No. A08-2169

STATE OF MINNESOTA
IN SUPREME COURT

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

Petitioners,

v.

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

Respondents,

and

Al Franken for Senate and Al Franken,

Intervening Respondents.

REPLY MEMORANDUM IN SUPPORT OF AMENDED PETITION

DORSEY & WHITNEY LLP
Roger J. Magnuson #0066461
James K. Langdon #0171931
John Rock #0323299
Suite 1500, 50 South Sixth Street
Minneapolis, MN 55402-1498
(612) 340-2600

TRIMBLE & ASSOCIATES, LTD.
Tony P. Trimble, #122555
Matthew W. Haapoja, #268033
10201 Wayzata Blvd, Suite 130
Minnetonka, MN 55305
(952) 797-7477

Attorneys for Petitioners

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INTRODUCTION

With its decision on December 12, 2008 to request all 87 county canvassing boards to segregate, open and count all purportedly wrongly rejected absentee ballots, the Minnesota State Canvassing Board (the "Board") has taken a false first step that if not corrected will impair this election's credibility. By not providing uniform standards or instruction, the Board has created a situation in which different county canvassing boards will take different steps, using different standards, to reach different results regarding similarly situated ballots. The prospect—indeed, certainty—of disparate treatment in these circumstances will disenfranchise some Minnesota voters, dilute the votes of others, and potentially lead to a violation of the Equal Protection Clauses of the Minnesota and United States Constitutions.

This Court must step into the fray to rectify the missteps being taken and to preserve the credibility of the election's results. Doing so need not impose any burden on the Court: it must merely apply Minnesota's clear election statutes. Those statutes make plain that the question of whether any absentee ballot was incorrectly rejected by election officials must be addressed in an election contest, where one three-judge panel can resolve such questions in a consistent manner using one standard, rather than on an *ad hoc* basis by 87 county canvassing boards attempting to interpret and apply confusing, internally inconsistent, and improper guidance provided to them recently by the Secretary of State's office. The Court accordingly can correct the errors and preclude future error simply by ordering Respondents to cease their actions and to leave the entire matter to an election contest.

The Franken campaign would have this Court believe all rejected absentee ballots in the so-called fifth pile indisputably are valid votes and that Petitioners are seeking to disenfranchise voters on mere technicalities. Nothing could be farther from the truth. There is no agreement that these ballots were wrongly rejected. Indeed, Petitioners believe many were properly rejected and that a contest proceeding, with decisions by one panel after recourse to the rules of civil procedure, would bear this out. In any event, the record does not reflect a vague possibility of disparate treatment or mere minor mistakes. Instead, it shows substantial and ongoing differences that implicate equal protection concerns: relying on the written guidance provided by the Secretary of State's Office, the canvassing boards of different counties are in fact reaching different results in determining whether similarly situated envelopes should go into the so-called fifth pile. As a result, this is not a circumstance capable of being addressed through the "obvious error" provisions of Minn. Stat. § 204C.39—for the simple reason that in many counties, for many ballots, officials are not dealing with obvious errors.

Even were the Court inclined to allow county canvassing boards to correct obvious errors made regarding rejected absentee ballots, it should articulate clear and meaningful standards by which the process should proceed uniformly in all counties. Those standards must ensure a public, transparent and fair process. They must also correct the Board's flawed first step which would not even ensure the evidentiary integrity of the process to enable either candidate, if he chooses, to raise the matter in an election contest.

Petitioners accordingly respectfully request that the Court exercise its authority pursuant to Minn. Stat. § 204B.44 to redress these errors.

RELEVANT FACTUAL BACKGROUND

I. Parties

Petitioners are Minnesota residents qualified to vote under Minnesota election laws who cast votes in the election for United States Senator. *See* Sheehan Aff. at ¶ 1.

Respondent Mark Ritchie is the Minnesota Secretary of State and is responsible for administration of Minnesota election law. Respondent Minnesota State Canvassing Board is granted, pursuant to Minnesota election law, limited responsibilities related to the state general election and administrative recounts. Nominal Respondents Isanti County Canvassing Board and Terry Treichel, Isanti County Auditor-Treasurer, represent all county and local election officials, including county canvassing boards, in each of Minnesota's 87 counties. Such county and local election officials are granted various election and recount responsibilities under Minnesota election law.

