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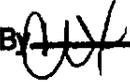
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Court Administrator

STATE OF MINNESOTA

JAN 12 2009

DISTRICT COURT

COUNTY OF RAMSEY

By  Deputy

SECOND JUDICIAL DISTRICT

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

Case No. 62-CV-09-56

Cullen Sheehan and Norm Coleman,
Contestants,

**MEMORANDUM IN SUPPORT OF
CONTESTEE'S MOTION TO DISMISS**

v.

Al Franken,

Contestee.

As the Minnesota Supreme Court has long recognized, "each house of Congress is the sole judge of the election returns and qualifications of its members, exclusive of every other tribunal, including the courts." *Odegard v. Olson*, 264 Minn. 439, 119 N.W.2d 717, 719 (1963) (citing U.S. Const., Art. 1, § 5, Cl. 1). This principle is both long-standing and critically important, for if "[the power to judge elections is] lodged in any other than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed or put into imminent danger." *Morgan v. United States*, 801 F.2d 445, 450 (D.C. Cir. 1986) (Scalia, J.) (quoting Justice Joseph Story, Commentaries on the Constitution § 833, at 604-05 (5th ed. 1905); accord *Scheibel v. Pavlak*, 282 N.W.2d 843, 847 (Minn. 1979). "Since the very justification for this legislative authority is to resist encroachment, a necessary implication is that it is an absolute grant of constitutional power which may not be shared with the courts. So the authorities universally hold." *Scheibel*, 282 N.W.2d at 847-48.

These foundational principles govern Minnesota's strict statutory scheme for state election contests relating to congressional office. In these contests, any jurisdiction the court has is carefully circumscribed, and the court's power must be properly invoked before a contest can go forward. Moreover, if there is jurisdiction at all, and even when the courts' power has been properly invoked, jurisdiction is limited to (1) supervising a recount, or in this case a re-recount, of which party received the highest number of votes legally cast, and (2) acting as agent of the United States Senate (though the Senate has never asked it to do so) in taking and preserving evidence of irregularities. Minn. Stat. § 209.12. The Court must always start with an analysis of its jurisdiction, and here the jurisdictional and statutory limitations, as defined by the underlying constitutional principles, preclude jurisdiction or at least directly control the proceedings before the Court.

At the November 4, 2008, general election, Contestee Al Franken was elected United States Senator for the State of Minnesota. On January 5, 2009, the Minnesota State Canvassing Board confirmed his election by certifying that Franken had received the highest number of votes for the office. Contestants Norm Coleman and Cullen Sheehan (collectively, "Coleman") responded with a Notice of Contest that fails on its face to comply with the strict, constitutionally mandated limitations of Minn. Stat. § 209.12. The Notice, an imprecise and scattershot pleading, is rife with challenges that fail to state a claim upon which relief can be granted. Due to its vagueness and breadth, the Notice is insufficient to grant this Court jurisdiction. Pursuant to Minn. R. Civ. P. 12.02(a) and (e), Franken respectfully requests that the Court decline jurisdiction and dismiss Coleman's claims.

I. BACKGROUND

On January 6, 2009, Coleman filed a Notice of Contest, purportedly pursuant to Minn. Stat. § 209.021. This provision expressly requires that a notice "specify the grounds on which

the contest will be made" within seven days after the State Canvassing Board's canvass is completed. Citing, among other things, "irregularities" in the conduct of the election and the canvass of votes, *see* Notice ¶ 9(a)-(d); "numerous and material errors" throughout the process, *see id.* ¶ 9(b)-(d); and various violations of Minnesota's election laws, *see, e.g.*, ¶¶ 14-16, the Notice of Contest relies on sweeping objections and repeated assertions that its more specific claims are "[b]y way of example only" and "without limitation." *E.g., id.* ¶¶ 10, 11. As relief, the Notice requests a stay of issuance of the Certificate of Election to Franken and a declaration that Coleman is entitled to the Certificate of Election. *Id.* ¶¶ 1 & 8. Coleman's proposed order, in turn, seeks a ruling defining the "questions to be decided in this matter" to be "(i) which party to the Election received the highest number of votes legally cast in the Election and is therefore entitled to receive a certificate of election . . . ; and (ii) whether or not there were irregularities in the conduct of the election sufficient to invalidate said election." Proposed Order ¶ 4(B).

II. STANDARD FOR A MOTION TO DISMISS

When a notice of contest fails to state a justiciable claim for relief under the Minnesota election laws, it must be dismissed. *Derus v. Higgins*, 555 N.W.2d 515, 516 & 517 n.4 (Minn. 1996) (citing Minn. R. Civ. P. 12.02 (a)&(e), which address "lack of jurisdiction over the subject matter" and "failure to state a claim upon which relief can be granted"). In light of the critically important interests implicated by this proceeding—including the need to respect a legislature's role in judging the election returns and eligibility of its own members and, here, the constitutional supremacy of Article I, Section 5, of the United States Constitution—this Court must act early in the case to determine its jurisdiction and, should the case continue, to confine the proceeding's scope to constitutional boundaries.

In general, when considering a motion to dismiss, the court must consider the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving

party. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (citing *Marquette Nat'l Bank v. Norris*, 270 N.W.2d 290, 292 (Minn.1978)). The court need not, however, accept as true legal conclusions masquerading as factual allegations. *See Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008). A plaintiff's obligation to provide the grounds of its entitlement to relief "requires more than labels and conclusions." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007)).

In election contest cases, the burden of pleading is higher. Minnesota election law, § 209.021, requires that a notice of contest "specify the grounds on which the contest will be made." As a result, claims brought in an election contest must be dismissed if they are not "definite and specific." *Soper v. Board of County Com'rs of Sibley County*, 48 N.W. 1112 (Minn. 1891). The heightened standards are also incorporated into § 209.12, which governs "points specified in the notice of contest" for federal congressional races. Where a complaint fails to establish jurisdiction or to state a claim upon which relief can be granted, dismissal with prejudice and on the merits is appropriate. *See Martens v. Minnesota Min. & Mfg. Co.*, 616 N.W.2d 732, 748 (Minn. 2000); *see also Greenly v. Independent School Dist. No. 316*, 395 N.W.2d 86, 90 n.1 (Minn. Ct. App. 1986).

III. ANALYSIS

A. **Coleman Has Failed To Comply with Minn. Stat. § 209.12 and, as a Result, this Court Lacks Jurisdiction.**

1. **Minn. Stat. § 209.12 Grants Limited Jurisdiction for Courts To Hear Only Certain Election Contests.**

The Court need not reach the broader question of whether it has any jurisdiction at all because Coleman has failed to properly invoke even the limited, arguable jurisdiction under Minn. Stat. § 209.12. For election contests relating to congressional offices, the limitations governing a reviewing court's jurisdiction are explicit and strict:

When a contest relates to the office of senator or a member of the house of representatives of the United States, *the only question to be decided by the court is which party to the contest received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of election.*

Minn. Stat. § 209.12 (emphasis added). "Evidence on any other points specified in the notice of contest . . . must be taken and preserved by the judge . . . but the judge shall make no findings or conclusion on those points." *Id.*

In this way, § 209.12 implements a bifurcated proceeding meant to acknowledge the exclusive responsibility of the United States Senate to judge the elections and qualifications of its own members. The Court decides a single question (which candidate "received the highest number of votes legally cast at the election"), and it does so through what is essentially a court-run canvass of the certified votes. While that process might itself violate the United States Constitution, *see infra* at n.1 and text, the statute at least strictly limits its scope. As to all other issues, the statute explains precisely what the Court can do: Any evidence on matters outside the sole resolvable question—that is, all evidence "taken and preserved" but not subject to the Court's findings or conclusions—must be certified and forwarded to the presiding officer of the United States Senate. Minn. Stat. § 209.12. In other words, the court simply takes evidence for later resolution by the Senate.

