); *accord Johnson*, 154 N.W.2d at 187; *In re Contest of Election of Vetsch*, 71 N.W.2d 652, 658 (Minn. 1955).

As the Court applies standards derived from § 203B.12 and § 203B.24 to determine the legality of each rejected absentee ballot, therefore, it should be mindful that those technical provisions apply only in their “substantial requirements,” *Bell*, 227 N.W.2d at 803, not in all their literal detail.² *Andersen*, 119 N.W.2d at 8; *In re Contest of School District Election*, 431 N.W.2d 911, 915 (Minn. App. 1988) (“As a general rule, as long as there is substantial compliance with the laws, and no showing of fraud or bad faith, the true result of an election should not be defeated by an innocent failure to comply strictly with the statute.”). The Court must apply the standards that have already

² A majority of states have adopted the “substantial compliance” standard in their election laws. *Eubanks v. Hale*, 752 So.2d 1113, 1152 (Ala. 1999). *Accord Adkins v. Huckabay*, 755 So. 2d 206, 216 (La. 2000); *Cure v. Bd. of County Comm'rs*, 952 P.2d 920, 923 (Kan. 1998); *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 724-25 (Fla. 1998); *Erickson v. Blair*, 670 P.2d 749, 755 (Co. 1983); *McCavitt v. Registrars of Voters of Brockton*, 434 N.E.2d 620, 628 (Mass. 1982); *Mittelstadt v. Bender*, 210 N.W.2d 89, 95 (N.D. 1973); *Application of Moore*, 154 A.2d 631, 638 (N.J. Super. Ct. App. Div. 1959); *Sommerfeld v. Board of Canvassers of City of St. Francis*, 69 N.W.2d 235, 237-38 (1955); *Gregory v. Sanders*, 15 So.2d 432, 435 (Miss. 1943); *Sheils v. Flynn*, 299 N.Y.S. 64, 83 (N.Y. Sup. Ct. 1937).

been set by various counties and the Canvassing Board to the remaining rejected absentee ballots consistent with Minnesota's policy of counting every legal vote.

In the absence of any indicia of untrustworthiness, Minnesota should presume its voters follow the law. A voter signs the absentee ballot envelope under penalty of a felony if he misrepresents himself. Minn. Stat. § 203B.03. The witness, who is also a registered voter or an official empowered to administer oaths, and is subject to the same statutory penalty, affirms that the voter is indeed who she says she is. The voter has applied for the ballot and election officials already have determined her to be registered. Minn. Stat. § 203B.06, subd. 4. In these circumstances, a ballot envelope that is signed by a registered voter and appropriately witnessed ought presumptively to be considered a legally cast vote unless and until a party submits evidence establishing otherwise.³

³ With respect to the burden of proof, a return envelope which was marked rejected and noted a specific reason should be presumed to have satisfied all other requirements of §203B.12 unless it is apparent from the face of the envelope that it fails to meet one or more other requirements of the statute. In other words, a ballot that does not call into question one of the requirements should be presumed to have met that requirement unless and until a party establishes that it did not. In particular, it is not Contestants' burden to prove that a voter did not otherwise vote on election day unless that is the reason noted for rejection. If the Court determines that a ballot appears to be a legally cast vote, it should follow the same procedure followed by the Secretary of State's Office in accepting the envelopes that were ultimately opened on January 3, 2009. Before it would open and count a ballot, the Secretary of State required a certification by the appropriate county or municipality that the person had not otherwise voted on election day.

SPECIFIC CATEGORIES OF ABSENTEE BALLOTS

1. **An absentee ballot 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 return envelope is checked by the witness should be accepted.**

Assuming that the voter has in fact registered, Minn. Stat. § 203B.07, subd. 3, and Minn. R. 8210.0500, subp. 3, both require only that the voter present the witness with proof of residence; the witness is encouraged but not required to mark the box. Minn. Stat. § 201.061, subd. 3, similarly requires that the voter present proof of residence. *See also Application of Moore*, 154 A.2d 631, 638 (N.J. Super. Ct. App. Div. 1959) (failure to check box on ballot was not grounds for excluding ballot). Where one of the proof of residence boxes is checked but the absentee ballot is rejected because an identification number is not included or a “wrong” or “invalid” number is written in the blank, these ballots should be accepted. Although the return envelope includes a blank where the witness may write in the voter’s driver’s license number or other identification number, there is no requirement in either the Minnesota Statutes or Rules that the witness must do anything with the voter’s identification number.

