

No. A09-697

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STATE OF MINNESOTA  
IN SUPREME COURT

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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,

Norm Coleman and Cullen Sheehan,

Appellants,

v.

Al Franken,

Respondent.

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**APPELLANTS' BRIEF**

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## ISSUES PRESENTED ON APPEAL

- 1) Whether the trial court erred in excluding evidence regarding (a) the disparate application by election officials of the statutory standard governing absentee ballots and (b) the presence of illegal votes in the certified vote totals?

Trial Court's Ruling: Such evidence was irrelevant to whether the ballots before it were legally cast.

Apposite Authorities: Minn. Stat. § 209.12; U.S. Const. amend. XIV.

- 2) Whether the trial court violated the constitutional protections of equal protection and due process when it declared Respondent received the highest number of "legally cast votes" where the record demonstrated the number of "illegally cast" ballots, under the court's own definition, that were counted on election day and during the recount greatly exceeded the margin between the candidates?

Trial Court's Ruling: Already-counted absentee ballots, even if illegal under the court's own definition, were properly included in the tally because Minnesota law does not provide any remedy for retracting such ballots from vote totals and the Fourteenth Amendment does not require that similar ballots in the same election be treated the same.

Apposite Authorities: Minn. Stat. § 209.12; *Hanson v. Emanuel*, 297 N.W. 749 (Minn. 1941); *Berg v. Veit*, 162 N.W. 522 (Minn. 1917); *Roe v. State of Alabama*, 43 F.3d 574, 581 (11th Cir. 1995); *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978); U.S. Const. amend. XIV.

- 3) Whether the trial court violated the constitutional protections of equal protection and due process when it imposed a strict compliance standard for rejected absentee ballots rather than a substantial compliance standard like that actually applied by election officials (and in accord with this Court's longstanding policy favoring enfranchisement)?

Trial Court's Ruling: Rejected absentee ballots that do not strictly comply with the statutory requirements may not be included as "legally cast" ballots regardless of whether election officials also followed a strict compliance standard.

Apposite Authorities: *Fitzgerald v. Morlock*, 120 N.W.2d 339, 345-47 (Minn. 1963); *Andersen v. Rolvaag*, 119 N.W.2d 1, 10 (Minn. 1962); *In re Contest of School District Election*, 431 N.W.2d 911, 915 (Minn. Ct. App. 1988); Minn. Stat. § 203B.12; *Erlandson v. Kiffmeyer*, 659 N.W.2d 724,

729 (Minn. 2003); *Bush v. Gore*, 531 U.S. 98 (2000); U.S. Const. amend XIV.

- 4) Whether the trial court erred in declining to order inspections of precincts in which double-counting may have occurred during the recount?

Trial Court's Ruling: Inspections were not required and unnecessary.

Apposite Authorities: Minn. Stat. § 209.06.

- 5) Whether the trial court erred in ruling missing ballots from a Minneapolis precinct were properly included in the final recount tally?

Trial Court's Ruling: The court gave deference to the canvassing board's determination that election night totals from that precinct be included in the tally.

Apposite Authorities: *Newton v. Newell*, 6 N.W. 346 (Minn. 1880).

## STATEMENT OF THE CASE

On November 4, 2008, the vote tally for the office of United States Senator showed 1,211,590 votes cast for Norm Coleman and 1,211,375 votes cast for Al Franken, an advantage of 215 votes for Coleman. On November 18, 2008, the Minnesota State Canvassing Board ("MSCB") directed the Secretary of State to oversee an administrative manual recount pursuant to Minn. Stat. § 204C.35, subd. 1. On January 5, 2009, the MSCB certified the recount results: Coleman received 1,212,206 votes and Franken 1,212,431, a difference of 225 in favor of Franken. There remain approximately 11,000 unopened absentee ballots.

Coleman brought this action on January 6, 2009 pursuant to Minn. Stat. § 209.12. The Notice of Contest sought a declaration that he received the highest number of legally cast votes. A.32-40. Franken moved to dismiss the Notice but also filed an answer and counterclaims. The trial court denied the motion and ruled the Notice complied with Minn. Stat. § 209.021 and stated a claim. A.134-143. Coleman moved for summary judgment, asking the court to count thousands of rejected absentee ballots with the same characteristics as ballots counted on election day. The court denied the motion but allowed Coleman to present evidence at trial regarding those ballots. A.186-196; A.159-163.

Trial commenced on January 26, 2009 and lasted seven weeks. Coleman presented evidence that thousands of rejected absentee ballots had sufficient indicia of trustworthiness to substantially comply with the statutory standard (Minn. Stat.

§ 203B.12, subd. 2) and, consistent with Minnesota's policy to enfranchise voters, should be counted.

Beginning with his opening statement, Coleman pursued an equal protection claim based on the disparate application of the standard set forth in Minn. Stat. § 203B.12, subd. 2 to absentee ballots. He contended constitutional violations must be addressed before the court decided under Minn. Stat. § 209.12 which candidate received the highest number of legally cast votes. Simply put, the court first would be required to apply a consistent standard to similar ballots to decide what votes, both uncounted and counted, were legally cast.

Consistent with this claim, Coleman presented evidence of substantial disparities among election officials in how they applied the statutory standard. Some counties, for example, assiduously researched whether a voter or his witness was registered; others never inquired. Some officials accepted ballots when they could not locate an application; others refused to do so. The result is that whether an absentee ballot was accepted depended on where the voter lived.

After several days of such testimony, the court ruled that any disparate treatment of ballots on election day was irrelevant. It thereafter refused to permit evidence regarding how local officials judged absentee ballots on election day. A.439-441; A.443; A.445-446; A.448-450; A.454-460; A.465; A.492; A.495; A.499-500; A.503; A.510; A.521. It also refused to admit evidence of absentee ballots counted on election day that failed to meet a strict compliance standard. A.543-544; A.551-552; A.556-557; A.566. The court granted Franken's motion in limine to exclude Coleman's expert statistician

