

STATE OF MINNESOTA
IN SUPREME COURT

Court File No. _____

Norm Coleman,

Petitioner,

vs.

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

Respondents.

**PETITION FOR AN
ORDER TO SHOW
CAUSE PURSUANT TO
MINN. STAT. § 204B.44**

Petitioner states and alleges as follows:

JURISDICTION

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

2. This action is necessary to redress errors and omissions made by the Minnesota State Canvassing Board (“Board”) on December 19, 2008 related to the inaccurate counting of defective ballots during the recount of the election for United

States Senator from the State of Minnesota (“Recount”), so that original ballots and duplicate ballots representing the same voter were both counted. As a result of denying candidate challenges to these ballots, the Board will certify an inaccurate vote in contravention of its duties under Minn. Stat. § 204C.33, subd. 3. The Board’s overruling of these challenges will result in double-counting of votes because both unmarked duplicate ballots, which were counted on election night (“Unmarked Duplicates”) and marked original ballots, which were located in envelopes containing original ballots for which duplicates were made by local election officials on election night but for which duplicates were not found during the Recount (the “Non-Matching Original Ballots”), will be counted.

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

4. This Court must intervene, pursuant to Minn. Stat. § 204B.44, because the Board has committed and certain county canvassing boards have committed a “wrongful act” by improperly double-counting votes during the Recount. Because this is an

issue that involves the proper tabulation of votes, it is a matter for the Board and/or the county canvassing boards to resolve, and should not await a contest. The Board and the county canvassing boards must simply follow Minnesota law, which states that in these circumstances only duplicate ballots should be counted.

PARTIES

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

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

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

FACTUAL BACKGROUND

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

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

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

In Minneapolis Ward 8, Precinct 7, the inability to find marked duplicates for eleven originals caused the Recount total (including challenged ballots) to *exceed* the election-night totals by eleven votes. The Recount Official’s incident log for this precinct stated, “would have matched election day tape if [Original Ballots] left in envelope.” Walstien Aff. Ex. 1 at 3.

In Minneapolis Ward 9, Precinct 2, the inability to find marked duplicates for six originals caused the Recount total (including

challenged ballots) to *exceed* the election-night totals by six votes. The Recount Official's incident log for this precinct stated, "count up by 6 [over election night]." *Id.* at 4.

In St. Louis County, Cedar Valley, the inability to find a marked duplicate for a "proof" ballot caused the following incident log: "Proof ballot discovered in with machine ballots". The proof ballot found contained the indication "transcribed to official ballot"; meaning that counting the proof ballot would result in exceeding the election night total by one and double-counting. *Id.* at 6; Ex. 2.

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

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

there is a big issue here [as a result of the Unmarked Duplicates],” and “I know [the improper creation of duplicate ballots] happened in several precincts.” *Id.*

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

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

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

15. Double-counting will occur because, on information and belief, contrary to Minn. Stat. § 206.86, subd. 5, local election officials created duplicate ballots for the Non-Matching Original Ballots on Election Day, but failed to mark these duplicates “DUPLICATES.” The Unmarked Duplicates were, as required by Minnesota law, then run through the voting machines on Election Day, while the Non-Matching Original Ballots were placed in a separate envelope containing originals for which duplicates were

made. Problems arise when the Unmarked Duplicates are fed into the machine with all the other counted ballots. This happened in numerous instances so that during the Recount, if the Unmarked Duplicates and the Non-Matching Original Ballots are all counted (as happened here), the total ballots counted during the Recount will exceed the number of persons who voted in those precincts on Election Day.

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

17. After completion of the Recount, a number of challenged ballots were presented to the Board, including all of the Non-Matching Original Ballots, for consideration of whether these challenges should be upheld. These challenged Non-Matching Original Ballots were included in the county canvassing board’s summary statements as “challenged ballots.” Walstien Aff. ¶ 8.

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

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

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

APPLICABLE LAW

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

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

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

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

24. The statutorily mandated procedure for creating duplicate ballots further requires that the duplicate ballots: (1) be clearly labeled “duplicate;” (2) indicate the precinct in which the corresponding damaged or defective ballot was cast; and (3) bear a

serial number, which also must be identified on the original, defective ballot. *Id.* For purposes of the automated tabulation of votes, the duplicate ballots are counted in lieu of the damaged or defective ballot cards. *Id.* The original, defective ballots—which must bear a serial number corresponding to their duplicates—nonetheless must be retained so that the accuracy of the duplicate ballot made by election officials can be checked.

