

*In Re: 2008 United States Senate Election*

**MEMORANDUM OF THE AL FRANKEN  
FOR SENATE COMMITTEE AND AL  
FRANKEN REGARDING IMPROPERLY  
REJECTED ABSENTEE BALLOTS**

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**INTRODUCTION**

“[N]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 729 (Minn. 2003) (internal quotation marks omitted). In Minnesota, the State Canvassing Board plays a central role in protecting this right. State law requires that the Board perform several functions: it must scrutinize reports submitted by county boards, create a report setting forth certain vote totals, and certify that this report is correct. In order to certify a report that represents the correct number of votes, the Board *must* consider and take into account all ballots cast—including validly cast absentee ballots that have been wrongfully rejected. Any other interpretation of the relevant statute would disregard its plain language, violate longstanding Minnesota precedent about the importance of the franchise, and raise serious constitutional problems under the U.S. Constitution’s Equal Protection Clause. As a result, the Board’s treatment of absentee ballots is critically important: It will decide not only the correct tallies in the election but also whether Minnesota honors its constitutional and statutory commitment to allow all eligible voters to vote and to treat such votes equally.

## FACTUAL BACKGROUND

The election between Al Franken and Norm Coleman for a seat in the United States Senate took place on Tuesday, November 4, 2008. This election resulted in a virtual tie, with the number of votes counted for each candidate apparently differing by fewer than 210 out of a total of nearly 3 million cast. A difference of less than one-half of one percent of the total number of votes triggers an automatic recount under Minn. Stat. § 204C.35. Currently, it appears there is a difference of less than one-hundredth of a percent.

Before the recount can begin, however, this Board will convene on Tuesday, November 18, 2008, for the purpose of preparing and certifying a report detailing the votes received. Minn. Stat. § 204C.33, subd. 3. An automatic state-wide recount is scheduled to begin the day following the certification.

Minnesota law expressly provides for absentee voting. Pursuant to statute, there are only four specific grounds upon which an absentee ballot may be rejected. *See* Minn. Stat. § 203B.12, Subd. 3 (“There is no other reason for rejecting an absentee ballot.”). Based on reports it received from voters following the election, Al Franken for Senate (“the Franken Campaign”) began to suspect that absentee ballots had been improperly rejected. On or about Tuesday, November 11, 2008, the Franken Campaign provided the counties with a written request for information under the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. § 13.01 *et seq.*, and Minnesota’s election laws.<sup>1</sup> Many of the counties refused to provide this

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<sup>1</sup> In this request, the Franken Campaign asked for “(a) the names and addresses of individuals who submitted absentee ballots for the November 4 general election, and (b) the names and addresses of individuals whose absentee ballots were rejected (and the reasons in each instance for the rejection).”

information. Ramsey County was the first to respond in writing with an unequivocal denial. In response, the Franken Campaign sought relief from the District Court, Second Judicial District. That suit is currently pending.

With the limited information to which it has access, the Franken Campaign has documented a number of errors in the rejection of absentee ballots resulting in the illegal disenfranchisement of voters. *See* Schiks Decl.; Berhens Decl.; Langland Decl.; Adkins Decl. In particular, it has reason to believe that registered voters have had their ballots improperly rejected for a number of reasons, including (1) purported mismatching of their ballot signatures with their registration; (2) erroneous determinations about witness signatures; (3) mistaken concerns over ballot envelopes; and (4) purported lack of registration, including improper removal of names from voter registration rolls. In many cases, these voters were disenfranchised without having been given the ability or time to challenge or correct the grounds cited for the rejection of their vote.

For example, Jessup Schiks, an eligible and registered voter in Kandiyohi County, requested an absentee ballot. Schiks Decl. ¶¶ 1-4. He received the absentee ballot and marked it as prescribed by the directions. In the U.S. Senate race, he voted for Al Franken. *Id.* ¶ 5. In addition to marking the ballot, Mr. Schiks completed the eligibility certificate printed on the back of the envelope. That certificate reflected his correct name and address, and it bore his genuine signature. *Id.* A registered Minnesota voter served as his witness. *Id.* Mr. Schiks did not cast any other ballot in this election. *Id.* ¶ 6. According to the county, Mr. Schiks' ballot was rejected because someone believed that the signatures on his application and ballot envelope did not match.