Section 209.12 stands in stark contrast to the remainder of Chapter 209, which also addresses non-congressional election contests. These provisions help to make clear the limited nature of the "question of who received the largest number of votes legally cast." *See, e.g.*, Minn. Stat. § 209.02 (indicating that non-congressional election contests may address "an irregularity in the conduct of an election or canvass of votes," "the question of who received the largest number of votes legally cast," or "deliberate, serious, and material violations of the Minnesota Election Law"). When § 209.02 is applied to non-congressional election contests, it

confers broad powers of review upon the courts. Courts may not only recount the ballots, but may correct irregularities before doing so. Section 209.12, by contrast, limits § 209.02's broader power for congressional elections. Section 209.12 allows only for limited review, parallel in scope to the administrative recount. *See* Minn. Stat. § 209.12 (requiring that a contest be limited in scope to the determination of "which party to the contest received the highest number of votes legally cast"); Minn. Stat. § 204C.35, subd. 3 (requiring that a recount be "limited in scope to the determination of the number of votes validly cast"). In short, § 209.12 requires that this Court limit its analysis to two related determinations, both analogous to issues addressed in the recount: first, which candidate should receive credit for votes that the Board has already counted and certified; and second, whether each vote so credited was, as a mathematical matter, appropriately counted.

To interpret § 209.12 any other way would contradict the plain language of the statute and make it clearly unconstitutional. Section 209.12 expressly excludes all but one of the grounds set forth in Minn. Stat. § 209.02. As a result, any claim that in substance alleges "an irregularity in the conduct of an election or canvass of voters" or a "deliberate, serious, and material violations of the Minnesota Election Law," *id.* § 209.02, simply cannot be resolved in a state-court election contest for congressional office. It is, of course, the claims' substance, not their form, that determines their categorization. *Derus*, 555 N.W.2d at 517 (Minn. 1996) (granting a contestee's motion to dismiss after analyzing "the substance of [the] allegations, not just the form of the notice" for an election contest).

The distinction between claims for a court-run recanvass (here, a re-recanvass) and claims alleging irregularities or election-law violations runs consistently throughout Chapter 209. For example, § 209.021, subd. 1 creates a different procedure "[i]f a notice of contest questions

only which party received the highest number of votes legally cast"; separate rules of appeal apply when a contest notice challenges only which party received the highest number of votes legally cast at the election, Minn. Stat. § 209.12; specific rules exist for the counting and inspection of ballots and the recanvassing of votes cast, *id.* § 209.06; special requirements are triggered when the contest involves an error in the counting of ballots, *id.* § 209.07, subd. 1, and different requirements apply when in the contest "there is no question as to which of the candidates received the highest number of votes cast." *Id.*

Yet it is not only the plain language of § 209.12 that limits the scope of the court's review in a contest; it is also the United States Constitution. A more expansive grant of jurisdiction would violate the constitutional requirement that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members." Art. I, § 5, Cl. 1. In *Odegard v. Olson*, 264 Minn. 439, 119 N.W.2d 717 (1963), the Minnesota Supreme Court recognized the delicate balance between this strict constitutional mandate and the important service Minnesota provides by conducting elections. A candidate for Congress had filed suit to enjoin the Minnesota secretary of state from issuing a certificate of election to his opponent. The Court refused to interfere. Citing Art. I, § 5, Cl. 1, it construed the applicable statute as not applying to congressional races. *See* 119 N.W.2d at 719 ("While the state legislature may regulate the conduct of elections subject to the limitations expressed in U.S. Const., art. I, s. 4, it should be conceded that . . . each house of Congress is the sole judge of the election returns and qualifications of its members, exclusive of every other tribunal, including the courts."). Its holding was constitutional, not merely statutory. *Id.* at 720 ("[W]e must come to the conclusion that s 204.32, subd. 2, has no application to a contest in the United States Senate or House of

Representatives. *Our courts are divested of jurisdiction by U.S. Const., art. I, s 5.*") (emphasis added).

Odegard's careful policing of Minnesota courts' involvement in congressional elections reflects the restrictions set forth in U.S. Const. Art. 1, § 5, Cl. 1. It is also in full accord with a long line of Minnesota precedent. *See, e.g., Youngdale v. Eastvold*, 44 N.W.2d 459, 462 (Minn. 1950) ("It is clear that our courts have no jurisdiction over the election of representatives to congress, but that congress is its own judge of the elections, returns, and qualifications of its members."); *In re Williams' Contest*, 270 N.W. 586, 587 (Minn. 1936) ("[T]here can in reason and logic be no room to doubt that [Minnesota courts] may not now entertain jurisdiction" over which congressional candidate received the most votes); *State ex rel. 25 Voters v. Selvig*, 212 N.W. 604, 604 (Minn. 1927) (affirming dismissal of an application challenging an election to the House of Representatives because the House's "exclusive jurisdiction" rendered any decision by Minnesota courts "officious and nugatory").

Following *Odegard*, the Minnesota legislature passed § 209.12 to attempt to provide a constitutional process by which Minnesota courts might play a narrow and defined role in congressional elections. Though Minnesota courts have expressed concerns over analogous statutes, they have not yet determined whether § 209.12 survives a constitutional challenge based on *Odegard* and Art. 1, § 5, Cl. 1.¹ At a minimum, however, the statute must be interpreted

¹ *See, e.g., Derus*, 555 N.W.2d at 518 (acknowledging, in the analogous context of state-senator contests, "[w]e have stated that the constitutionality of the role assigned the judicial branch with regard to legislative election contests by Minn. Stat. c. 209 is open to question"); *see also id.* at 519 (Page, J., concurring specially) ("To the extent that Minn. Stat. § 209.10 purports to grant [authority to resolve a primary election contest on its merits] to the judicial branch of government, it is unconstitutional."). Although this Court need not decide the issue in light of the deficiencies in the Contestants' notice, Franken respectfully submits that state-run election contests for congressional offices—and in particular Minn. Stat. Sec. 209.12—cannot be reconciled with *Odegard* and Art. 1, § 5, Cl. 1. Rulings reached in other jurisdictions confirm this conclusion. *See, e.g., Young v. Mikva*, 363 N.E.2d 851, 853 (Ill. 1977) ("Because the Constitution gives Congress the exclusive authority to judge the elections of its members, many State courts have construed legislation authorizing election contests to exclude elections for seats in Congress or have simply held that State courts cannot constitutionally entertain such proceedings"); *Hoffmann v. Sumner*, 230 Cal. Rptr. 746, 747-

consistently with *Odegard*—and therefore in a manner that strictly limits its scope. The statute must be read and applied so as not to allow contestants to bring claims that must instead be presented to the Senate (claims, for example, such as those that might be contained in sweeping, non-specific challenges to the election proceedings; claims alleging irregularities or election-law violations; and others that cannot be resolved through a court-run recanvass). And the statute must be construed and applied in a fashion that minimizes any delay that otherwise would interfere with the Senate's ability to address the election and qualifications of its members—and, should it so choose, seat a full complement to do the nation's business. Any different reading or application of Minn. Stat. § 209.12 would violate the doctrine of constitutional avoidance. *See State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003) ("When reviewing a statute, we assume that the legislature does not intend to violate the United States and Minnesota Constitutions.").