II. The Recount

The election for United States Senator from the State of Minnesota occurred on Tuesday, November 4, 2008 ("General Election"). Thousands of people voted absentee in this election. The close result of this election triggered an automatic statewide administrative recount under Minn. Stat. § 204C.35 (the "Recount"). The Recount has been conducted pursuant to Minn. Rules Ch. 8235, the Secretary of State Recount Plan, dated November 18, 2008, and the 2008 Recount Guide. *See* Langdon Aff. Ex. 1 (Nov. 18, 2008 Recount Plan) and Ex. 2 (2008 Recount Guide). County and local election officials have completed the manual recounting of the ballots. During the Recount, only

absentee ballots that had been accepted by local election officials were counted. The Board is scheduled to consider challenged ballots this week.

III. The Secretary of State's "Detailed Instructions" Related to Rejected Absentee Ballots

The Franken campaign began raising the potential issue of improperly rejected absentee ballots on or about November 11, 2008. *See* Sheehan Aff. Ex. 2. On Tuesday, December 2, 2008, Deputy Secretary of State Jim Gelbmann "asked for each county's assistance" in reviewing all previously-rejected absentee ballots. *See* Langdon Aff. Ex. 3. Mr. Gelbmann indicated that he was requesting the re-sorting because "the Board members expressed an interest in knowing the number of Absentee Ballots that may have been mistakenly rejected." *Id.* This December 2, 2008 email asks the counties to create a "fifth category"[1] while "reviewing all previously-rejected absentee ballots." *Id.*

On December 4, 2008, with the manual recount largely completed, Mr. Gelbmann emailed a document entitled "Detailed Instructions for Sorting All Currently-Rejected Absentee Ballots Cast in the U.S. Senate Race." *See* Langdon Aff. Ex. 4. These "Detailed Instructions," which we understand to be a new document encompassing guidance beyond that which was available pre-election to the election judges, state:

> This task goes beyond a mere listing of the reasons for rejecting an absentee ballot that are listed on the envelope. **It requires the election workers to further document that the reasons listed are accurate**. The integrity of our election system, and the need to make sure every effort is made to count every vote that is legitimately cast by a qualified,

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[1] Minn. Stat. §204B.12, subd. 2 provides four grounds for rejecting absentee ballots. This new idea of a fifth category is now popularly referred to as the "fifth pile."

> registered voter, is dependent upon your voluntary participation in this process. **No voter should be required to rely on an election contest to ensure his or her vote is counted by the State Canvassing Board. If the Board lacks the authority to count absentee ballots that were mistakenly rejected, it is critical that the Board be able to document the number of mistakenly-rejected absentee ballots in its final certification of the election results.**

Id. (Detailed Instructions at p. 1) (emphasis added).

The Detailed Instructions invited local election officials to "conduct preliminary investigations relative to each rejected absentee ballot prior to the actual public sorting process." *Id.* at p. 2. The Detailed Instructions for the non-mandatory re-sorting of rejected absentee ballots contain a further "optional" instruction. Under the heading "**Optional: Mail Ballots**," the Secretary of State's office stated: "**At the discretion of the local Election Official**, previously rejected ballots from **mail ballot precincts may also be reviewed** to determine whether any were rejected due to an administrative error, through no fault of the voter." *Id.* at p. 6. (emphasis added).

The Detailed Instructions also requested county officials to move any absentee ballots from the second pile (for ballots rejected because the return envelope does not contain the voter's genuine signature) to the fifth pile if the application and return envelope signatures "are similar, but not identical." *Id.* at p. 3.

On December 7, 2008, the Secretary of State's office sent an email under the subject line "Updated Information on Sorting of Rejected Absentee Ballots." *See* Langdon Aff. Ex. 5. Here, Mr. Gelbmann stated that Houston County conducted "a public sort on Friday" and then provided the remaining counties who still planned to

conduct the voluntary re-sort with "additional clarifications and instructions." *Id.* at p. 2. This December 7 email directs the counties to, for the first time, consider a rejected absentee ballot as improperly rejected if the signatures do not match or even if there is no signature, but the "transaction was actually handled at your in-person counter and was witnessed by a county or city official." *Id.* at p. 3. On the other hand, neither the Detailed Instructions, nor the December 7 email, acknowledge that absentee ballots should be rejected if the instructions, which require in part that the absentee voter have a witness who is registered to vote in Minnesota, are not followed.