Likewise, Bruce Deane Behrens, a registered voter in Goodhue County, appears to have been disenfranchised through improper rejection of his absentee ballot. Mr. Behrens requested and received an absentee ballot and marked the ballot as prescribed by the directions sent to him with the ballot. Behrens Decl. ¶¶ 1-4. In the U.S. Senate race, he voted for Al Franken. *Id.* ¶ 5. In addition to marking the ballot, he completed the eligibility certificate printed on the back of the envelope as prescribed in the enclosed directions. The certificate reflected his correct name and address, and it bore his genuine signature. *Id.* His girlfriend, Kimberly Lindquist, a registered voter in the state of Minnesota, served as the witness while he voted, signed the certification, and sealed the envelope. She then completed her portion of the witness certification. *Id.* ¶ 6. This ballot was the only ballot Mr. Behrens submitted in the November 4, 2008 election. *Id.* ¶ 7. According to the county auditor, his ballot was rejected because someone believed that Ms. Lindquist was not a registered voter in Minnesota. Unfortunately, no one from the county contacted Mr. Behrens to inform him of this issue or to request verification of his signature. *Id.* ¶ 8.

It appears the vote of James Langland was also improperly rejected. Mr. Langland, who was registered in Pennington County and entitled to vote, completed his ballot in the Pennington County Recorder's Office and handed the signed envelope to the staff. Langland Decl. ¶¶ 1-6. On November 13, 2008 an official at the Recorder's Office explained to Mr. Langland that the Recorder had forgotten to sign the envelope. *Id.* ¶ 6. According to the county auditor, his vote was not counted as a result of the County Recorder's missing witness signature.

The vote cast by Ordell Adkins appears to have been similarly mishandled. As of November 4, 2008, Ms. Adkins was registered in Pennington County and entitled to vote. Adkins Decl. ¶¶ 1-4. Prior to the November 2008 general election, she signed and submitted an

application for an absentee ballot, complying substantially with the applicable statutes and rules. *Id.* ¶ 5. Ms. Adkins received the ballot, marked it, and returned it in accordance with the directions; she voted for Al Franken. *Id.* ¶ 6. According to the county auditor, her absentee ballot was rejected on the ground that Ms. Adkins was not registered. However, the Secretary of State’s own database indicates that Ms. Adkins was registered and had voted in the past.

Compelled to seek relief as a result of such errors, the Franken Campaign and Al Franken respectfully request that this Board consider and take into account improperly rejected absentee ballots, before completing its report, as it is required to do by law.

## ARGUMENT

### **I. Minnesota and Federal Law Require that Eligible Voters Not Be Deprived of Their Rights to Vote and to Have Their Votes Counted.**

As the Minnesota Supreme Court has recognized, “no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 729 (Minn. 2003) (quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964))). In short, “[t]he right to vote . . . is a fundamental and personal right essential to the preservation of self-government.” *State ex rel. South St. Paul v. Hetherington*, 61 N.W.2d 737, 741 (Minn. 1953); *see also Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’”); *In re Candidacy of Independence Party Candidates Moore v. Kiffmeyer*, 688 N.W.2d 854, 860 (Minn. 2004) (“the right to vote and the right to associate in pursuit of common political ends” are important constitutional rights “central to preservation of our democracy”) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983))).

But the right to vote is more than a nominal right: Votes cast in compliance with law must be counted, and must be counted equally. Once a state has granted individuals the right to vote, it “may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-105 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)). To ignore documented errors and refuse to count validly cast ballots, while counting other ballots, simply does “not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right.” *Bush*, 531 U.S. at 105.

The importance of the right to vote, and to have votes counted, extends equally to absentee ballots. Indeed, one of the primary purposes and motivations behind Minnesota’s absentee voting legislation is to preserve the enfranchisement of qualified voters. *See Matter of Contest of School Dist. Election Held on May 17, 1988*, 431 N.W.2d 911, 915 (Minn. App. 1988) (citing *Bell v. Gannaway*, 303 Minn. 346, 353, 227 N.W.2d 797, 802 (1975)). Put simply, given that Minnesota has created a right to vote by absentee ballot, it may not treat those votes with any less careful scrutiny than others; nor can it arbitrarily refuse to include those ballots validly cast.