In short, the United States Constitution requires that state-run congressional election contests be limited in scope. Minn. Stat. § 209.12 must be interpreted accordingly. Courts in other jurisdictions have reached analogous conclusions. *See, e.g., Rogers v. Barnes*, 474 P.2d 610, 612 (Colo. 1970) (court had no jurisdiction to hear contest to primary election premised on voting irregularities and noting that "section 5 empowers Congress, and Congress alone, to determine charges of voting irregularity, for example, stemming from a general election and concerning the offices of United States Senator and member of the United States House of Representatives"); *Laxalt v. Cannon*, 397 P.2d 466, 467 (Nev. 1964) (dismissing election contest after completion of recount in Senate race, rejecting argument that a state court could decide an election contest as an "aid to the final decision of the Senate," and noting that legal authority

48 (Cal. App. 1986) (court had no jurisdiction to hear election contest to primary election); *Opinion of Justices*, 142 A.2d 532, 535 (Me. 1956); *State ex rel. Zimmerman*, 24 N.W. 2d 504, 507 (Wis. 1946); *Belknap v. Board of Canvassers*, 54 N.W. 376 (Mich. 1893); *see also* 107 A.L.R. 205 (collecting cases).

"overwhelmingly" supported dismissal); *McLeod v. Kelly*, 7 N.W.2d 240, 242 (Mich. 1942) (where plaintiff challenged county canvassing board's certification of returns for congressional race, and expressly disavowed any claim that a recount was sought, the court found that it had no authority to interfere because "the final determination as to who is entitled to the office rests solely and entirely with the house of representatives in Congress"); *LaCaze v. Johnson*, 305 So.2d 140, 146 (La. Ct. App. 1974) (Court had no jurisdiction to "determine the validity of certain absentee ballots and to conduct an evidentiary hearing as to the alleged malfunction of one voting machine" because the "forum for a resolution of these issues is the United States House of Representatives"); *see also Morgan*, 801 F.2d at 447 (affirming summarily, on the ground that "the Constitution so unambiguously proscribes judicial review of the proceedings," the District Court's dismissal of a challenge to the decision by the House of Representatives to seat a candidate).

The limitations contained in § 209.12 also stand on exceptionally strong policy grounds, given, among other things, the importance of a legislative body's ability to judge the elections and qualifications of its own members. *See Scheibel*, 282 N.W.2d at 847; *Morgan*, 801 F.2d at 450. At the outset, § 209.12 at least partially respects the autonomy of the Senate by reducing distracting parallel proceedings and contradictory rulings. At the same time, it provides a benefit to Minnesota's judicial system by helping courts avoid advisory opinions. *See Odegard*, 119 N.W. 2d at 720 (acknowledging that Minnesota courts should not "gratuitously" hear federal election contests); *Scheibel*, 282 N.W.2d at 850 (concluding that, as a general matter, issuing advisory opinions in election contests "is not in keeping with the rendition of [f]inal decisions which is our own separate and co-equal constitutional responsibility"). And strictly construing the statute still provides the contestant an efficient and timely remedy—while ensuring the

people of Minnesota the full representation to which they are entitled. Coleman can bring all his claims to the Senate. *See Derus*, 555 N.W.2d at 518 (acknowledging, in an analogous context, that "[a]lthough we hold that these proceedings fall outside the statutory election provisions now existing, this decision does not preclude [the contestant] from seeking a remedy from the legislature itself, for it is the legislature that is the 'judge of the . . . eligibility of its own members.'" (quoting Minn. Const. art. 4, § 6, which parallels U.S. Const. Art. 1, § 5, Cl. 1)).

In short, § 209.12 is an important statute that means what it says: "[T]he only question to be decided by the court is which party to the contest received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of election." As the United States Constitution and Minnesota case law make clear, this limitation is obligatory, and it has teeth.

2. Coleman Has Brought an Election Contest Outside the Scope of Minn. Stat. § 209.12.

Coleman's contest flouts § 209.12. As a result, Coleman's notice is deficient under § 209.021, which requires contestants to specify the grounds on which the contest will be made. Coleman does not limit his demands to resolution of the question set forth in § 209.12, "which party to the contest received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of elections." Minn. Stat. § 209.12. Rather, he expressly calls on this Court to address and resolve alleged "irregularities" in the "conduct of the [election]" and the canvass of votes. *See* Notice ¶ 9(a)-(d). He further demands that this Court address unidentified "numerous and material errors" throughout the proceedings, *see id.* ¶ 9(b)-(d), and he seeks relief for various alleged violations of the Minnesota Election Law, *see, e.g.*, ¶¶ 14-16. Tellingly, Coleman's proposed order describes the "questions to be decided in this matter" as "(i) which party to the Election received the highest number of votes legally cast in the

Election and is therefore entitled to receive a certificate of election . . . ; and (ii) whether or not there were irregularities in the conduct of the election sufficient to invalidate said election." Proposed Order ¶ 4(B). Even Coleman's more specific claims—involving, among other things, recount officials' treatment of damaged ballots and steps the Board has taken in response to ballots it deemed to be missing—ask this Court to resolve far more than what its broadest possible jurisdiction allows: which candidate should receive credit for votes that the Board has already counted and certified and whether each vote so credited was, as a mathematical matter, appropriately counted. See Notice ¶¶ 12(a)-(e); 18. None of these claims is permissible under § 209.12. Nowhere does Coleman allege material mistakes in counting legally cast ballots that are not due to irregularities. And nowhere does he invoke the remedy of taking and preserving evidence of irregularities to present to the Senate.² In short, Coleman's sprawling notice, which is deliberately vague and unrestricted, fails to comply strictly with Chapter 209 of Minnesota's election laws. Indeed, it fails even to comply *substantially* with § 209.021 and § 209.12. Rather, it flagrantly disregards the jurisdictional limitations and requirements set forth by statute. Coleman has chosen not to ask for that to which he might constitutionally be entitled under the statute, and the seven days for doing so have run.