There are more than 150 improperly rejected absentee ballots that fall within this subcategory. Moreover, the Canvassing Board opened approximately 15 ballots from this subcategory on January 3. *See, e.g.,* Trial Exs. C245; C254 (Hallet-Arnold return envelope).

- 2. An absentee ballot 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 should be accepted so long as the address is sufficiently similar or the process was done in person.**

If the voter address on the return envelope is on a pre-printed sticker, then any address mismatch between the return envelope and the application is an official error and should not be the basis for disenfranchisement. Unlike typical address forms, the address form on the return envelope provides only one line (instead of two) for the voter to include his entire address and does not specify that it be the street address. Accordingly, where the voter fills out the address by hand on the return envelope and the address does not match the address on the application, then the ballot may only be rejected if the address is materially different. Minor differences such as "St." vs. "Blvd." or P.O. Box vs. street address still substantially comply.

Certainly in the instance where a voter cast his absentee ballot in person at an appropriate county or municipal office and the process was witnessed by an elections official, the fact that the address is different should not disqualify the ballot. The official could have—should have—noticed the error and given the voter a chance to correct it.

Minn. R. 8210.2200, subp. 2.

- 3. An absentee ballot 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 should not be accepted.**

Minnesota law provides that the certificate of eligibility may be 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. Although, neither that statute nor the language of § 203B.12, subd. 2, requires that a witness who is a notary or who is authorized to administer oaths actually notarize the voter’s signature, it is reasonable to expect such a person to provide the standard evidence that he or she is in fact a notary. The absence of such is sufficient to rebut the presumption of trustworthiness afforded to the voter. The ballot should not be counted.

- 4. An absentee ballot cast by a non-registered voter who has not submitted proper voter registration materials even if the voter was not issued registration materials due to official error should be accepted only if the voter had his ballot witnessed by an elections official.**

Upon receipt of an absentee ballot application by an unregistered voter, the relevant election official “shall include a voter registration application among the election materials provided to the applicant.” Minn. Stat. § 203B.06, subd. 4. Pursuant to Minn. R. 8210.2200, subp. 2, when a voter applies for and completes an absentee ballot in person, the appropriate elections official must inspect the absentee ballot return envelope and allow the voter an opportunity to correct any errors. In these circumstances only, then, a registered voter’s absentee ballot cannot be rejected if it turns out the voter was not registered. Any other circumstances, such as a transaction solely by mail, are not sufficient to overcome the fact that the voter simply is not registered and therefore cannot cast a lawful ballot.

5. An absentee ballot 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 should be accepted for statewide races.

The application merely requires the voter to provide his or her address. The voter is not required to list his or her precinct. Indeed, while most voters know the location of their polling place they do not know the numerical designation for their voting precinct. It is the government official who determines which precinct ballot to send to the absentee voter. *See* Minn. R. 8210.0700, subp. 7 (“The official mailing or delivering absentee ballots to an absent voter shall, before doing so, fill in the absent voter’s ward and precinct number in the spaces provided on the left-hand end of the return envelope.”).

It would be manifestly unfair to exclude legally cast votes—where the voter completed and returned the ballot as instructed—solely on the basis that the voter was sent the wrong absentee ballot by government officials. Because a voter’s intent on the U.S. Senate Race can be determined whether or not the voter received the correct ballot and whether or not the ballot is delivered to the proper precinct, these votes should be counted. Moreover, the Canvassing Board opened at least three ballots from this category on January 3. *See, e.g.*, Trial Exs. C245; C261 (Schill return envelope).

Similarly, no absentee ballot should be rejected because election officials delivered the envelope to the wrong precinct. Absentee voters mail or deliver their absentee ballots to the county auditor or municipal clerk. *See* Minn. Stat. § 203B.08, subd. 1. They do not mail them to a precinct polling place, which may only be open on election day. Thus, if the absentee ballot is delivered to the wrong precinct, it is official error and it should be counted.

6. **A UOCAVA ballot submitted where there is no evidence that the voter submitted a Federal Post Card Application or absentee ballot application should be accepted.**

The Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) dictates that a federal write-in ballot must be counted even if no Federal Post Card Application (“FPCA”) is received or on file with election officials. *See* 42 U.S.C. § 1973ff-2(a). UOCAVA “merely requires that the overseas citizen submit an [FPCA], not that the state election official receive it.” *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp.2d 1305, 1316-17 (N.D. Fla. 2000). As that court held, to condition the counting of federal write-in ballots on election officials’ receipt of FPCAs would conflict with both the letter and spirit of UOCAVA and therefore any conflicting state law requirement is pre-empted. Accordingly, ballots in this category must be counted.