**II. Some Number of Absentee Voters Were Improperly or Incorrectly Rejected, Depriving Voters of Their Constitutionally Protected Right to Vote and Drawing into Question the Will of the Electorate.**

Minnesota law expressly provides for absentee voting and allows such ballots to be excluded only under a few specific, enumerated circumstances. Election judges *must accept* absentee ballots if:

- (1) the voter’s name and address on the return envelope are the same as the information provided on the absentee ballot application;
- (2) the voter’s signature on the return envelope is the genuine signature of the individual who made the application for ballots and the certificate has been completed as prescribed in the directions for casting an absentee ballot, except

that if a person other than the voter applied for the absentee ballot under applicable Minnesota Rules, the signature is not required to match;

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

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

*Id.* § 203B.<sup>2</sup> The statute makes clear that “[t]here is no other reason for rejecting an absentee ballot.” *Id.* (emphasis added). 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.* Nor may election judges reject ballots based on any other reason.

Moreover, even where a ballot does not meet all of the statutory requirements, mere technicalities or irregularities cannot be used to exclude absentee ballots. This key principle was first set forth in Minnesota's most significant recount case, *Application of Andersen*, 119 N.W.2d 1 (Minn. 1962). “As a general rule, as long as there is substantial compliance with the laws, and no showing of fraud or bad faith, the true result of an election should not be defeated by an innocent failure to comply strictly with the statute.” *In re Contest of School Dist.*, 431 N.W.2d 911 (Minn. App. 1988) (citing *Andersen*, 119 N.W.2d at 8; *Kerrigan v. Vetsch*, 71 N.W.2d 652, 658 (1955)).

As set forth above and in the attached declarations, the Franken Campaign has raised serious and legitimate concerns that validly cast absentee ballots were impermissibly rejected in the November 4, 2008 election. The Campaign is currently in the process of identifying and

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<sup>2</sup> Section 203B.02 provides that any eligible voter who reasonably expects to be unable to go to the polling place on Election Day in the precinct where the individual maintains residence because of absence from the precinct, illness, disability, religious discipline, observance of a religious holiday, or service as an Election Judge in another precinct may vote by absentee ballot. Minn. Stat. § 203B.02. The voter must return the ballot to the designated election location before the close of voting on Election Day, be a registered voter, and sign the ballot in the presence of a witness. An eligible voter who is not registered to vote but who is otherwise eligible to vote by absentee ballot may register to vote by including a completed voter registration card with the absentee ballot. *Id.* § 203B.04.

verifying additional errors, and once the counties comply with their obligations under the MGDPA, the number of verified errors is likely to grow exponentially. These voters, it appears, have been impermissibly disenfranchised.

**III. The Canvassing Board Has the Authority and Obligation to Examine Rejected Absentee Ballots and Correct Errors of Election Judges, Ensuring that All Ballots Validly Cast Are Counted.**

**A. The Plain Language of the Statute Allows the Canvassing Board to Examine Rejected Absentee Ballots and Correct Errors.**

The State Canvassing Board has three mandatory duties set forth in Minn. Stat. § 204C.33, subd. 3. All three of these duties confirm that the Board necessarily has the authority to consider and take into account all ballots cast, including rejected absentee ballots. Though the Coleman Campaign, citing the same provisions, argues that the Board lacks authority, it has failed to explain the basis for its conclusion. Certainly, there is nothing in the statutory language that would preclude such common-sense review and, as discussed below, Minnesota and federal precedent require such a conclusion.

The Board's first duty is to "canvass the certified copies of the county canvassing board reports received from the county auditors." Minn. Stat. § 204C.33, subd. 3. Second, it "shall prepare a report" that states three things:

- (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.

*Id.* Finally, it "shall sign the report and certify its correctness." *Id.*

Each of these three duties grants to the Board the ability to review rejected absentee ballots. The first duty, the "canvass," requires that the State Canvassing Board scrutinize the

county reports for error—and not rubberstamp erroneous reports. *See* Merriam-Webster Dictionary, canvas (defining “canvas” as “to examine in detail; specifically: to examine (votes) officially for authenticity”); *see also Murray v. Floyd*, 11 N.W.2d 780, 785 (Minn. 1943) (explaining that “[i]n canvassing ballots the great object is to ascertain and to give effect to the intention of the voter” while looking to statute to determine whether the intention has been manifested in the proper manner). The Board cannot scrutinize the county reports for error without reviewing, where necessary, the underlying ballots, and in particular ballots that were not included in the totals.