While the Secretary of State's office indicated that candidate representatives may be present during these re-sortings in each county, candidate representatives have not been allowed to offer any objections or otherwise participate in the process other than mere observation. *See* Langdon Aff. Ex. 4 (Detailed Instructions at p. 2). Accordingly, the campaigns cannot verify that a supposedly "improperly rejected" absentee ballot was indeed improperly rejected. Additionally, a number of counties and Hennepin County cities have conducted their re-sortings apparently without giving public notice. These include: Cass, Chisago, Lac qui Parle, Washington, Hennepin-Long Lake, Hennepin-Minneapolis, Hennepin-Minnetonka, Hennepin-Rogers and Hennepin-Wayzata. *See* Langdon Aff. ¶ 10.f.

IV. Counties are Handling the Rejected Absentee Ballots Differently

Already, counties have adopted differing standards and some counties have refused to engage in the recommended process at all. Scott County has placed no ballots in the fifth pile. *See* Sheehan Aff. ¶ 3. At least five ballots were rejected (and have not

been put in the fifth pile) where the voter and the witness have the same street address and surname, but the witness did not include the city in his or her address. Similarly, some absentee voters used election judges as witnesses. These absentee voters' ballots were rejected where the election judge/witness did not include his or her complete address information. These have not been moved to the fifth pile. *Id.* In contrast, in Minneapolis, officials have now placed previously rejected absentee ballots in the fifth pile where a city official acted as the voter's witness and provided only name title without the witness's address." Still other counties are applying the Secretary of State's instructions inconsistently. For example, Clay County has placed at least one ballot in the fifth pile even though it has no witness information, while Lyon County has left a similarly situated ballot in a rejected pile. *See* Sheehan Aff., Ex. 1.

The City of Minnetrista, in Hennepin County, has created its own categories in the re-sorting process, believing that the Secretary of State's instructions were incomplete. In an email dated December 12, 2008, Terri Haarstad, City Clerk for the City of Minnetrista, stated: "the on-line survey requested by the Canvassing Board, Minnetrista left Category 5 blank as Categories 1-4 do not address all legal and valid reasons why an absentee ballot may be properly rejected. As such, Minnetrista created their own categories for ballots rejected under MS§ 203B.08 subd. 4, MS§ 203B.08 subd. 1, MS§ 203B.07 subd. 3, MN Rules 8210.2200 and MN Rules 8210.2500." Langdon Aff. Ex. 6.

A number of counties have *declined* (some on the advice of county attorneys) to participate in this process, including St. Louis, Freeborn, Hubbard and Stearns. Langdon Aff. ¶ 10.6; Ex. 7, at p. 8 of 13. After Freeborn County stated that it did not intend to

participate in the re-sorting of rejected absentee ballots, Mr. Gelbman stated, "At a minimum, the Board wants to be able to quantify the number of mistakenly-rejected absentee ballots when it certifies the final numbers for the Senate race." *Id.* at p. 7 of 13.

V. The Board Resolves to "Recommend" That Counties Re-Sort Rejected Absentee Ballots and Suggests the Counties Submit Amended Returns

At its December 12, 2008 meeting, the Board unanimously passed a resolution ("Resolution") that "recommends" (but does not require) that county canvassing boards re-canvass to determine whether or not any absentee ballot envelopes were improperly rejected by local election officials.[2] *See* Langdon Aff. Ex. 8. A December 12, 2008 email from the Secretary of State's office made the counties aware of the Board's "recommendation" and suggested that the counties rely on Minn. Stat. § 204C.39 (related to "obvious errors") to count the Senate votes from the ballots in the fifth pile and then submit amended returns. *See id.* This email also stated that the "Board expressed a desire that amended returns be made by Friday, December 19." *Id.* Presumably those county canvassing boards that choose to follow the Board's recommendation will seek to amend their returns this week. Such action, pursuant to Minn. Stat. § 204C.39, could