7. **An absentee ballot submitted by a voter in an absentee ballot return envelope in which the voter failed to sign the certificate of eligibility on the absentee ballot return envelope where a sticker placed by election officials obstructs (either fully or partially) the certification or signature block should be accepted.**

The voter’s signature on the return envelope is a strong indicator that the ballot is indeed a legally cast vote. However, in the instances where official error blocks the instruction to sign the ballot envelope, the absence of the voter’s signature does not always disqualify a ballot. An envelope may still have sufficient indicia of trustworthiness when it is from a registered voter and has been properly witnessed. In particular, where the voter’s failure to certify was at least in part the fault of government personnel placing an identification sticker over either the instructions or the signature

block, a voter may reasonably find it difficult to see (or to understand) that his or her signature is required.

If a government official places the sticker on the envelope in such a fashion as to obstruct the certification or signature block, the voter cannot be disenfranchised for his failure to sign the certification. It would be unfair to reject these ballots for lack of voter signature, especially where none shows any indicia of fraud, because the defect is directly the result of an error by a government official. Indeed, due process requires that the voter be afforded an opportunity to correct this induced error. *See Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646 at *6 (N.D. Ill. Mar. 13, 2006); *accord Raetzel v. Parks/Bellefont Absentee Election Bd.*, 762 F. Supp. 1354 (D. Ariz. 1990).

8. An absentee ballot cast by a voter whose absentee ballot application does not contain a signature should be accepted.

This category is another example of official error: if the voter did not sign the application, the election official should not have provided an absentee ballot to the voter and, according to Mr. Gelbmann's testimony, should have contacted the voter to correct the error. While the voter easily could have remedied his oversight, once the voter received the absentee ballot in response to his application, he would have properly assumed he had satisfied all requirements up to that point. When a voter cast his absentee ballot in person at an appropriate county or municipal office and the process was witnessed by an elections official, failure to sign the application—or even the certification on the envelope—should not disqualify the ballot. In these instances, the election official should have noticed the error and given the voter a chance to correct it.

E.g., Minn. R. 8210.2200, subp. 2. As noted in Section 7 above, due process requires no less.

A voter's signature on an absentee ballot must be presumed genuine—even if the absence of a signature on the application means that it cannot be “authenticated” against another signature specimen of the voter.⁴ A ballot envelope that is not only signed by a registered voter but also appropriately witnessed ought presumptively to be considered a legally cast vote unless and until a party submits evidence establishing otherwise. Other courts have likewise concluded that signatures of registered voters should be “presumed valid until otherwise proven” and not “presumed invalid based upon some vague suspicion.” *Pena v. Lelson*, 400 F. Supp. 493, 496 (D. Ariz. 1975).⁵ Moreover, mail

⁴ The presumption in Minnesota law is to enfranchise the voter. Alternative sources for authenticating a voter's signature are available to election officials, including the registration application, previous poll rosters and even contacting the voter herself (as Mr. Gelbmann testified). Disqualifying a ballot for the absence of a signed application elevates official convenience over the goal of enfranchising voters.

⁵ Nor is it sufficient to overcome the presumptive genuineness of the voter's signature because one or more election judges were concerned that the signature did not match that on the application. Local officials are not trained to be handwriting experts. Perceived mismatches in voters' signatures are more likely to be attributable to the circumstances in which the signatures were made, or to the health or physical (dis)abilities of the voter, than to any intent to defraud. The fact that the absentee ballot application did not warn voters that there would be a signature comparison (so be sure to sign in the same fashion), that the application may be submitted by facsimile and that the application expressly contemplates persons other than the voter signing the application furthers the difficulty in using it as an exemplar of the voter's signature. Indeed, only 17 of 87 counties rejected any absentee ballots for signature mismatch. Given the presumption afforded to the genuineness of the signature on the return envelope, the Court should reject only those ballots for which it is convinced as a matter of law that the signatures are those of two different persons. See *McIntyre v. Wick*, 558 N.W.2d 347 (S.D. 1996); *Pena*, 400 F. Supp. at 496; *Meyer v. Keller*, 376 So.2d 636, 638 (La. Ct. App. 1979) (signature mismatch harmless error).

ballots (which many counties treat in the same fashion as absentee ballots) do not even require the voter to submit an application. See Minn. Stat. § 204B.45.