² To the extent Coleman's more vague and sweeping claims—such as his claim that some number of unidentified ballots "challenged by representative of [Coleman] during the Recount . . . were . . . erroneously ruled by the Board as votes for Contestee Al Franken," Notice ¶ 12(f)—might simply be assumed to include requests that this Court decide appropriate questions (such as which candidate should receive credit for votes that the Board has already counted and certified), those claims are insufficiently specific either to survive a motion to dismiss or to satisfy the jurisdictional mandates of § 209.12. What is more, Coleman fails to allege with adequate specificity that these particular alleged errors, even if remedied, would be sufficient to change the outcome of the election. For this second, independent reason, the allegations are insufficient to confer jurisdiction on this Court. See *Christenson*, 119 N.W.2d 35, 39 (Minn. 1963) (confirming that a contestant's failure to allege materiality—that is, his failure to allege that remedying the alleged errors would result in a different party being declared the winner—constitutes "candor [that] can hardly supply the basis upon which a court can assume jurisdiction"); see also *Greenly*, 295 N.W.2d at 90 (acknowledging that "although the precise result in *Christenson* has been altered by legislative action," the opinion still serves as "persuasive dicta"). Cf. *id.* at 90 ("A notice which charges irregularities in the election but fails to allege how these irregularities deprived the voters of a fair election does not constitute valid notice.")

3. This Court Lacks Jurisdiction To Hear the Contest.

Coleman's failure to comply with the requirements of Chapter 209 deprives this Court of any jurisdiction it might otherwise have. As the Minnesota Supreme Court has repeatedly acknowledged, "[t]he authority of courts to entertain election contests is purely statutory." *Derus*, 555 N.W.2d at 516 n.1 (quoting *Phillips v. Ericson*, 80 N.W.2d 513, 517 (Minn. 1957)). "Similarly, the remedies for claimed violations of the election laws are only those provided by statute." *Id.* As a result, a contestant *must* comply fully with the statutory procedural requirements. "'Substantial compliance' with the 'strict procedural requirements' imposed by the legislature is insufficient." *Rachner v. Growe*, 400 N.W.2d 749, 751 (Minn. Ct. App. 1987) (quoting *O'Loughlin v. Otis*, 276 N.W.2d 38, 40 (Minn. 1979)).

Indeed, if a contestant fails to pay strict adherence to the statutory requirements, the court lacks jurisdiction. *See id.* ("[I]n order for the district court to acquire jurisdiction the provisions of the statute relating to filing and serving of the notice must be strictly followed.") (quoting *Petraleso v. McFarlin*, 296 Minn. 120, 124, 207 N.W.2d 343, 345 (1973)); *see also, e.g., Hancock v. Lewis*, 122 N.W.2d 592 (Minn. 1963) (dismissing on jurisdictional grounds); *Rachner*, 400 N.W.2d 749 (same); *Greenly v. Independent School Dist. No. 316*, 395 N.W.2d 86, 91 (Minn. Ct. App. 1986) (rejecting "the argument that the court has adopted a 'substantial compliance' rule with regard to the *contents* of the notice") (emphasis in original).

Section 209.021, which governs the filing and serving of the notice, requires that the notice "specify the grounds on which the contest will be made." This requirement is also incorporated into § 209.12 ("points specified in the notice of contest"), and it is jurisdictional. In the instant case, the few grounds that Coleman has specified fall outside the scope of the applicable provision for any claim to alter the ballot count or to delay the certificate of election, Minn. Stat. § 209.12, and, as a result, his notice is defective. This Court lacks jurisdiction.

In short, the case must be dismissed. In these circumstances—and particularly in light of the imperative of at least provisionally seating a second Minnesota Senator (subject to any election contest in the Senate)—no amendment is permissible. *See Christenson*, 119 N.W.2d at 403 ("We are committed to the rule, universally followed, that where amendments to a pleading allege jurisdictional grounds not previously alleged in the initial pleading, the court cannot appropriate to itself jurisdiction which the law does not give by permitting such amendments after the time for initiating the proceeding has expired. In other words, a sufficient statutory notice of election contest must exist before the power to grant an amendment can be exercised.").

4. Even if this Court Had Jurisdiction, It Would Be Limited To Determining the Highest Number of Votes Legally Cast.

At an absolute minimum, Chapter 209 requires that this Court limit this process and its decision-making to the single question resolvable pursuant to Minn. Stat. § 209.12: "which party to the contest received the highest number of votes legally cast." As explained above, this rule limits the scope of this Court's determinations to first, which candidate should receive credit for votes that the Board has already counted and certified; and second, whether each vote so credited was, as a mathematical matter, appropriately counted. In other words, this Court's decision-making jurisdiction is limited to questions that can be resolved through a court-run recanvass. As to all other matters, it can only take and preserve evidence. Minn. Stat. § 209.12.

B. Coleman Has Failed To State a Claim Upon Which Relief Can Be Granted

Even if this Court had jurisdiction to resolve all of Coleman's challenges, each fails to state a claim upon which relief can be granted and, as a result, should be dismissed. *See Derus*, 555 N.W.2d at 516 & 517 n.4.

1. Nearly All of Coleman's Claims Must Be Dismissed for Vagueness

Coleman has saturated his Notice with unfocused assertions and catch-all allegations that muddy the briefing but otherwise serve no function. As well-established case law makes clear, claims that are insufficiently specific must be dismissed.

a. Minnesota Law Requires that Vague Claims Be Dismissed

Claims brought in an election contest must be "definite and specific." *Soper*, 46 Minn. at 276, 48 N.W. at 1112. It is well-settled—and critical to the timely functioning of an election contest—that insufficiently specific claims be dismissed on the pleadings.

At the outset, it is difficult to imagine a circumstance in which the policy concerns are stronger. The Minnesota legislature has required that contestants "clearly state the points [upon which they bring suit]" because, among other things, "there is a strong public policy in favor of finality in elections." *Greenly*, 395 N.W.2d at 91; *see also Franson v. Carlson*, 137 N.W.2d 835, 840 (Minn. 1965); ("[T]he whole system [is] intended to expeditiously dispose of election contests. . . . [T]he general idea inherent in the statute [is] that there may be a speedy determination of these matters . . ."); *Hunt v. Roloff*, 28 N.W.2d 771, 776 (Minn. 1947) (Matson, J., concurring) ("The legislature has wisely provided a summary and strict procedure to avoid intolerable delay in the adjudication of election contests.").

The instant case provides a powerful illustration of the concern. Over two months ago, Minnesota elected the second of its two Senators and, a week ago, the 111th Congress was sworn in. Yet Minnesota voters remain underrepresented, and they suffer continuing harm as their elected official remains out of office and embroiled in an unfocused fishing expedition disguised as an election contest. And this is not just a Minnesota concern. The nation faces incredibly serious and exigent problems, and it expects Minnesota to have two Senators contributing to the solution.

Minnesota courts act decisively in light of these concerns, even when they involve state legislators. "To invoke a court's jurisdiction, open the ballots, and subject to scrutiny the acts of sworn officials, to expose the contestee to considerable expense, and to affect the public interest by preventing the declared winner from taking office during the delay occasioned by the proceeding is surely too great a price to pay for honoring a defeated candidate's desire to inspect the ballots in order to marshal evidence upon which to justify instituting an election contest." *Christenson v. Allen*, 119 N.W.2d 35, 40 (Minn. 1963); *see also Greenly*, 395 N.W.2d at 91 ("The will of the voters in any election could easily be subverted by the filing of a groundless notice of contest, or even by the filing of a meritorious notice weeks after the election.").

