No. A09-697

STATE OF MINNESOTA
IN SUPREME COURT

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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INTRODUCTION

Franken would have the Court believe Coleman's claims are an unfounded challenge to an election system that operated under uniform standards during the November 4, 2008 election with no more than minor errors. Nothing could be farther from the truth. More than 12,000 absentee ballots were rejected on election day, and officials later corrected errors so that 933 were counted. About 4,800 of the remaining ballots were raised in the contest. Some 4,400 of those are still uncounted.

Coleman's claims arise from indisputably material and conscious inconsistencies in how local officials applied the statutory standard to absentee ballots cast in their jurisdictions, including these 4,400 still at issue. The record, although truncated by the trial court's rulings, establishes this disparity occurred despite extensive training and good faith efforts. Uniform treatment of similarly situated voters may have been a goal, but it was not the reality; the trial court's own findings undermine its assertion otherwise.

The trial court's decisions exacerbated these inconsistencies by changing the rules long after the election was held, leaving thousands of voters disenfranchised. Those decisions strictly interpreting what constitutes a legal vote also create a dilemma for this Court: if the trial court is correct, thousands of "illegal" votes are in the count; if it is incorrect, as Coleman believes, thousands of voters remain wrongly disenfranchised. Both situations are unacceptable under Minnesota law and the U.S. Constitution because they put the election's outcome in doubt and disenfranchise voters. They demand a remedy.

ARGUMENT

I. THE RECORD ESTABLISHES WIDESPREAD, DELIBERATE DISPARITIES IN HOW LOCAL OFFICIALS TREATED SIMILARLY SITUATED ABSENTEE VOTERS.

Franken mischaracterizes Coleman's claims as a challenge to "minor" errors that are not actionable. The Court should disregard this contention as an obvious straw man. More than 4,400 uncounted absentee ballots, representing the votes of citizens who attempted in good faith to participate in the democratic process, cannot be "minor" in an election where the candidates are separated by 312 votes and the record demonstrates that despite administrative efforts some people's votes were valued over others.

The issue here is not minor mistakes or, as the trial court characterized it, "garden variety errors."[1] Add.82. The evidence showed something far more, something that cannot be ignored: despite uniform training, Add.52-53 at ¶¶ 52-57, different jurisdictions made conscious decisions to apply the standard differently. As a result, the thousands of absentee voters who acted in good faith, Add.49 at ¶ 34, but only substantially complied with the statutory requirements, had their votes counted only if they lived in certain jurisdictions but not if they lived in others. The court's own findings concede the disparities. Add.47-48, 50-51, 60-63 at ¶¶ 16, 35, 36, 44, 101, 105-110, 115 and 118. Meanwhile, the trial court, in refusing to accept the presumptions of regularity

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[1] No one contends mere mistakes implicate the constitutional guarantee of equal protection. Of course election judges from time to time mistakenly accept invalid ballots. That such mistakes happen does not require that all similar ballots be accepted. For example, if, as the trial court observed, Add.92, one county mistakenly allows a felon to vote, equal protection does not require that all felons throughout the state be allowed to vote.

used by officials on election day, compounded the problem by introducing its own application of the standard, including a burden of proof that was an obstacle to enfranchisement, and that was not used anywhere on election day.

In suggesting otherwise, Franken ignores and miscasts the substantial testimony from local officials, set forth in the Opening Brief, regarding the differences in how they applied the governing standard, Minn. Stat. § 203B.12, subd. 2, as well as Coleman's extensive written offers of proof. Despite the court's restrictions barring additional evidence, the record shows officials made conscious decisions, for various reasons, to apply the standard differently in confirming witness registration, requiring witness addresses, confirming voter registration, evidencing non-registered voters' proof of residence, and confirming the genuineness of a voter's signature, among other elements.[2]