The authority of the Board to examine ballots becomes even more evident in light of the second and third duties: to prepare the Board’s report and provide a formal attestation that it is accurate. *See* Minn. Stat. § 204C.33, subd. 3. More specifically, Board members must “certify” the “correctness” of a report that includes, among other things, the “number of votes received by each of the candidates.” *Id.* By definition, *a Board member cannot certify the correctness of a report he or she suspects or knows to be in error.* Particularly where the Board has already been presented with evidence of ballot-related error in the county reports, it is impossible for the State Canvassing Board to perform its statutorily imposed duties without reviewing the relevant ballots. To be correct, the Board’s report would have to be adjusted to account for certain mishandled votes.

Unsurprisingly, therefore, there is nothing in the statute that so much as suggests that the Board lacks authority to correct errors. The Coleman campaign mistakenly argues that a different provision, contained in the recount statutes, somehow prohibits the Board from acting

here. *See* Coleman Letter Brief (citing Minn. Stat. § 204C.35, subd. 3).<sup>3</sup> But, in fact, that provision only supports the authority of officials to consider rejected absentee ballots.

The provision defines the scope of a recount as follows:

A recount conducted as provided in this section is limited in scope 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.

*Id.* The language is clear: To facilitate the goal of determining the “number of votes validly cast,” recount officials may consider ballots cast in the election *and* summary statements certified by election judges. Charged with this duty, the recount officials necessarily may consider *all* the ballots cast—not only those that were accepted by local election judges and other county officials. Otherwise, there would be no way to determine the “number of votes validly cast.”

The statute reflects this obvious point, using the broad term “ballots cast” (rather than a narrower term such as “votes accepted by county officials” or even “votes validly cast”) to confirm that all ballots cast may be considered. *Id.* Absentee ballots received and rejected are, of course, “ballots cast.” *See* Merriam-Webster Dictionary, cast (defining “cast” as “to deposit (a ballot) formally”); *see also, e.g.*, Minn. Stat. § 203B.03, subd. 1 (penalizing one who “cast[s] an illegal ballot,” thereby confirming that even improper ballots are “cast”); *Smith v. Board of Com’rs of Renville County*, 64 Minn. 16 (1896) (confirming that the term “ballots cast” includes even “unintelligible” ballots).

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<sup>3</sup> This position is consistent with those taken by the Coleman Campaign throughout the election process. On November 8, 2008, the Coleman Campaign sought an emergency temporary injunction preventing all “election officials in the State of Minnesota, or other persons, from unsealing, opening and/or tallying” any ballot that was “not included in ballot boxes sealed on Election Day or included in the ballots tallied and sealed at the precinct polling locations.” Mtn. for Temporary Restraining Order at p. 6, *Coleman v. Reichert* (2d Jud. Dist., Nov. 8, 2008). The court refused to grant this relief.

As a result, even if the recount provision set forth in Minn. Stat. § 204C.35, subd. 3 did somehow limit the obligations and authority of the State Canvassing Board (which it does not), it confirms that the Board has the right and obligation to review rejected absentee ballots, not call the authority into question.

As a result, even if the recount provision set forth in Minn. Stat. § 204C.35, subd. 3 did somehow limit the obligations and authority of the State Canvassing Board (which it does not), it would do so in a manner that would confirm that the Board has access to rejected absentee ballots, not call the authority into question.

This conclusion is reinforced by another portion of the election laws that specifically relates to contests relating to the office of United States Senator. In such a contest the law provides:

... 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. The judge trying the proceedings *shall make findings of fact* and conclusions of law upon that question.

Minn. Stat. § 209.12 (emphasis added). Surely if the legislature has mandated that a court is required to engage in fact-finding to determine if votes were legally cast in a U.S. Senate race, this State Canvassing Board can and should engage in similar fact-finding to determine whether rejected absentee ballots were legally cast in a U.S. Senate race. Logic and fairness demand no less.