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[2] The Board apparently passed the Resolution in reliance on the most recent letter it had received from the Attorney General's office, which outlined a number of procedures for dealing with purportedly wrongly-rejected ballots, including a petition under Minn. Stat. §204B.44. Langdon Aff. Ex. 8 (Dec. 10, 2008 Ltr. from Alan Gilbert to Board.) This letter from the Attorney General's office seemed to be at odds with earlier correspondence to the Board stating that "Courts that have reviewed this issue have opined that rejected absentee or provisional ballots are not cast in an election." 2d Langdon Aff. Ex. B (Nov. 17, 2008 Ltr. from Kenneth E. Raschke, Jr.).

potentially trigger litigation in the district court for each county that seeks to correct so-called "obvious errors."

The Resolution failed to provide uniform guidance to Minnesota election officials on how to determine whether or not any absentee ballot envelopes in a county relating to the 2008 general election were improperly rejected by election judges and/or absentee ballot boards. Additionally, the Resolution failed to issue any direction to Minnesota election officials relative to permitting campaign representatives to challenge any ballots which are opened utilizing the evolving challenge procedures adopted during the Recount. Finally, the Resolution failed to issue direction to Minnesota election officials to segregate the envelopes and ballots from other ballots cast in local jurisdictions, thereby raising the distinct and real possibility that the ballots would be commingled with all other ballots. Such commingling would effectively destroy the utility of these ballots (or the corresponding envelopes) as evidence in a potential future election contest under Minn. Stat. Chapter 209.

ARGUMENT

The Board's recent request that counties segregate, open and count all purportedly wrongly rejected absentee ballots, without any authority to compel the counties' compliance, and without any uniform standards to govern the process, is improper and almost certainly will lead to disparate treatment of similarly situated ballots. This Court should prevent the counties from taking further action so that a contest court may consider the proper standard to apply to all of the rejected absentee ballots. A contest court is uniquely situated to handle the rejected absentee ballots because it can apply the

same standard to all of the rejected absentee ballots and, unlike the Board, a contest court is empowered to consider evidence and make factual determinations. In the alternative, this Court should adopt clear, uniform standards to govern the acceptance or rejection of the absentee ballots by county boards. Absent some action by the Court, the Board's request will lead to an untenable situation where 87 counties apply 87 different standards to the same ballots.

I. Minnesota's Election Law Dictates That Rejected Absentee Ballots Must Be Addressed In A Contest Proceeding

Minnesota law provides for a two-tier review process to address close elections. The first tier of review is the automatic recount under Minn. Stat. § 204C.35. If a recount does not provide a satisfactory resolution, then an eligible voter, including a candidate, may contest the election under Minn. Stat. Ch. 209. The contest court has full review authority to determine not only tabulation issues but also the validity of ballots.

A. The Canvassing Board's Duties are Limited

As a creature of statute, the Canvassing Board "has only those powers given to it by the legislature." *In the Matter of Qwest's Wholesale Service Quality Standards*, 702 N.W.2d 246, 259 (Minn. 2005) (internal quotation marks omitted). Indeed, the duties of the Board are expressly limited by statute: "The duties of each canvassing board are limited to those duties specified in sections 204C.32 to 204C.39." Minn. Stat. § 204.31, subd. 3.

(1) Initial Canvass Duties

Related to the Board's primary, but limited authority to act, Minn. Stat. § 204C.33 provides:

> **Subd. 3. State canvass.** The State Canvassing Board shall meet at the secretary of state's office on the second Tuesday following the state general election **to canvass the certified copies of the county canvassing board reports received from the county auditors and shall prepare a report that states**:
>
> (a) the number of individuals voting in the state and in each county;
>
> (b) the number of votes received by each of the candidates, specifying the counties in which they were cast; and
>
> (c) the number of votes counted for and against each constitutional amendment, specifying the counties in which they were cast.

Minn. Stat. § 204C.33 (emphasis added).