The evidence shows the notion of an "objective" statutory standard is delusional. Local officials made their own, deliberate decisions so that the standard was applied in a materially disparate fashion statewide. To the extent the trial court's findings, Add.53 at ¶ 58, suggest there was no such evidence, they are clearly erroneous. *See* Minn. R. Civ. P. 52.01; *Matter of Ryan*, 303 N.W.2d 462, 465 (Minn. 1981) (in an election contest reviewing court not bound by findings based on documentary evidence if convinced of error); *Fitzgerald v. Morlock*, 120 N.W.2d 339, 347-354 (Minn. 1963) (overruling contest court's rejection of certain ballots and acceptance of others). The fact that, as the trial

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[2] To the extent Franken seriously contests the import of Joseph Mansky's testimony, Resp't Br. at 36, the record reflects he is responsible for administering elections in Ramsey County and is frequently consulted by other election officials throughout the state. Tr. Vol. 4 at 186-93. His opinion matters.

court noted, local officials were asked to apply the same statutory standard and received uniform training in how to do so does not mean they acted uniformly or in conformance with the statutory standard. The record reflects the extent of the disparities, and would have reflected more had the court allowed further questioning. *See* Opening Brief at 10-19; A.570-591; A.704-708.

The court's legal conclusion that all officials complied with Minnesota's election statutes, Add.68 at ¶ 154, cannot be accurate. Officials in Minneapolis, Ramsey County and Washington County who did not check witness registration and those officials in Carver County who did cannot both have been correct. A.368 (at 71); A.389 (at 45); A.437 (at 78); A.521 (at 116-117). Officials in Ramsey County who accepted incomplete witness addresses and those in Carver County who demanded full addresses cannot both have been correct. A.368 (at 71-72); A.436 (at 69-70). Officials in Washington County who presumed any absentee voter submitting a registered voter envelope was registered and those in Dakota County who checked and rejected such ballots if the voter was not registered, even if officials mistakenly sent incorrect forms, cannot both have been correct. A. 376 (at 38); A.406 (at 49-50). Further examples in the record abound.

The court's findings that Coleman did not present evidence to support his claims, Add.55, 57, 58 at ¶¶ 70, 87, and 89, are especially curious in light of the court's repeated refusal, as detailed in the Opening Brief, to accept further testimony regarding the different ways officials applied the standard. Although Franken dismisses such evidence as cumulative and irrelevant, it was neither: it demonstrates similarly situated voters were treated differently without rational basis and that this disparate treatment affected the

outcome of the election. Indeed, Franken's effort to exclude evidence, and then to argue any disparities were immaterial, is particularly disingenuous.

II. THE DISPARATE TREATMENT AFFECTED THE OUTCOME OF THE ELECTION.

Accepting Franken's contention that the disparate treatment did not affect the outcome of this historically close election requires the Court to ignore the record. It also requires the Court to eschew mathematics and common sense. The Court should do neither.

Coleman met his burden to show the intentional disparate treatment was material: the record, including Coleman's offers of proof, establishes beyond doubt the disparate application occurred so broadly and on such a significant scale that whether the trial court imposed the correct standard or not, the outcome of the election is in doubt. Thousands of uncounted absentee ballots would have been accepted if judged by another Minnesota jurisdiction on election day (many of which are similar to ballots accepted during the process this Court ordered), so that thousands of voters remain disenfranchised because of the trial court's standard. Many of these ballots come from precincts that voted predominantly for Coleman, as the MSCB's tallies show, making clear the failure to count them affected the election's outcome. If the local officials were wrong and the trial court's standard correct, then thousands of "illegal" ballots are in the count. Before the court barred further evidence, Coleman offered approximately 450 individual illegal ballots, from just a few jurisdictions, each of which voted predominantly for Franken.

See A.570-591; A.704-919. In either case, then, the numbers are substantially larger than the margin between the candidates.