It should be noted, finally, that the Secretary of State has published a guide to help election officials and staff that are participating in an election recount. *See* Office of the Minnesota Secretary of State, 2008 Recount Guide, *available at* [http://www.sos.state.mn.us/docs/recount\\_guide\\_2008.pdf](http://www.sos.state.mn.us/docs/recount_guide_2008.pdf). The Guide expressly states that its readers must refer to Minnesota's actual election laws when using the guide, given that

“[p]ortions of this guide contain procedures based on best practices, rather than statute or rule,” so that, “[i]f employing these portions, [one must] not consider the information to hold the same authority as that information governed by federal and state law.” *Id.* at 1. With this caveat, the guide provides a section entitled “Example Instructions,” which states, among other things, that the recount “is not to determine if absentee ballots were properly accepted.” *Id.* at 6. The inclusion of this phrase does not change the authority and obligation of the State Canvassing Board. (Indeed, it does not speak to the State Canvassing Board at all.) What is more, to the extent the phrase suggests that recount officials cannot consider and take into account validly cast, but impermissibly rejected, absentee ballots, it is a misstatement of the law—a point that is explained in this brief’s discussion of Minn. Stat. § 204C.35, subd. 3. (In all likelihood, this interpretation of the guide is incorrect, and the provision simply means to provide exactly what it says it does: an example instruction, to be used when the treatment of absentee ballots is not at issue.) Finally, it should be noted that if it were somehow correct to conclude that recount officials cannot take into account impermissibly rejected absentee ballots, then there would be even further support for the conclusion that the State Canvassing Board must be the body to do so.

In short, the Coleman campaign’s statutory interpretation runs contrary to Minn. Stat. § 204C.33, subd. 3 for at least two, critical reasons: (1) it disregards its plain language, and (2) it strips the State Canvassing Board of the authority it needs to fulfill its statutory imposed duties.

**B. Minnesota Law Requires the State Canvassing Board to Take Action to Ensure that Ballots Cast in Substantial Compliance with the Law Are Counted.**

The plain language of the election statutes makes clear that the State Canvassing Board has authority to correct any errors and count all absentee ballots cast in substantial compliance

with the law. Even if it did not, both Minnesota and federal precedent would enable—indeed *require*—the Board to do so here.

The Minnesota courts have repeatedly emphasized that the overriding concern in interpretation of the election laws is the enfranchisement of voters. Consequently, all ballots cast “in substantial compliance” with the law must be counted. *See Application of Andersen*, 119 N.W. 2d 1 (Minn. 1962); *In re Contest of School District Election*, 431 N.W. 2d 911 (Minn. App. 1988). Post-election statutory provisions that address such issues as the timing of election officials’ actions are generally “directory” and not “mandatory”; procedural rules cannot override the principle that all validly cast ballots must be counted to reveal the electorate’s true vote and the expression of its will. *Andersen*, 119 N.W. 2d at 9-10. “To rule otherwise,” the court has recognized “would require the loser to become the winner in spite of the vote of the people.” *Id.* at 12.

Because the policy in favor of voter enfranchisement is paramount, election officials may count absentee ballots even when doing so conflicts with a technical, procedural rule. Thus, in *Andersen*, the Minnesota Supreme Court held that the State Canvassing Board was required to accept amended returns from county canvassing boards reflecting newly counted absentee ballots, even though the procedure followed by the counties was not strictly in accordance with the statutes. 119 N.W. 2d at 8-10. Likewise, in *School District*, the court held that the canvassing board acted appropriately in applying flexible rules in order to ensure that absentee ballots were counted. In that case, a number of voters had failed to follow the absentee-ballot instructions by placing a voter-certification card in the wrong envelope. The canvassing board nevertheless counted the improperly sealed ballots and included the votes in the election totals. The court agreed that this approach was correct. “The purpose and intent behind absentee voting

legislation is the preservation of the enfranchisement of qualified voters, the preservation of the secrecy of the ballot, the prevention of fraud, and the achievement of a reasonably prompt determination of the election result.” *Id.* at 915. As a result, “as long as there is substantial compliance with the laws, and no showing of fraud or bad faith, the true result of an election should not be defeated by an innocent failure to comply strictly with the statute,” and “mere irregularities in following statutory procedure will often be overlooked.” *Id.* (internal quotation marks omitted). *Id.*<sup>4</sup>

The rulings in *Andersen* and *School District*—that improperly excluded absentee ballots should be counted even if initially rejected and that procedural technicalities should not defeat the goal of preserving voter enfranchisement—are consistent with those of other state courts in similar circumstances. *See, e.g., Washington State Republican Party v. King County Div. of Records*, 103 P. 3d 725 (Wash. 2004) (concluding, in the context of a recount, that it was proper for a canvassing board to reconsider and then to include in election totals 573 absentee ballots that had been erroneously rejected by election officials); *Eubanks v. Hale*, 752 So. 2d 1113 (Ala. 1999) (election officials should have counted improperly excluded absentee ballots); *In re Election of U.S. Representative for Second Congressional Dist.*, 653 A. 2d 79 (Conn. 1994) (because purpose of election law is to ensure the true and most accurate count possible of the votes, valid absentee ballots that were not counted during initial canvass could be counted on recanvass).