This is precisely why the statute demands that a contestant "*specify* the grounds on which the contest will be made." Minn. Stat. §209.021 (emphasis added). It also helps to explain the long line of Minnesota precedent requiring dismissal of insufficiently specific claims. In *Rachner*, the contestant alleged "'lack of thoroughness in the canvassing process conducted by the State Canvassing Board' and unspecified 'irregularity in the conduct of the election by the DFL candidate.'" 400 N.W.2d at 752. The court acknowledged that this notice "clearly did not sufficiently apprise" the contestee of the relevant claims, *id.*, and so it dismissed the case. In *Christensen*, the Supreme Court did the same, expressing serious concerns that contestants could otherwise engage in "fishing expedition[s]." 119 N.W.2d at 40 (internal quotation marks omitted). In yet another decision, the Court rejected a contestant's claim "that at said election a large number of legal voters of said town desired and attempted to cast votes [in favor of one candidate], but with the knowledge, consent, and connivance of the said judges of election, they were, by violence and threats, prevented from casting their votes." *Soper*, 46 Minn. at 276, 48

N.W. at 1112. The Court dismissed the claim as "altogether too general, uncertain, and indefinite." *Id.*

The decision set down in *Holmen v. Miller*, 206 N.W.2d 916 (Minn. 1973), confirms the rule. Although the Minnesota Supreme Court concluded that a statutory amendment had altered *Christenson's* holding as to the *jurisdictional* requirements of § 209.021 (and even that, only with respect to certain types of claims and contests), it did not call into question the need for specificity if a claim is to survive a motion to dismiss. *See Holmen*, 206 N.W.2d at 922 ("Of course, it will be necessary for the contestant, as in all election contests, to comply with the appropriate provisions of c. 209."); *see also Greenly*, 395 N.W.2d at 90 n.1 (citing *Holmen* and noting that "although the precise result in *Christenson* has been altered by legislative action, the *Christenson* opinion is still persuasive dicta in this case"). In short, "the legislature has required that one who plans to challenge an election clearly state the points upon which he will do so and that he file his notice soon after the election." *Id.* at 91-92. "The Minnesota Supreme Court has held that these requirements must be strictly followed." *Id.* at 92.

The specificity requirement takes on increased and even constitutional importance in the context of congressional election contests. Section 209.12, which carefully limits the scope of these contests, cannot be enforced against vague or untimely claims. Insufficiently specific claims necessarily permit litigation to extend outside § 209.12's limited scope. What is more, as discussed above, *supra* at 7-10, the United States Constitution itself requires that the § 209.12 line be strictly policed. For state courts to resolve sweeping, loosely defined challenges to congressional election proceedings unquestionably violates Art. 1, § 5, Cl. 1.

The structure of Chapter 209 also requires claim specificity. To rid the statute of this requirement would violate other procedural sections, making it impossible, for example, for

contest proceedings to be brought on for trial "as soon as practicable within 20 days after the filing of the notice of contest." Minn. Stat. § 209.065. It would render the meticulous canvassing process—and, in many cases, the recount—a wasteful exercise in futility, rather than an important opportunity for contestants to gather evidence and formulate claims. Perhaps most significantly, it would call into question the ability of "[a]ny eligible voter" to bring a contest in the manner provided in Chapter 209. Grave danger would lie in allowing any voter, in any election, to delay the seating of officials simply by filing vague, sweeping challenges pursuant to § 209.021.

In short, for a challenge in an election contest to survive a motion to dismiss, it must be "definite and specific," *Soper*, 48 N.W. at 1112; it must "clearly state the points" upon which the contestant brings suit, *Greenly*, 395 N.W.2d at 91; and it must be "sufficient to apprise the contestee of the grounds of the contest so that [h]e is given a fair opportunity to meet the asserted claims" within the few weeks he has to prepare for trial, *Rachner*, 400 N.W.2d at 751 (internal quotation marks omitted).

b. Each of Coleman's Claims Not Expressly Set Forth in the Notice Must Be Dismissed

Under this standard, Coleman's challenges fail. The offending claims—that is, those too vague to survive dismissal—are numerous and by their nature difficult to distinguish. At a minimum, they include the claims set forth at Notice ¶ 9(a) ("[i]rregularities, matters and things" challenged without further explanation); *id.* at ¶ 9(b)-(d) ("[n]umerous and material errors, mistakes and other irregularities" challenged without further explanation); *id.* at ¶ 14 ("[failure to] comply with all the requirements of the . . . Election Law" challenged without further explanation); *id.* at ¶ 15 (votes by "unqualified and ineligible persons" challenged without further explanation); *id.* at ¶ 16 (challenge to unidentified persons allegedly voting more than once

without further explanation); *id.* at ¶ 17 (challenge to unidentified intent-of-the-voter determinations without further explanation); *id.* at ¶¶ 19, 20 (challenge to alleged failure to "detect and correct obvious errors" challenged without explanation, other than an internal cross-reference); *see also id.* at ¶¶ 10, 11, 12(f), 12(g), 13 (no specific legal basis for challenges identified). Coleman's repeated use of phrases such as "[b]y way of example only" and "including without limitation," *see, e.g., id.* at ¶¶ 10, 11, further confirms the defective nature of his pleading.

Taken in sum, the entire Notice fails for vagueness, and it should be dismissed. At a minimum, every claim contained in the Notice—other, arguably, than the six claims identified below—is insufficiently specific to survive. Franken therefore respectfully submits that this Court should dismiss any claim not specifically set forth in the Notice, including each of the claims identified in the preceding paragraph.

2. Coleman's Remaining Challenges Fail To State a Claim Upon Which Relief May Be Granted

Even Coleman's more specific claims fail to state a claim upon which relief may be granted, and, as a result, they must be dismissed. *See Derus*, 555 N.W.2d at 516 & 517 n.4. Stated broadly, the deficiencies are threefold.

First, Coleman's claims fall outside the scope of Minn. Stat. § 209.12. As discussed above, this Court therefore lacks jurisdiction to hear them.

Second, at least two of Coleman's claims consist of allegations that, even when assumed to be true, fail to state a violation of Minnesota law.

Finally, Coleman's claims fail for lack of a remedy. As the Minnesota Supreme Court has emphasized repeatedly, the "authority of courts to entertain election contests is purely statutory." *Derus*, 555 N.W.2d at 516 n.1 (quoting *Phillips*, 80 N.W.2d at 517). As a corollary,

the "remedies for claimed violations of the election laws are only those provided by statute." *Id.* Claims seeking any other form of remedy must therefore be dismissed. *See id.* ("[W]hile the contestant has attempted to avail himself of broad remedial relief under the election laws by denominating this proceeding as an election contest, even accepting as true for those purposes the allegations of wrongdoing included in the 'notice,' no justiciable claim for relief thereunder has been asserted. The purported notice of contest must be dismissed."). Indeed, "were the courts to afford the unprecedented relief [a contestant] seeks, it would, in effect, have usurped the very function that [the Supreme Court has] long acknowledged is that of the legislature alone." *Id.*

Each of Coleman's discernable claims is addressed in turn.

a. Coleman's First Specified Challenge—to Alleged "Double-Counting"—Falls Outside the Scope of § 209.12 and Fails for Lack of a Remedy.