This evidence is sufficient to meet the contestant's burden of proof. *See Johnson v. Tanka*, 154 N.W.2d 185, 187 (Minn. 1967) (outcome of election "should not be determined by illegal votes;" if number of potentially illegal votes had exceeded margin, this would have affected outcome and "put the results in doubt"); *Erickson v. Sammons*, 65 N.W.2d 198, 202 (Minn. 1954) (issue is whether legal infirmities render results uncertain or inaccurate).

None of the cases on which Franken relies is to the contrary. In *Taylor v. Taylor*, 10 Minn. 107, 1865 WL 940 (Minn. 1865), the court merely found that, in the absence of illegal votes, technical violations related to the qualifications of election judges had not affected the outcome. Similarly, in *Hahn v. Graham*, 225 N.W.2d 385 (Minn. 1975), a challenge based on contestee's brother's service as the town's voter registration deputy was dismissed where there was no evidence he had tampered with ballots or influenced voters. Finally, in *Ganske v. Independent School District No. 84*, 136 N.W.2d 405, 407-408 (Minn. 1965), this Court overruled the trial court's determination that a "combination of minor irregularities" voided the election, noting the number of illegal ballots could not affect the outcome.

Coleman has shown thousands of ballots are still at issue, a number that greatly exceeds the margin between the two candidates. The court's findings, to the extent contrary, Add.55, 57, 58 at ¶¶ 70, 87, and 89, are clearly erroneous. *See* Minn. R. Civ. P. 52.01; *Matter of Ryan*, 303 N.W.2d at 465. Nor is there any support for the trial court's

speculation, Add.58 at ¶ 93-94, Add.96, that opening more ballots would not change the result. *See Sweno v. Gutches*, 252 N.W. 839, 841 (Minn. 1934). The record establishes ballots opened previously came overwhelmingly from areas Franken won. Those results cannot be statistically significant regarding uncounted ballots from other areas Coleman won.

In sum, the record confronts the Court with indisputable evidence that this deliberate, disparate treatment of voters was significant enough to affect the outcome. That being so, the Court should weigh the claims under state and federal law.

III. THE DISPARATE TREATMENT CREATES A DILEMMA UNDER STATE LAW.

Under Minn. Stat. § 209.12 this Court cannot ignore illegal votes in deciding which candidate received the highest number of legally cast votes. The trial court's actions present a dilemma for this Court—on the one hand, the disparate treatment of similar ballots on election day renders the result unreliable; and, on the other hand, the trial court's imposition of a different standard not used on election day means thousands of voters remain wrongly disenfranchised and that what the trial court deemed "illegal" votes are in the count.

To avoid this, and to ensure a fair and accurate election result, the Court should conclude that, because of the undisputed evidence of how local officials reviewed absentee ballots differently on election day, the trial court misapplied § 203B.12, subd. 2. The Court can reach that conclusion either: (i) by adopting substantial compliance, in the context of absentee voting, for this and future elections; or (ii) by ruling that in the

context of this election the application of § 203B.12, subd. 2, in a non-uniform fashion does not survive constitutional scrutiny. By rejecting the trial court's findings and remanding for further counting, the Court can enfranchise voters and correct the problem of "illegal" votes remaining in the count.

Appellants have already addressed the efficacy of, and historical support from this Court for, a substantial compliance approach. Opening Brief at 34-45. We turn here to the constitutional issues permeating this case.

IV. THE DISPARITIES VIOLATED THE CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION AND DUE PROCESS.

A. The State Does Not Have A Rational Interest In Treating Similarly Situated Absentee Voters Differently.

Minnesota may have a uniform statute governing absentee ballots, Minn. Stat. § 203B.12, subd. 2, and, as the trial court observed, it may have trained its election officials using uniform materials, Add.53 at ¶ 58, but in this historically close election those officials made different decisions about how to apply the standard so that it was not uniformly applied to similarly situated voters. This disparity implicates the constitutional guaranty of equal protection and places this case squarely within the ambit of *Bush v. Gore*, 531 U.S. 98 (2000), a decision which if not binding precedent is certainly authoritative. Simply put, in these circumstances the state must have sufficient

justification for treating voters so differently.[3] The record makes clear the state does not.[4]