In short, any ambiguity regarding the Board’s authority must be resolved in favor of counting all ballots. “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

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<sup>4</sup> As in *School District*, in the present case, election officials can adopt sound canvassing procedures that will protect the identity of any voter whose ballot envelope must be opened to determine if a registration

of the election governed by the votes so cast.” *Andersen*, 119 N.W.2d at 8-9. “[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 . . . 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” and would undermine citizens’ fundamental right to vote. *Id.* at 11.

**C. The United States Constitution Requires that Votes Cast by Absentee Ballot Receive the Consideration the Board Gives to Votes Cast at Polling Places.**

Federal law prohibits the arbitrary treatment of voters. As a result, this Board must consider and account for improperly rejected absentee ballots.

When a ballot is cast at the polls, but then not counted by county officials (for example, due to an overvote or analogous defect), that ballot is subject to review by the State Canvassing Board and at the recount. Pursuant to the Equal Protection Clause of the United States Constitution, individuals casting absentee ballots are entitled to this same protection. If this Board were to disregard its authority and obligation to review rejected absentee ballots, then only voters casting ballots at the polling places would receive the protections afforded by the State Canvassing Board. In contrast to how it treats ballots cast in person, the State Canvassing Board would be unwilling even to consider whether it was proper to reject ballots shown to be legitimately cast.

This two-tiered system of review is impermissible under the Equal Protection Clause. The State may not value one person’s vote over that of another. *Bush v. Gore*, 531 U.S. 98, 104-105 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)). To ignore documented errors and refuse to count validly cast absentee ballots, while considering and

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application is contained in it.

counting similarly situated regularly cast ballots, does “not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right.” *Bush*, 531 U.S. at 105.

#### **IV. The Possibility of an Election Contest Does Not Change the Result.**

The Coleman Campaign has suggested that the protections of the canvassing process should be ignored in favor of an election contest. Yet whether either campaign can or will bring an election contest is beside the point. The possibility of future litigation does not release the Board from its responsibility to ensure that ballots improperly excluded are included as part of the certified election. First, the purpose and intent behind the election statutes—including “absentee voting legislation”—is, among other things, “the achievement of a reasonably prompt determination of the election result.” *School District*, 431 N.W.2d at 915 (citing *Bell v. Gannaway*, 227 N.W.2d 797, 802 (1975)). To delay until a contest the proper counting of absentee ballots would defy this purpose. Second, as the Minnesota Supreme Court has made clear, the election laws aim to “avoid the necessity of an election contest where possible.” *Andersen*, 119 N.W.2d at 5. Election contests are governed by complex procedures and rules that do not affect the canvassing and recount processes, and the effect of delay produced by an election contest is significant. In short, Minnesota has rejected the notion that various processes are somehow interchangeable, and the court has emphasized the importance of resolving outstanding election-related issues at earlier stages.

#### **CONCLUSION**

For the foregoing reasons, the Franken Campaign and Al Franken respectfully request that the State Canvassing Board fulfill its statutory obligation to consider and take into account all ballots cast (including validly cast absentee ballots that have been wrongfully rejected) as the Board canvasses reports submitted by county boards, creates a report setting forth certain vote

totals, and certifies that the report is correct. To the extent the Board wishes to clarify the procedures governing the *next* stage of the process—the recount—the Franken Campaign further requests that this Board confirm that, per Minn. Stat. § 204C.35, subd. 3, the recount includes consideration of all “ballots cast,” including validly cast absentee ballots that have been wrongfully rejected, to determine the “votes validly cast.”

Dated: November 17, 2008.

Respectfully Submitted,

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\* *Pro hac vice* motions pending.