This Court has expressly stated that the Board's authority is limited to ministerial duties. In *O'Ferrall v. Colby*, 2 Minn. 180, 1858 WL 2544 (Minn. 1858), the Court held the duties of the clerk of the board of supervisors, in receiving and opening election returns, in canvassing and estimating the votes, and in giving certificates of election, "are *purely ministerial*," and that no judicial or discretionary powers are conferred upon him, or the board of canvassers. *Id.* at *5 (emphasis added). The Court further stated "that neither the board of canvassers, nor the clerk of the board of supervisors, has anything to do with the question as to whether any returns received by said clerk from established precincts contained illegal votes." *Id.* at *3.

In *Taylor v. Taylor*, 10 Minn. 107, 1865 WL 940 (Minn. 1865), this Court reiterated that a canvassing board is not competent to decide whether "errors or irregularities complained of invalidated" an election. *Id.* at *3. "That was a question for judicial, *not for ministerial* officers—a question that could only be decided by a court that

could call in witnesses, hear evidence, and decide questions of law and fact. *Irrespective* of the [ ] statutory provision [then in effect], it is quite clear that the question could not properly be decided by the canvassing board." *Id.* (emphasis added). That today's statutory scheme may be different does not gainsay the Court's conclusion regarding the limited authority of a canvassing board.

(2) Recount Duties

The Board's role with respect to the recount process also is limited. As part of a statewide administrative recount, the Board has the authority to recount "valid ballots" cast in elections for statewide office and to make decisions on challenged ballots. *See* Minn. Stat. § 204C.35, subd. 1. The statutory framework makes clear, however, that the Board may only consider certain information in conducting the recount. Specifically, the scope of the Board's review is

> limited...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 (emphasis added).

The Administrative Rules further confirm the limited scope of the Board's review authority: "The scope of an automatic or administrative recount is limited to the recount of the ballots cast and the declaration of the person nominated or elected." Minn. R. 8235.002. The Secretary of State's own Recount Guide confirms this commonsense approach:

> This is an **administrative** recount held pursuant to M.S. 204C.35 and M.R. 8235. It is **not** to determine who was eligible to vote. It is **not** to determine if campaign laws were

> violated. It is **not** to determine if absentee ballots were properly accepted. It is **not** – except for recounting the ballots – to determine if judges did things right. It is simply to physically recount the ballots **for this race**!

See Langdon Aff., Ex. 2 (2008 Recount Guide) at p. 6 (emphasis added). In other words, the Board's job is not to second-guess local election officials. It does not review substantive validity.[3]

The Board's limited list of duties, as provided by statute and as confirmed by this Court's precedent, obviously does not include an omnibus power to search for, open, verify and recount ballots that were rejected by local election officials. Thus, although the Board does have authority, during the recount process, to evaluate challenges to valid ballots cast in the election, rejected absentee ballot envelopes are not ballots cast in the election and were not certified by any local election officials. In agreeing with this analysis, the Attorney General's Office recently explained as follows:

> [T]he rules of the Secretary of State relating to recounts are directed to the recounting of "ballots cast" (Minn. R. 8235.0200) and "voted ballots" (Minn. R. 8235.0300, 8235.0700). Courts that have reviewed this issue have opined that rejected absentee or provisional ballots **are not cast in an election**. . . . This is not to suggest that there is no remedy for the wrongful rejection of absentee ballots. Minn. Stat. Ch. 209 (2008) sets forth the process for an eligible voter or candidate to commence a judicial election contest to

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[3] The Franken campaign appears to agree. In a brief provided to the Board yesterday, the Franken campaign agreed that the Board has only "ministerial duties" and is without power to consider factual, "incident based" challenges. *See* 2d Langdon Aff., Ex. A (December 15, 2008 Memorandum Regarding Canvassing Board's Proceedings, at 4). The Franken campaign cites *Hancock v. Lewis*, 265 Minn. 519 (1963), for the proposition that disputes regarding absentee ballots should be considered in an election contest and not in an administrative recount. *Id.*

> challenge, among other things, "an irregularity in the conduct of an election."

2d Langdon Aff., Ex. B (Nov. 17, 2008 Ltr. from Kenneth E. Raschke, Jr.) (emphasis added; internal quotations and citations omitted). The Minnesota statutes clearly limit the Board's review authority to certified copies of the county canvassing board reports and to validly cast ballots that have been challenged, and *not* to extraneous election materials such as rejected absentee ballot envelopes which are not reflected within, referred to, or otherwise incorporated within, any county canvassing board reports.