Coleman's first challenge, Notice ¶ 12(a), that ballots "were counted twice during the Recount due to such Ballots being not marked as 'DUPLICATES' and matched with its 'Original' Ballot in contravention of Minnesota Statute § 206.86, subd. 5," must be dismissed. It both falls outside the scope of § 209.12 and fails for lack of a remedy.

In objecting to the manner in which certain ballots were treated vis-à-vis alleged duplicates, Coleman strays far afield of the question of "which party to the contest received the highest number of votes legally cast." Minn. Stat. § 209.021. Rather, Coleman's challenge seeks a remedy for an alleged "irregularity in the conduct of an election or canvass of votes" or, as his citation to § 206.86 suggests, an alleged violation of the Minnesota Election Law. *Id.* § 209.02. Certainly, the challenge is not limited to whether he or Franken should receive credit for counted votes, nor to whether each vote so credited was, as a mathematical matter, appropriately counted. Yet no other question can be resolved by this Court, and Coleman does not invoke the evidence

preservation procedure for this or any other claim. Coleman's attempt to object to an election irregularity for any other purpose violates § 209.12 and must be dismissed.

Even if Coleman could pursue his claim, he lacks a cognizable remedy. Coleman is demanding that any ballot supposedly producing a "double-count" now be subtracted from the totals. Yet the class of ballots he has identified as possibly containing these targets—ballots damaged or defective so that could not be counted on Election Day, for which no corresponding duplicate can be found—does not correlate one-to-one with the ballots he alleges were double-counted. Throwing out the entire class of ballots (including those not double-counted) would disenfranchise voters in a crude and legally impermissible manner. “There can be no dispute that unmatched original ballots are valid ballots and the votes marked on those ballots should be counted in the election.” *Coleman v. Minnesota State Canvassing Board*, No. A08-2206 (Minn. Sup. Ct., Dec. 24, 2008), slip op. at 4. Short of holding a new election, therefore, there is no way to fashion a remedy for Coleman's challenge. In any event, because neither a new election nor throwing out ballots is among the remedies statutorily available to Coleman, the Court is powerless to provide those remedies. *See Derus*, 555 N.W.2d at 516 n.1. Either action would amount to a remedy for an election irregularity and, as such, would have to be presented to the United States Senate. It cannot be resolved pursuant to § 209.12.

b. Coleman's Second Specified Challenge—to the Inclusion of Certain Votes in the Recount but Not Counted on Election Night—Falls Outside the Scope of § 209.12 and Fails as a Matter of Law.

Coleman's second challenge, Notice ¶ 12(b), that certain ballots "'found' and counted" during the recount should not have been included in the recount due to chain-of-custody or reliability concerns, similarly falls outside the scope of § 209.12. Again, Coleman is not challenging which candidate should have received credit for counted votes, and he is not challenging whether each vote so credited was, as a mathematical matter, appropriately counted.

Instead, he is attempting to correct an election irregularity, which is plainly not permitted under § 209.12 ("the judge shall make no findings or conclusions on" "other points specified in the notice of contest").

c. Coleman's Third Specified Challenge—to the Certification of Certain Election-Night Tallies—Falls Outside the Scope of § 209.12 and Fails as a Matter of Law.

Coleman's third challenge, Notice ¶ 12(c), that "alleged ballots not located or viewed during the recount" were improperly included in vote totals because they were deemed missing by the State Canvassing Board, must be dismissed: It both falls outside the scope of § 209.12 and fails as a matter of law.

By way of background, the following occurred in Minneapolis Ward 3 Precinct 1. On Election Day, 2,028 ballots were cast, but only 1,896 ballots were found during the recount. Election officials located five ballot envelopes. One was a different color and contained write-ins. The other four were labeled "2 of 5," "3 of 5," "4 of 5" and "5 of 5." There was no envelope labeled "1 of 5." After an extensive investigation, Minneapolis Director of Elections Cindy Reichert testified to the State Canvassing Board that there was simply no doubt that the ballots had been cast, counted, and then lost. The Board determined that the only way to enfranchise the voters whose ballots had been lost, and the only way to ensure the most accurate count possible was to use the Election Day vote totals for that precinct. No recount of the missing ballots could be completed for the ballots were not available to be recounted. Accordingly, the Hennepin County Auditor included the Election Day totals in her amended canvass results to the state canvassing board, and the State Canvassing Board certified the returns from Minneapolis Precinct 3-1 that included the missing, but validly cast, ballots.

This information, of course, is not contained in Coleman's notice, which inexplicably denies that *any* evidence supports the conclusion that "such alleged Ballots were actually

missing." Notice ¶ 12(c). Yet even taken at face value, Coleman's misleading allegations—and his effort to use this contest to disenfranchise the voters whose ballots were lost—must be rejected. First, the claim falls outside the scope of § 209.12. As discussed above, § 209.12 limits this Court's analysis to two determinations: first, which candidate should receive credit for any vote that the Board has already counted and certified; and second, whether each vote so credited was, as a mathematical matter, appropriately counted. Here, Coleman makes no claim that he is entitled to any of the votes credited to Franken from Minneapolis 3-1; nor does he allege any mathematical error. Rather, he asks the Court to address what he deems to be an irregularity and rely on the recount numbers that exclude the missing ballots, instead of the Election Day returns that encompass the missing ballots. This is an effort to correct an alleged irregularity in the canvass (without an attempt to invoke the sole remedy of taking and preserving evidence of irregularities to present to the Senate) and it is not permitted under § 209.12.

Second, even were this remedy permissible, Coleman's claim would fail on its face. As the State Canvassing Board recognized, based on advice from the Attorney General, Minnesota law is clear that once ballots are deemed missing, Notice ¶ 12(c), election officials must turn to the next best evidence: here, the vote totals provided by election officials on Election Day. *See Moon v. Harris*, 142 N.W. 12, 14 (Minn. 1913); *see also Stemper v. Higgins*, 37 N.W. 95 (Minn. 1888) (stating that when ballots have not been properly safeguarded, other evidence should be used as indication of vote).