## AFFIDAVIT/DECLARATION OF JESSUP SCHIKS

1. My name is Jessup Schiks. On November 4, 2008, I was eighteen years of age or older, a citizen of the United States, and had maintained residence in Minnesota for at least thirty days immediately preceding the general election held November 4, 2008. I am providing this affidavit because I believe that my November 2008 absentee ballot for that election was improperly rejected because someone determined that my signature on my absentee ballot <sup>to</sup> not match the signature on my voter registration card, and I am hopeful that, by providing this affidavit, my ballot can be verified and counted. 
2. As of November 4, 2008, I was fully entitled to vote. I was not under court-ordered guardianship in which the court order revoked my right to vote; had not been found by a court to be legally incompetent to vote; and had not been convicted of treason or any other felony that might disqualify me from voting.
3. I was registered to vote for the November 2008 general election. At the time I registered to vote for that election, I resided at 7585 12th Street NW, Wilmar, MN 56201 in Kandiyohi Dovre Township (Precinct No. 0030). I was a resident at that address when I requested, received and voted an absentee ballot in the November 2008 general election.
4. Prior to the November 2008 general election, I signed and submitted an application for an absentee ballot. I applied under my correct name and address.
5. I received the absentee ballot and in mid-October marked the ballot in the manner proscribed by the directions sent to me with the ballot. In the U.S. Senate race, I voted for Al Franken. In addition to marking the ballot, I completed the eligibility certificate printed on the back of the envelope and had a registered Minnesota voter sign the envelope as a witness, all as explained in directions I received with the absentee ballot. The eligibility certificate reflected my correct name and address, and it contained my genuine signature.
6. This ballot is the only ballot I submitted in the November 2008 general election. I did not vote in person on November 4, 2008 or submit any other absentee ballot.

7. If notarized below, this is my Affidavit. If not notarized, it is my declaration under 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 17, 2008.  
Sworn and subscribed to before me  
on this \_\_\_ day of November, 2008.

Signature: \_\_\_\_\_

  
Jessup Schiks

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Notary Public

**AFFIDAVIT/DECLARATION OF BRUCE DEANE BEHRENS**

1. My name is Bruce Deane Behrens. On November 4, 2008, I was eighteen years of age or older, a citizen of the United States, and had maintained residence in Minnesota for at least thirty days immediately preceding the general election held November 4, 2008. I am providing this affidavit because I understand that my ballot was not counted and I am hopeful that, by providing this affidavit, my ballot can be verified and counted.

2. As of November 4, 2008, I was fully entitled to vote. I was not under court-ordered guardianship in which the court order revoked my right to vote; had not been found by a court to be legally incompetent to vote; and had not been convicted of treason or any other felony.

8DB  
11/18/08  
3. I have been registered to vote for several years. At the time I registered to vote, I resided at 34 Millercrest Ct. SW, Pine Island, Minnesota, in Pine Island WI precinct (Precinct No. 0100), in Goodhue County. I was a resident at this address when I requested, received and voted an absentee ballot in the November 2008 general election.

4. Prior to the election, I signed and submitted an application for an absentee ballot. I applied under my correct name and address.

5. I received the absentee ballot and marked the ballot as prescribed by the directions sent to me with the ballot. In the U.S. Senate race, I voted for Al Franken. In addition to marking the ballot, I completed the eligibility certificate printed on the back of the envelope as prescribed in the enclosed directions. The eligibility certificate reflected my correct name and address, and it bore my genuine signature.

6. My girlfriend, Kimberly Lindquist, served as the witness while I voted the ballot, signed the certification and sealed the envelope. She then completed her portion of the witness certification. Kimberly is a registered voter in the State of Minnesota.

7. This ballot is the only ballot I submitted in the November 4, 2008 election. I did not vote in person on November 4, 2008 or submit any other absentee ballot.

8. I understand that my ballot was rejected because someone believed that Kimberly was not a registered voter in Minnesota. Unfortunately, no one

from the County contacted me to inform me of this issue or to request verification of my signature.

9. If notarized below, this is my Affidavit. If not notarized, it is my declaration under 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct.

Executed on November \_\_, 2008.  
Sworn and subscribed to before me  
on this \_\_ day of November, 2008.