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

Any ballots requiring duplication at the polling place or central counting center must be duplicated in the following manner:

A. Whenever a ballot is required to be duplicated, the duplication process must be performed by two election judges not of the same political party.

B. *Whenever it is necessary to duplicate a ballot, the duplicate ballot and the original ballot must be identified with a single number written on both ballots. The number on the duplicate ballot must be the same number as on the original. When more than one ballot is being duplicated in a precinct, the numbering must be serial.*

C. *The reason for duplication must be written on the duplicate ballot. The election judges duplicating the ballot shall initial the duplicated ballot and the original ballot.*

D. When duplicating a ballot, one election judge shall call from the original ballot the valid selections of the voter; another election judge shall prepare the duplicate ballot with the voter's valid selections. The duplicate ballot must be compared against the original ballot to ensure it has been accurately duplicated.

E. *All original ballots which require duplication must be placed in an envelope marked "ballots for which duplicates were or are to be made."* **The duplicate ballot must be placed with the other valid ballots to be tabulated.**

Minnesota Rule 8230.3850 (emphasis added).

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

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

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

28. While Minnesota election law unambiguously creates the requirement that duplicate ballots be made according to the procedure outlined above, and that only duplicate ballots be tabulated and counted, the Board adopted recount rules proposed by the Minnesota Secretary of State on how to handle a variety of issues during the Recount, including how to handle original and duplicate ballots.

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

9. As the Table Official sorts the ballots, he or she shall remove all ballots that are marked as duplicate ballots and place those duplicate ballots in a fourth pile. At the conclusion of the sorting process, the Table Official shall open the envelope of original ballots for which duplicates were made for that precinct *and sort the original ballots in the same manner as they sorted all other ballots.*

The Table Official shall disregard this step if there is not an envelope of original ballots, in which case the duplicate ballots will be sorted.

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

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

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

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

It is the opinion of our Office that Rule 9 is clear about the process to be used when duplicate ballots are found during the sorting process. Those ballots are to be removed from the sorting process and placed in a separate [sic] pile. If there is an envelope of original ballots, the original ballots should then be sorted. If there are no duplicate ballots found during the sorting process, the canvass board has not authorized the envelope of original ballots to be opened and the original ballots envelope should remain sealed. If no envelope of original ballots exist, the duplicate ballots should then be sorted.

While there is no requirement to compare the number of duplicate ballots to the number of original ballots, if there is an apparent significant discrepancy in the numbers, the candidates' representatives should attempt to agree on whether to sort the original or duplicate ballots. The Deputy recount official shall note on the incident log if the duplicates rather than original ballots were counted. If the two candidate representatives can not agree, the Deputy Recount Official shall sort and count the original [sic] ballots. I hope this provides additional clarity.

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

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

34. To preserve the integrity of the Recount and to avoid clear double-counting of certain ballots, the Board should have upheld the candidate challenges to the Non-Matching Original Ballots and excluded from the Recount totals original but defective ballots for which there are no corresponding duplicate ballots. Only those originals for which there were corresponding duplicates should have been counted.

THE BOARD'S ERRORS AND OMISSIONS

35. In overruling the candidates' challenges to the Non-Matching Original Ballots and ensuring that both the Non-Matching Original Ballots and the corresponding

Unmarked Duplicates are counted in the Recount, the Board has enabled double-counting of votes in excess of the number of persons who voted on Election Day.

36. The principle that each citizen is entitled to one (but not more than one) vote is deeply engrained in the American tradition of voting rights. As the Supreme Court has explained, “[t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote.” *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (internal quotation omitted).

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

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

39. The Board had the duty, discretion and authority to prevent such unfairness from occurring. *See Eu v. San Francisco County Democratic Central Comm.*, 489 U.S.