Simply put, the Board has no authority or discretion to consider rejected absentee ballots in this recount, as they do not comprise "ballots cast in the election" and are not part of the "summary statements."

B. The Contest Court Has the Authority to Make Findings of Fact and Is Particularly Suited for This Inquiry

While the Board's authority is limited to ministerial duties associated with counting and certifying the results of the election, a contest court is not so limited. Indeed, the Legislature established the contest court as the exclusive venue to challenge any irregularity that occurs during an election. Specifically, the Legislature empowered any eligible voter, including a candidate, to bring an election contest "over an irregularity in the conduct of an election or canvass of votes, over the question of who received the largest number of votes legally cast, . . . or on the grounds of deliberate, serious, and material violations of the Minnesota Election Law." Minn. Stat. § 209.02, subd. 1. Thus, the Legislature expressly gave the contest court the substantive duty to review the validity of local election judge's decisions, including those related to determinations

made on absentee ballots. *See Hancock v. Lewis*, 122 N.W.2d 592, 594 (Minn. 1963) (noting that a contest is the "exclusive statutory proceeding" in which to challenge an election).

As a court bound by the Minnesota Rules of Civil Procedure, the contest court also has the power to make factual determinations pursuant to the rules of evidence. Minn. Stat. § 209.12 provides that a "judge trying the proceedings [in a contest for U.S. senate] shall make findings of fact and conclusions of law upon [the] question" of "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." Thus by statute it is the contest court that has the authority to make factual determinations necessary to determine whether any rejected absentee ballot should have been counted.

This Court has confirmed the statutory framework that gives the contest court the authority to make findings of fact in the first instance. In *Hunt v. Hoffman*, 125 Minn. 249, 255, 146 N.W. 733, 735 (1914), this Court concluded that the contest court has full authority to rectify canvassing board error, which is to be accorded no *res judicata* effect. This only makes sense given that the court has full fact-finding authority pursuant to appropriate procedural protections and rules of evidence.

The question of whether absentee ballots were improperly rejected requires a court to take evidence and witnesses to be examined and cross-examined, all while following the rules of evidence. This is not a task the Canvassing Board is equipped to undertake; nor is it given statutory authority to do so.

As discussed more fully in Section II(C) *infra*, the statutory ability of a county canvassing board to correct "obvious errors" and for a candidate then immediately to challenge that correction in the district court in which the precinct is located, *see* Minn. Stat. § 204C.39, does not resolve the issue either. Unlike the errors at issue in *Application of Andersen*, 119 N.W.2d 1 (Minn. 1962), the purported errors at issue here are not "obvious"—they often involve subjective judgments made by trained election officials. And, in any event, separate challenges in 87 counties, with 87 courts attempting to evaluate the purported errors, all before the State Canvassing Board could accept and certify any amended returns, would be impracticable and almost certainly lead to violations of the Equal Protection Clause.

II. The Review and Actions Recommended By The State Canvassing Board Will Lead to a Violation of The Equal Protection Clause.

While Minnesota's absentee voter laws provide clear standards for acceptance or rejection of an absentee ballot, the instructions provided by the Secretary of State's office do not track these legal requirements, and indeed, are confusing and internally inconsistent. *See* Minn. Stat. § 204C.361(a) (requiring the secretary of state to "adopt rules . . . establishing uniform recount procedures"). Rather than provide uniform guidance to the counties, the Secretary of State's directions have created a situation in which each county can independently decide whether to apply the directions or not. This Court must take action to prevent the Board from disenfranchising legal voters.

A. Minnesota Law Provides Clear Standards for Acceptance or Rejection of Absentee Ballots

Under Minnesota law, voters who take advantage of the state's absentee voting provisions must adhere to the following criteria:

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

(2) the voter's signature on the return envelope is the genuine signature of the individual who made the application for ballots and the certificate has been completed as prescribed in the directions for casting an absentee ballot,[4] except that if a person other than the voter applied for the absentee ballot under applicable Minnesota Rules, the signature is not required to match;

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

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

Minn. Stat. § 204B.12, subd. 2.[5] A voter's failure to follow these clear instructions will result in that voter's absentee ballot being rejected. Minnesota law does not permit an election judge to reject an absentee ballot for any other reason. *See* Minn. Stat.