Quite simply, "while the ballots are original evidence, the official results are *prima facie* evidence of the votes cast. Where the original ballots cannot be deemed trustworthy, *or as here, are missing, the official results are the best evidence.*" *McDunn v. Williams*, 620 N.E.2d 385, 402 (Ill. 1993) (emphasis added). This principle is clearly established not only in Minnesota but

across the country—and has been for well over a century. *See Newton v. Newell*, 6 N.W. 346, 347 (Minn. 1880) ("The ballots cast at an election may . . . be resorted to for the purpose of disputing the returns of the board of canvassers, and of investigating and ascertaining the actual state of the vote. *But to entitle them to be used for these purposes it must affirmatively appear that they have, in the language of section 18 of the election law, been "carefully preserved."*) (emphasis added); *Sullivan v. Ebner*, 262 N.W. 574, 575-76 (Minn. 1935) (citing *Newton* and concluding that trial court was correct to reject recounted ballots as likely subjected to tampering); *see also Graham v. Reid*, 779 N.E.2d 391, 395 (Ill. App. 2002) ("the returns are prima facie evidence of the results when the ballots in a precinct are missing"); *Henderson v. Maley*, 806 P.2d 626, 632 (Okla. 1991) (where there is reasonable doubt as to the integrity of the ballot boxes "no recount is had and the returns of the precinct officials prevail"); *Thoms v. Andersen*, 235 N.W.2d 898 (S.D. 1975) (holding that, where ballots were missing from recount, the court should have avoided disenfranchising more than 200 electors by using official canvass in place of ballots themselves); *Wilson v. Burrige*, 346 P.2d 282, 285 (Wy. 1959) ("The fact alone that only 505 ballots out of 529 were found and recounted impugns the integrity of the ballots to such an extent that the recount cannot prevail"); *Burke v. Beasley*, 75 So.2d 7 (Fla. 1954) (holding that where integrity of ballot box had been compromised, the ballots lost their probative force and were not admissible to impeach the Election Day return); *Smith v. Kincaid*, 235 S.W.2d 62, 64 (Ky. 1951) ("[W]here the ballots were missing from one of the boxes, they, of course, could not be examined as evidence of the result of the election"; instead, "the original count made by the board of election commissioners [w]as the best evidence of which the case was susceptible." (citing *Frazier v. Wright*, 228 S.W.2d 424 (Ky. 1950))); *Swift v. Registrars of*

Voters of Milton, 183 N.E. 727 (Mass. 1932) (holding that it was proper to accept election figures returned by precinct officers in lieu of missing ballots).³

Common sense supports the conclusion reached by the overwhelming body of case law, by the Minnesota Supreme Court, and, in this case, by the State Canvassing Board. A missing vote simply cannot be recounted and the original count stands. *See Jenkins v. Martin*, 154 S.W.2d 242, 243 (Ky. 1941) ("If the ballots have been tampered with, naturally a recount in no way impeaches the original figures for the same thing is not counted." (internal quotations omitted)).

As recognized by the State Canvassing Board, an incorrect result indisputably would have resulted had the Board attempted to tally remaining votes as though the missing votes did not exist. As numerous officials recognized, the city, the county, and the Board had the authority and duty under state law to accept the Election Day return. Had the State Canvassing

³ The list of supporting citations is truly extensive, and not contained in full in this brief. Additional cases include, e.g., *Conley v. Rice*, 67 S.W.2d 478, 480 (Ky. App. 1934) (holding there could be no recount of a precinct after it was discovered after the recount began that 32 ballots were missing from a ballot box); *Talbott v. Thompson*, 182 N.E. 784 (Ill. 1932) (considering "all the attending facts and circumstances" where both the judges and the custodians have failed properly to perform their duties); *Madrid v. Sandoval*, 13 P.2d 877 (N.M. 1932) (where ballots had not been properly preserved, official returns, rather than recount tally, governed); *State ex rel. Jarrett v. Board of Canvassers*, 128 S.E. 821 (W.Va. 1924) (the board of canvassers erred in holding that the ballots were the best evidence of the result of the election where there was evidence of compromised ballots); *Phillips v. Kincaid*, 240 S.W. 737, 738 (Ky. App. 1922) (allowing ballots to be recounted only where the ballot box has been kept as the law requires); *Burd v. Meadows*, 124 S.W.2d 85, 86 (Ky. App. 1917) (trial court denied request for a recount where the integrity of the ballots had clearly been compromised, as recount would have been useless); *Rich v. Young*, 197 S.W. 442, 44 (Ky. App. 1917) (allowing ballots to be recounted only where the ballot box "has been kept as the law requires"); *Ottley v. Herriford*, 170 S.W. 205, 210 (Ky. App. 1914) (holding that, where there was evidence that the ballots had been tampered with, best evidence is the return certified by the election officers); *Browning v. Lovett*, 94 S.W. 661, 663 (Ky. App. 1906) (same, where the ballots had been stolen from one box and those in another had been tampered with); *Bailey v. Hurst*, 68 S.W. 867, 869-70 (Ky. App. 1902) (same, where ballots had been tampered with or lost); *Frazier*, 228 S.W.2d at 425 (same, where ballots to be recounted were missing from ballot box); *Brown v. Crosson*, 88 N.W. 366 (Iowa 1901) (holding that that recount totals could not be used from locality in which ballots had been compromised following the election); *Howser v. Pepper*, 79 N.W. 1018, 1019 (N.D. 1899) (indicating that "the preliminary question as to whether the ballots offered to impeach the returns are the original ballots, and in the same condition as when cast by the electors"); *id.* at 1020 (holding that official canvassing results would be controlling where the integrity of the ballot boxes were not maintained between the election and the recount); *see also Behrensmeier v. Kreitz*, 26 N.E. 704 (Ill. 1891) (allowing extrinsic evidence to determine the vote of a missing ballot); *Stemper v. Higgins*, 37 N.W. 95, 97-98 (Minn. 1888) (allowing parol evidence by judges as to the number of votes actually cast, counted, and publicly declared for the several candidates where the return was not conclusive and the ballots had not been adequately protected).

Board relied on a manual recount of the ballots now available from Minneapolis Precinct 3-1— notwithstanding the ballots that have been erroneously misplaced and therefore excluded from the recount—it would not be considering all of the ballots legally cast in that precinct. Instead, it would be signing and certifying the correctness of a report that was universally acknowledged to be incorrect, in violation of longstanding Minnesota precedent.

Yet, that is precisely what Coleman asks of this Court in Notice ¶ 12(c). Because the request falls outside the scope of § 209.12 and because it fails as a matter of law, it must be dismissed.

d. Coleman’s Fourth Specified Challenge—to the Inclusion of Certain Absentee Ballots after Election Day—Falls Outside the Scope of § 209.12 and Fails for Lack of a Remedy.

Coleman asserts, in ¶ 12(d) of the Notice, that some number of absentee ballots were erroneously opened and counted after Election Day, pursuant to the Minnesota Supreme Court’s December 18th order and a Protocol jointly created by Coleman, Franken, the Secretary of State, and local election officials. As set forth in Franken’s Affirmative Defenses, because Coleman had an opportunity to object to each and any of the 933 absentee ballots that were counted, he is now estopped from challenging the absentee ballots described in paragraph 12(d). Coleman’s claims that some of the 933 ballots were (1) opened or counted in error or (2) that his representatives did not agree to the inclusion of certain ballots, are also barred by laches and unclean hands.