Minnesota courts have previously dispensed with signature requirements altogether when other indicia of trustworthiness were available.⁶ See *Clayton v. Prince*, 151 N.W.2d at 912 (counting votes of 2,317 voters who failed to submit affidavits of registration required by statute but took oaths they were legal voters); *McEwen*, 147 N.W. at 276-77 (counting some votes where affidavits of registration lacked official signatures but voters had nevertheless sworn to them and other votes where voter affidavits were not properly signed).

9. An absentee ballot cast by a voter where there is no independent evidence that the voter completed an absentee ballot application should be accepted.

Where there is no evidence that a voter failed to file a proper application, the absence of an application, without more, is not sufficient to rebut the presumptive trustworthiness of the absentee ballot or the genuineness of the voter's signature on the return envelope.⁷ Indeed, without evidence such as that offered regarding Petitioner Buck (Charles Nauen Affid., Ex. 10), nothing about the absence of an application suggests that the return envelope does not contain a legally cast vote.

⁶ *Bell v. Gannaway*, does not establish a strict signature requirement. In *Bell*, the absentee voter not only failed to sign the ballot but the subscribing witness had also improperly signed the ballot without performing any of the witnessing functions. 227 N.W.2d at 802, 804. The ballot therefore lacked any indicia of trustworthiness whatsoever.

⁷ This presumption is all the stronger when the voter's address has been affixed by sticker on the absentee ballot because such stickers indicate the ballot was handled and processed by election officials, presumably on the authority of a submitted application.

The trial testimony from every government official thus far has been that a voter cannot obtain an absentee ballot without having made an application, which is precisely what the statute and applicable rules dictate. *See* Minn. Stat. § 203B.04; Minn. R. 8210.0200 (2008). Moreover, § 203B.06, subd.5, requires each county auditor or municipal clerk to preserve applications for an absentee ballot and § 203B.10(a) requires each to deliver the absentee ballot applications to the appropriate precincts for use by election judges. That an application has gone missing is far more likely to be attributable to clerical error than to fraud. *See, e.g., Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp.2d 1305, 1317 (N.D. Fla. 2000). And an official's failure to carry out his statutory duty should not disenfranchise a voter who has not made any mistake at all.

The Canvassing Board opened more than 50 ballots on January 3 that had been improperly rejected for no application. *See* Trial Ex. C245 (*e.g.*, Theresa Kriesel - Cass County; Ronald Dean Larson - Dakota County; Geraldine Scheer - McLeod County; Eugene Pederson - Stearns County).

- 10. An absentee ballot submitted by a non-registered voter who failed to sign voter registration materials should be accepted only if the voter had his ballot witnessed by an elections official.**

This is discussed in Section 4 above.

- 11. An absentee ballot 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 should be counted.**

Unless the opposing party presents evidence to rebut the presumption, the Court must presume that the voter signed the application herself or that she directed another to

sign on her behalf. Unless there is some indicia of fraud, a voter whose genuine signature appears on his or her absentee ballot return envelope should not be disenfranchised because the voter directed someone else to sign the application requesting the absentee ballot on his or her behalf. *See Clayton v. Prince*, 151 N.W. 911, 912 (Minn. 1915) (counting votes of 2,316 voters who failed to submit affidavits of registration required by statute but took oaths they were legal voters); *McEwen*, 147 N.W. at 276-77 (counting votes of voters whose affidavits of registration were defective for lack of official signatures, for lack of voter signatures, and for factual errors). Although § 203B.04 says the application must be “signed and dated by the applicant,” Minn. Stat. § 203B.12, subd. 2(2) requires only that the voter who “made” the application have affixed his genuine signature to the return envelope.

12. An absentee ballot 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 should be accepted.

Minn. Stat. § 203B.07 dictates that the return envelope must be signed by a person registered to vote in Minnesota. Minn. Stat. § 203B.12, subd. 2(2) incorporates this requirement—but only this requirement. Neither statute purports to require that a witness provide his or her full address or, indeed, any address. The only question is whether the witness is a registered voter. Even the form itself, with its lack of sufficient space allotted for the address and no reference to “street,” suggests that a full and precise address is unnecessary.

Mr. Mansky testified that, in Ramsey County, if a witness does not provide an address on the return envelope, officials will enter the witness name into SVRS to

determine if they are registered.⁸ If the witness is registered, the ballot must be accepted, even if the voter did not provide his or her address on the envelope. *See also Colten v. City of Haverhill*, 564 N.E.2d 987, 990-91 (Mass. 1991) (accepting absentee ballots despite omission of witness address).