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4 The directions include the requirement that the absentee voter have a witness who is registered to vote in Minnesota and instructions on how to complete and mail the ballot. *See* Minn. R. 8210.0500, Subpart 2.

5 Minn. Stat. § 204B.12 applies to absentee ballots cast by "[a]ny eligible voter who reasonably expects to be unable to go to the polling place on election day." Minn. Stat. § 203B.02, subd. 1. The standards for acceptance of ballots cast by voters who are in the military or who temporarily reside outside of the United States ("overseas ballots") are slightly different. *See* Minn. Stat. § 203B.04, subd. 1.

§§ 203B.12, subd. 2; 203B.24, subd. 1.[6] In particular, failure to place the ballot within the security envelope before placing it in the outer white envelope is not a reason to reject an absentee ballot. *Id.*

Absentee voting, of course, is a convenience afforded to voters by the state. In turn, to preserve the integrity and purity of elections, the absentee voter statutes, "so far as the acts and duties of the voter are concerned, must be held to be *mandatory* in all their substantial requirements." *Bell v. Gannaway*, 227 N.W.2d 797, 803 (Minn. 1975) (emphasis added); *accord Wichelmann v. City of Glencoe*, 273 N.W.2d 638 (Minn. 1937) ("The provisions of election laws requiring acts to be done and imposing obligations upon the elector which are personal to him are mandatory.").[7]

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6 While Minnesota law requires the election judge to write the reason for rejecting overseas absentee ballots, it does not require an election judge to note the reason for rejecting regular absentee ballots. *Compare* Minn. Stat. § 203B.24, subd. 1 (for overseas ballots, "[e]lection judges must note the reason for rejection on the back of the envelope in the space provided for that purpose") *with* Minn. Stat. § 203B.12, subd. 2 (for regular absentee ballots, "[i]f all or a majority of the election judges examining return envelopes find that an absent voter has failed to meet one of the requirements prescribed in clauses (1) to (4), they shall mark the return envelope 'Rejected,' initial or sign it below the word 'Rejected,' and return it to the county auditor").

7 For this reason, the Franken campaign's contention that the failure to count absentee ballots would violate equal protection, Brief of Al Franken for Senate at 19-22, is mistaken. *See In re Contest of School District Election*, 431 N.W.2d 911, 915 (Minn. Ct. App. 1988) (recognizing that statutory compliance is mandatory for absentee votes and applying substantial compliance only as to matters not addressed by statute); *accord McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807-808 (1969) ("It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots.").

Trained election judges and absentee ballot boards are required to evaluate absentee ballots according to these clear statutory requirements and to determine whether the absentee ballots should be counted. *See* Minn. Stat. §§ 203B.12, subd. 1; 203B.24, subd. 2. Here, each of the absentee ballots now in the "fifth pile" was originally rejected by county election officials (by either an absentee ballot board or at least two (2) election judges, often of different political parties). These ballots should not now be deemed "improperly rejected" after an *ad hoc* and extra-statutorial "sorting process." Contrary to the Franken campaign's representation, Brief of Al Franken for Senate at 11, there is no past practice of counting rejected absentee ballots—the truth is that it has never been done in the history of Minnesota elections. Those counties to which Franken refers were not opening ballots that had been rejected—they had been accepted but misplaced or otherwise not been counted on election night. Like in *Andersen*, before opening them each county establish a chain of custody and allowed inspection by the campaigns.

B. The Secretary of State's Instructions

Although Minnesota law is clear on the grounds upon which absentee ballots may be rejected, as a result of the Secretary of State's conflicting and unclear guidance, a strong likelihood exists that these standards will be interpreted differently, indeed on an *ad hoc* basis, by each county and city that engages in this process (including jurisdictions that decide not to engage in the process at all).

As discussed above, the Secretary of State's instructions to county auditors, in conjunction with a review and second-guessing of election judges' original decisions, are riddled with problems. Following the election, the Secretary of State issued a number of