Signature: Bruce D. Behrens 11/16/08  
Bruce Behrens

\_\_\_\_\_  
Notary Public

**AFFIDAVIT/DECLARATION OF James T. Langland**

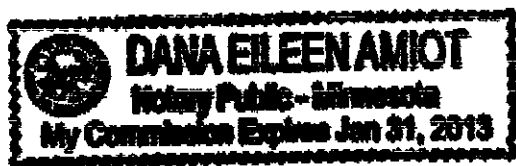
1. My name is James T. Langland. On November 4, 2008, I was eighteen years of age or older, a citizen of the United States, and had maintained residence in Minnesota for at least thirty days immediately preceding the general election held November 4, 2008.
2. As of November 4, 2008, I was not under court-ordered guardianship in which the court order revoked my right to vote; had not been found by a court to be legally incompetent to vote; and had not been convicted of treason or any other felony.
3. I reside at 1014 Oakland Park Road, Thief River Falls, MN 56701, in precinct 3B (precinct code \_\_\_\_\_).
4. I have registered to vote at the above-designated precinct and have previously voted there in every election since 1983.
5. Prior to the election, I signed and submitted an application for an absentee ballot as I was traveling the week before the election. I applied under my correct name and address.
6. I received the absentee ballot and marked the ballot as prescribed by the directions sent to me with the ballot. In the U.S. Senate race, I voted for Al Franken. In addition to marking the ballot, I completed the eligibility certificate printed on the back of the envelope as prescribed in the enclosed directions. The eligibility certificate reflects my correct name and address, and bears my genuine signature. I completed my ballot in the Pennington County Recorders office and handed the signed envelope to the staff. On November 13 the County Recorder told me that he forgot to sign the envelope.
7. The above-referenced ballot is the only ballot I submitted in the November 4, 2008 election. I did not vote in person on November 4, 2008 or submit any other absentee ballot.
8. As notarized below, this is my Affidavit. I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 13, 2008.  
 Sworn and subscribed to before me  
 On this 13 day of November, 2008.

Signature: James T. Langland

Name (please print): James T. Langland

Dana Eileen Amiot  
 Notary Public



**AFFIDAVIT/DECLARATION OF** \_\_\_\_\_

1. My name is Orwell Adkins On November 4, 2008, I was eighteen years of age or older, a citizen of the United States, and had maintained residence in Minnesota for at least thirty days immediately preceding the general election held November 4, 2008.

2. As of November 4, 2008, I was not under court-ordered guardianship in which the court order revoked my right to vote; had not been found by a court to be legally incompetent to vote; and had not been convicted of treason or any other felony, or had the right to vote because, if I have been convicted of a felony, my felony sentence has expired (been completed) or I have been discharged from my sentence.

3. I reside at 285 So. Jackson St in precinct \_\_\_\_\_ (precinct code 381).

4. I registered at the above-designated precinct:  
 by submitting a voter registration application prior to the twentieth day preceding the election.  
 by enclosing a completed registration application with my submission of an absentee ballot.

5. Prior to the election, I signed and submitted an application for an absentee ballot. I applied under my correct name and address.

6. I received the absentee ballot and marked the ballot as prescribed by the directions sent to me with the ballot. In the U.S. Senate race, I voted for Al Franken. In addition to marking the ballot, I completed the eligibility certificate printed on the back of the envelope as prescribed in the enclosed directions. The eligibility certificate reflects my correct name and address, and bears my genuine signature.

7. The above-referenced ballot is the only ballot I submitted in the November 4, 2008 election. I did not vote in person on November 4, 2008 or submit any other absentee ballot.

8. If notarized below, this is my Affidavit. If not notarized, it is my declaration under 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 14, 2008.  
Sworn and subscribed to before me  
On this 14<sup>th</sup> day of November, 2008.

Signature: Orwell Adkins

Name (please print): Orwell Adkins

Shirley J. Lundgren  
Notary Public



# Minnesota SOS Voter Lookup

SOS Voter ID

FirstName  MiddleName  LastName

HouseNumber  Address2

StreetName  City

UnitType  State

UnitNumber  ZipCode

## SOS Voter Election History

<i>VoterId</i>	<i>ElectionDate</i>	<i>ElectionDescription</i>	<i>VotingMethod</i>
2059019	11/8/1994	STATE GENERAL	P
2059019	11/5/1996	STATE GENERAL	P
2059019	11/3/1998	STATE GENERAL	P
2059019	11/7/2000	STATE GENERAL	P
2059019	11/5/2002	11-05-02 STATE GENERAL ELECTION	P
2059019	11/2/2004	11/02/2004 - STATE GENERAL	P
2059019	11/7/2006	11/07/2006 - STATE GENERAL	A