



## **KEY PORTIONS OF MINNESOTA SUPREME COURT BRIEF**

Pp. 1-2      The Coleman brief centers on five issues: (1) whether the trial court wrongly excluded relevant evidence; (2) whether constitutional equal protection and due process protections were violated by the inclusion of ballots declared “illegal” under the trial court own definition in the candidates’ vote totals; (3) whether the trial court’s imposition of a strict compliance standard long after election day for counting still rejected absentee ballots violated equal protection and due process protections since election day and recount absentee ballots were judged under a substantial compliance standard; (4) whether the trial court erred in declining to order the statutorily provided for inspections in precincts where duplicates and originals were double counted, and (5) in ruling missing ballots were properly included in the tally.

**Pp. 3-9      Statement of the Case and Summary of the Argument**

**Pp. 9-21      Statement of Facts**, including detailed evidence on 10 categories of ballots in which Minnesota counties and cities applied different standards for counting similar ballots. The court stopped Coleman’s lawyers from questioning additional elections officials about their differing interpretations of state law.

**Pp. 21-49      Legal Argument**

Pp. 22-24      The trial court wrongly excluded Coleman’s attempts to question local election officials about (1) their widely differing practices for accepting absentee ballots and (2) the ballots included in their election day counts that now fall within the trial court’s definition of an “illegal” vote is reversible error.

Pp. 24-47      The Constitutional principles of equal protection and due process mandate a single, uniform standard be used to judge all absentee ballots.

The trial court failed to do this, and “the record reflects not merely minor errors or isolated inconsistencies, but the wholesale disregard by some counties of standards held inviolate by other counties, as well as the bending of other standards, such that a voter’s ability to have his absentee ballot counted depended on where he lived and cast his ballot....It resulted from intentional and systemic differences that impacted thousands of votes – well in excess of the narrow margin separating the candidates.” (P. 25)

Pp. 25-33

Upholding the trial court’s February strict compliance standard would result in creating thousands of illegal votes although they were ruled valid by local election officials on election day. That is contrary to Minnesota law. In addition, fundamental due process principles require that all votes in the election be counted under the same set of rules. The trial court’s set of rules was not used by any Minnesota jurisdiction on election day.

“[T]o satisfy due process and to be ‘legally cast’ vote a vote must comply with the appropriate standard regardless of when it is reviewed.” (P. 26).

As a matter of Minnesota law, “illegal” votes cannot be included in the candidates’ vote totals. “This Court should ensure that only legally cast votes are included in the final count to preserve the integrity of the election.” “Here, notwithstanding the trial court’s suggestion to the contrary, the presence of enough illegal votes to change the outcome of the election is clear...” (P. 27)

The constitutional guarantee of due process requires that all absentee ballots cast in the election be subject to the same rules. “The court’s standard has led to the untenable situation of ballots now being rejected by the trial court, strictly construing the statute, while thousands of similarly situated ballots were counted on election night and, pursuant to this Court’s directive, during the recount. As a result, those voters whose ballots were rejected under the trial court’s strict compliance standard have been unfairly disenfranchised and have had their due process rights violated by the court’s changing of the rules more than three months after the election.” (Pp. 30-31)

The trial court’s strict compliance standard creates a dilemma for the Supreme Court – if it upholds strict compliance then it has created illegal votes in the count from election day and the recount. The only remedy for that – which Coleman does not favor – is a proportionate reduction of the candidate’s totals or a declaration that the winner of the election cannot be known. (Pp. 32-33)

The Court “may avoid that Hobson’s choice by instead directing the application of a substantial compliance standard, built by an amalgam of the practices on election night, to all absentee ballots... Minnesota law and the federal guarantees of equal protection and due process favor such a ruling and remedy.” (P. 33).

Pp. 33-39

The Minnesota Supreme Court’s prior cases have long favored a substantial compliance standard that enfranchises voters rather than the trial court’s strict compliance standard.

“The constitutional guarantee of equal protection mandates a substantial compliance standard.” (P. 40). “Regardless of how clear the statutory language for accepting absentee ballots might appear, the evidence showed that standard was applied inconsistently – deliberately and not in error – by county officials on

election night. This undeniable circumstance, together with the trial court's imposition of a strict compliance standard on what in large areas of the state was a substantial compliance regime, constitutes a violation of the constitutional guarantee of equal protection." (Pp. 40)

"The differences in application were not merely the exercise of discretion about how best to ensure compliance with the statute but instead decisions by some local officials not to apply specific elements the trial court later found to be required." (Pp. 41-42)

"That errors and inconsistencies occur in all elections because they are all run by human beings cannot, as the trial court would have it, gainsay the extensive and deliberate decisions by local officials to apply a statutory standard differently." (P. 45)

"In sum, as a matter of constitutional law, the overwhelming evidence of disparate treatment cannot be ignored – no matter how expedient it may be to do precisely that. The deliberate and disparate treatment of large numbers of similarly situated voters – who had their votes counted only if they lived in certain jurisdictions – is unacceptable in any election. It is especially so in one so close." (P. 45)

"The appropriate remedy is to count more absentee ballots." (P. 46)

"The standard for determining whether an absentee ballot is legally cast must be applied so that identical ballots from the November 4, 2008 election are treated the same. Because identical ballots have been treated differently in numerous instances at every stage of this election, the most equitable and most efficient remedy is to presume, as a significant number of Minnesota jurisdictions did on election day, that an absentee ballot which substantially complies with the statutory requirements is a legal vote. Absent a showing that a particular absentee ballot was cast by an ineligible voter or was tainted by fraud or bad faith, many thousands of the remaining rejected absentee ballots should be opened and counted." (P. 46)

Paid for by Coleman for Senate