Even assuming, *arguendo*, that ¶ 12(d) is not barred by equity, the claim falls outside the scope of § 209.12 and therefore must be dismissed. In objecting to the inclusion of allegedly

improperly rejected absentee ballots, Coleman is objecting to an election irregularity—an issue that cannot be resolved by this court consistent with the authority granted by § 209.12.⁴

Finally, this claim fails to state a claim upon which relief can be granted, for it lacks any permissible court-ordered remedy. Minnesota law mandates secret ballots. *See* Minn. Stat. § 206.80 ("An electronic voting system may not be employed unless it: (1) permits every voter to vote in secret"); *see also Application of Andersen*, 264 Minn. 257, 267, 119 N.W.2d 1, 8 (1962) ("Procedural statutes governing elections are intended to safeguard the right of the people to express their preference in a free election by secret ballot and to have the results of the election governed by the votes so cast."); Minn. Stat. § 202A.18 (requiring secret ballots even for caucuses and conventions). The Secretary of State, when counting these ballots, did number them so as to link them to their envelopes. However, relying on that system to remove votes would by necessity destroy their secrecy. As a result, this Court cannot perform the only remedy that Coleman seeks, to adjust the vote totals. To the extent Coleman seeks a different remedy, this Court is not the proper forum.

e. **Coleman's Fifth Partially Specified Challenge—to the Inclusion of Unidentified Absentee Ballots on Election Day—Falls Outside the Scope of § 209.12 and Fails for Lack of a Remedy.**

Coleman's claim set forth in ¶ 12(e) of the notice fails for the similar reasons. Here, Coleman contends that some vague number of absentee ballots perhaps were improperly opened and counted on Election Day. As explained above, and in Franken's answer, one cannot meaningfully and intelligently respond to the allegations of paragraph 12(e) because Coleman has identified not a single absentee ballot envelope improperly accepted by election officials on Election Day. Coleman has had two months to identify absentee ballot envelopes supposedly

⁴ Again, Coleman does not invoke the remedy of taking and preserving evidence of irregularities to present to the Senate.

accepted in error, and his conclusory and bare speculation that some absentee ballot envelopes were erroneously accepted and that Franken received the majority of the votes cast fails to provide the sufficiency required in an election contest.

Even assuming, however, that Coleman had identified particular ballots, Coleman once again asks the Court to perform a task not permitted by § 209.12. He demands that the Court resolve an alleged election irregularity, rather than arguing he should receive credit for votes the Board has already counted and certified; that votes so credited were, as a mathematical matter, inappropriately counted; or that evidence of some other issue should be collected and brought before the Senate.

Moreover, this claim again lacks a remedy and must therefore be dismissed. Absent requiring each voter to profess his or her vote in open court (which would be unconstitutional, on top of all other objections), there is literally no way for a court to determine which votes are associated with which absentee ballots opened on Election Day. To the extent Coleman would advance some creative alternative remedy, it must be presented to the United States Senate.

f. Coleman's Sixth, Partially Specified Challenge—to the Counting of Ballots without Judge's Initials—Falls Outside the Scope of § 209.12 and Fails as a Matter of Law.

In ¶ 18 of the notice, Coleman claims that "election judges in several precincts failed to initial the backs of Ballots under their control" and "failed to prevent the deposit of Ballots without such endorsement in the Ballot boxes and voting machines." This claim must be dismissed both because it falls outside the scope of § 209.12 and because, taking Coleman's allegations as true, the claim fails as a matter of law.

First, ¶ 18 is yet another objection to an alleged election irregularity. His claim is therefore outside the scope of "which party to the contest received the highest number of votes

legally cast," Minn. Stat. § 209.12. Consistent with both § 209.12 and the United States Constitution, it must be decided by the United States Senate.

Second, even if ¶ 18's claim were properly before this Court, it would fail as a matter of law. In essence, Coleman seeks to have this Court throw out lawful votes cast by eligible voters because certain voters were handed ballots by election judges who failed to initial the back of the ballot. Even assuming all facts alleged by Coleman to be true, the allegations fail to state a claim.

The plain language of the statute does not allow a ballot to be disqualified simply because it lacks election judge initials. Minn. Stat. § 204C.20, subd. 2, governing the counting of ballots, provides that:

If the number of ballots in one box exceeds the number to be counted, the election judges shall examine all the ballots in the box to ascertain that all are properly marked with the initials of the election judges. If any ballots are not properly marked with the initials of the election judges, the election judges shall preserve but not count them; however, if the number of ballots does not exceed the number to be counted, the absence of either or both sets of initials of the election judges does not, by itself, disqualify the vote from being counted and must not be the basis of a challenge in a recount.

Id. (emphasis added). Here, Coleman does not allege that, where election judge initials were missing, the total number of ballots exceeded the number of ballots to be counted. And, in any case, the statute plainly contemplates a procedure to be conducted only on election night, and specifically bars the process from being applied in a recount. Thus, under the plain terms of the statute, the lack of initials cannot be the basis for failing to count the ballots.

Moreover, Minnesota law is clear that innocent voters should not be disenfranchised because of irregularities, ignorance, inadvertence, or mistake on the part of election officials. "[T]he right of the elector to have his vote cast and counted is protected from fraud or mistake of the election officers by every possible safeguard, where it appears that his untrammled right to

this high privilege of citizenship has not been denied or abridged." *State v. Falk*, 89 Minn. 269, 275-276 (Minn. 1903) (citing *McCrary on Election*, § 131); *Taylor v. Taylor*, 10 Minn. 107 (1865); *Stemper v. Higgins*, 37 N.W. 95 (Minn. 1888); *Soper*, 48 N.W. at 1112). As a result, to the extent there is any ambiguity in the statutory provision, it must be interpreted in favor of enfranchisement. See *Application of Andersen*, 119 N.W.2d 1 (Minn. 1962) ("Procedural statutes governing elections are intended to safeguard the right of the people to express their preference in a free election by secret ballot and to have the results of the election governed by the votes so cast. . . . As long as there is substantial compliance with our laws and no showing of fraud or bad faith, the true result of an election, once ascertained, ought not be defeated by an innocent failure to comply strictly with the statute. For that reason we have frequently held, in a variety of situations, that, after a fair election is held and the results ascertained, mere irregularities in following statutory procedure will often be overlooked.").

In short, Coleman's position that a voter should be disenfranchised because an election judge failed to initial the backs of the ballot is not only unjust; it is also contrary to statute and irreconcilable with the fundamental right to vote, long recognized and protected by Minnesota precedent. It fails on its face.

IV. CONCLUSION

Al Franken has been elected United States Senator for the State of Minnesota. On January 5, 2009, after hundreds of officials and volunteers across the State participated in a meticulous and model recount, the Minnesota State Canvassing Board confirmed this result. The next day, the 111th United States Congress was sworn in—and Coleman promptly initiated a lawsuit. With each passing day, the vague and open-ended litigation brought by Coleman further deprives Minnesota voters of the senator they have elected to serve them.

For the reasons set forth above, Coleman's lawsuit is defective and his claims without basis in law. Contestant Franken therefore respectfully requests that this Court dismiss Coleman's challenges. It is time for this litigation to end, for the people of Minnesota to have a full complement of congressional representation, and for the work of government to begin.

Dated January 12, 2009.

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ACKNOWLEDGMENT

Applicants acknowledge that sanctions may be imposed under Minn. Stat. §549.211.



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