The absence of an address (or an incomplete address), therefore, should not disqualify a ballot from being a legally cast vote. Testimony from Washington, Pine, Anoka and Dakota counties indicates this practice is not uniform throughout the state, so that some voters had their ballots counted while others who submitted similar ballots have not. The Canvassing Board opened more than 10 ballots from this category on January 3. *See* Trial Ex. C245 (*e.g.*, Jeffrey Krueger - Scott County; Rochelle Bellin - Dakota County; Lauren Sorenson - Scott County; Jeanne Gotz - Dakota County).

13. A UOCAVA ballot received late should be accepted provided it is received by the state deadline for counting.

All reasonable steps should be taken to avoid disenfranchising service men and women sacrificing so much to protect democracy. Those who mailed their ballot from an overseas location should not be penalized for being in a place where the mail service is not as good as it is domestically. *See Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp.2d at 1317 (referencing “congressional recognition of the problems with the mail system”). Any UOCAVA ballot received before the county canvassing board meets at the county auditor’s office to canvass the general election returns (*i.e.*, on or before the

⁸ If the witness provides a Minnesota address, many counties (including Ramsey and Washington) do not conduct any further investigation to confirm that the witness is registered. Accordingly, no absentee ballots should be rejected for a non-registered witness where the witness has provided a Minnesota address.

seventh date following the state general election), *see* Minn. Stat. § 204C.33, subd. 1, should be counted and added to the reports provided to the State Canvassing Board.

14. An absentee ballot dropped off in-person by the voter on Election Day should be accepted if it arrives at the same time as or before the last postal delivery of the day.

Although Rule 8210.2200, subp. 1, suggests that a voter personally dropping off his ballot must do so by 5:00 the day before the election, the statute indicates that an absentee ballot return envelope received by the county auditor or municipal clerk at any time before the last postal delivery is timely. Minn. Stat. § 203B.08, subd.3. Therefore, an absentee ballot dropped off in-person by the voter on election day should be accepted if it arrives by the time of the last postal delivery of the day.

15. An absentee ballot dropped off by a proper agent on Election Day but after the statutory deadline for delivery should not be accepted.

If an agent delivers a ballot after 3:00 p.m. on election day the ballot should be rejected. *See* Minn. Stat. §§ 203B.08, subd. 1; 203B.11, subd. 4.

16. An absentee ballot 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 absentee ballot return envelope elsewhere should be accepted.

A registered voter, like Gerald Anderson, who signs the return envelope should not be disenfranchised for his failure to place his signature in the designated signature box. Minn. Stat. § 203B.12, subd. 2, simply requires that the voter's signature be "on the return envelope." So long as the voter signs the return envelope, whether the signature is within the designated area is immaterial. *See, e.g., McEwen v. Prince*, 147 N.W. 275,

276 (Minn. 1914); *Carney v. Davignon*, 289 A.D.2d 1096, 1097 (N.Y. App. Div. 2001)

(court properly accepted ballot despite voter signing on wrong line).

- 17. An absentee ballot 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 should be accepted for statewide races.**

So long as the voter is registered to vote in Minnesota and has not otherwise voted already, his or her absentee ballot should be counted for statewide races, including that for U.S. Senator.

- 18. A ballot cast by a non-registered voter who has failed to register to vote should not be accepted.**

Excluding the specific situation described in Section 4 above (where the voter applied in person for an absentee ballot and the election official erred in not providing him the appropriate forms), a non-registered voter's absentee ballot should be rejected. However, to confirm that the voter is in fact non-registered, an official must check SVRS, review all yet-unprocessed paper registration applications, and verify that a registration card is not inside the return envelope or the secrecy envelope.

- 19. A ballot cast by a voter not registered to vote within the precinct in which he or she resides should be accepted for statewide races.**

So long as the voter is registered to vote in Minnesota and has not otherwise voted already, his or her absentee ballot should be counted for statewide races, including that for U.S. Senator.

CONCLUSION

For the reasons set forth above and based on the evidence that has been and will be presented at trial, Contestants respectfully request that the Court order that previously rejected absentee ballots in all categories identified above (except Sections 3, 15 and 18) be opened and, subject to confirmation by the Secretary of State that these voters are registered and did not already cast a ballot that was counted in the 2008 general election, counted.

Dated: February 11, 2009

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