214, 231 (1989) (“[a] State indisputably has a compelling interest in preserving the integrity of its election process”); *Crawford*, 128 S.Ct. at 1620 (2008) (recognizing Indiana’s interest in maintaining “the integrity and legitimacy of representative government”); *id.* at 1619 (“the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process”). In fact, it already had exercised this discretion and authority with respect to counting the election-night totals, as opposed to the recount totals, for a Minneapolis precinct where an envelope of ballots was alleged to have become missing; this discretion similarly should have been exercised with respect to the Non-Matching Original Ballots. Walstien Aff. ¶ 11.

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

41. The court in *Wright* considered twenty-one ballots in which there were various issues, including an original ballot for which there was no matching duplicate, a duplicate for which no original was found, and other ballots that did not contain serial numbers such that the originals and duplicates could be tied together. *Id.* at 1221. The

Court held that the ballots at issue would not be counted because, to do so, would be to “ignore the clear written law on the subject, and create a situation that would authorize procedures that would frustrate the proper handling of ballots and even create methods for fraudulent mischief in the counting of the votes.” *Id.* at 1223. Thus, under a comparable Indiana law, originals without corresponding properly-marked duplicates should not be counted (because, per statute, duplicates are the ballots to be counted on election night). *See generally id.*

42. By counting both a Non-Matching Original Ballot and an Unmarked Duplicate corresponding to the same voter, one person’s vote will be double-counted and other voters who have only voted once will be disenfranchised. *See* Minn. Stat. § 204C.35, subd. 3 (the scope of the Recount is limited to “the determination of the number of votes validly cast”). The Board does not have the authority to count Non-Matching Original Ballots because they were not “votes validly cast” in the election and therefore are not ballots that can be considered during the Recount. *See id.*

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

44. By overruling the challenges to the Non-Matching Original Ballots, the Board will certify vote totals in the Recount which exceed the number of persons that voted in these precincts on Election Day, thereby resulting in double-voting. The Board,

which has a duty to determine the number of votes “legally cast,” cannot approve numbers that show more votes than voters.

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

CLAIM FOR RELIEF

WHEREFORE, Petitioner respectfully prays for an Order of the Court:

Given the errors and omissions that have already occurred and the irreparable harm that may result from them and to avoid the double-counting of votes during the Recount caused by counting Non-Matching Original Ballots and the Unmarked Ballots corresponding to them, this Court should:

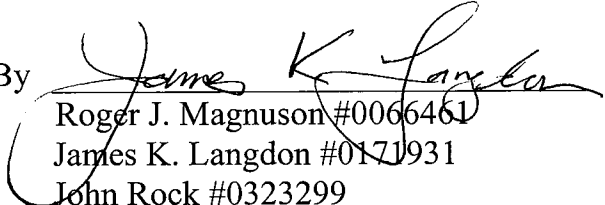
- i. Restrain the Board from certifying or finalizing the results of its recount until the Duplicate/Original issue is resolved by the County Canvassing officials;
- ii. Order each campaign to list every precinct in which it believes Duplicate Ballots made on election night to correct damaged ballots have not been correctly reconciled with the Original Ballots;

- iii. Order the local canvassing boards to ensure that vote totals are reconciled to correct any errors relating to the Duplicate/Original Issue so that no double-counting of votes occurs and to do so as part of this Court's previously ordered process for finding wrongly rejected absentee ballots. The counties shall then amend their returns by the December 31, 2008 deadline so that accurate results are included in the Board's final certification results; and
- iv. In the counties with precincts where all Original Ballots cannot be reconciled with Duplicate Ballots, order those county canvassing boards to amend their returns to the Board and in so doing, count and certify only Original Ballots for which there are corresponding marked duplicates.

Dated: December 19, 2008

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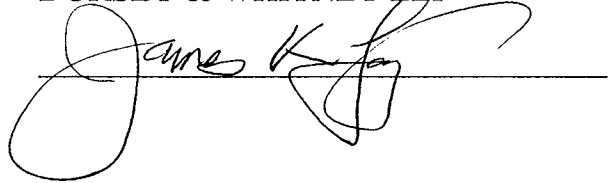
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ACKNOWLEDGMENT

The undersigned hereby acknowledges that sanctions may be imposed under
Minn. Stat. § 549.211.

DORSEY & WHITNEY LLP

A handwritten signature in black ink, appearing to read "James K. [unclear]", is written over a solid horizontal line. The signature is stylized and cursive.