Even if the trial court is correct that absentee voting is a privilege, access to which the Legislature may reasonably constrain, that does not mean the state is free to impose inconsistent standards on similarly situated voters. The state's disparate application of the standard still must survive rational basis review. *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 734 (Minn. 2003) (equal protection violation existed where some absentee voters would not be able to obtain replacement ballot). In order for the disparate treatment to survive even this lower level of review: (1) there must be a genuine and substantial distinction between the voters to which the standard was disparately applied; and (2) that distinction must be rationally related to the purpose of the absentee voting statute. *See State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991); *State v. Nw. Preparatory Sch.*, 37 N.W.2d 370, 371 (Minn. 1949). The disparate application at issue here—local officials consciously applying the statutory standard differently—does not meet either prong.

There is no principled distinction between those absentee voters whose ballots were accepted by some jurisdictions on election day and those whose similar ballots were

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[3] Appellants were not required to give the Attorney General notice because they do not bring a facial challenge to the constitutionality of a statute. *See Markert v. Behm*, 394 N.W.2d 239, 243 (Minn. Ct. App. 1986).

[4] Franken's unsupported assertion that Coleman waived the equal protection claim by not bringing all 300,000 absentee ballots before the trial court deserves but short shrift. The issue for equal protection purposes is to accept the much narrower group of ballots raised in the contest (some 4,400) that remain rejected. The testimony of election officials regarding how they applied the standard and the presumptions on which they relied in doing so is sufficient to establish that ballots similar to those before the court were, by deliberate decisions, accepted in other jurisdictions on election day and during the recount.

rejected in others, and then excluded by the trial court. Their envelopes look the same; they simply live in different places. Having a different place of residence, however, is not rationally related to "[t]he purpose of the absentee ballot," which "is to enfranchise those voters who cannot vote in person." *Erlandson*, 659 N.W.2d at 734.

Nor does having different localities apply the standard differently serve any purpose rationally related to administering the absentee voting system. In the face of a statute allowing absentee voting and imposing a statewide standard, it cannot fairly be said the state has a rational interest in having different jurisdictions apply that standard differently. As the trial court noted, the standard is meant to be applied uniformly. Add.52 at ¶ 50. The trial court's reliance on the lack of local resources to excuse uniform application accordingly makes no sense: if the Legislature had been willing to give local officials discretion, depending on the lack of resources, it certainly would have said so. Moreover, as the record reflects, a "lack of resources" had nothing to do with whether most officials took short-cuts: even Minneapolis and Ramsey County, both of which had numerous employees and access to the SVRS, did not check witness registration and did not rigorously match voter signatures. A.368 (at 7); A.521 (at 116-117); A.364 (at 40); A.522 (at 118). Ramsey and Washington, among others, did not check voter registration if an envelope with an "R" was used. A.367 (at 63); A.368 (at 70); A.376 (at 38).

In any event, *Bush* did not exempt from constitutional scrutiny differences resulting from varying local resources. The Supreme Court merely observed that, when it came to voting machinery, differences in resources alone might not constitute a violation. But the Court noted a lack of resources could not justify deliberate disparities in how

similarly situated voters were treated. *See Bush*, 531 U.S. at 108.[5] Merely because the uniform application of a standard may be time-consuming or impose a burden on officials cannot be an acceptable basis on which to ignore a clear constitutional violation. *Cf. League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008) (differences in allocation of resources and training could severely limit right to vote based on residence and thereby violate equal protection).

It is not sufficient to say, as the trial court did, Add.85, that officials did not arbitrarily disregard the statutory elements but merely used different short-cuts to become satisfied the statutory requirements had been met. That argument ignores reality: it is those short-cuts that led to similarly situated absentee voters being treated differently.[6] Indeed, such conduct is precisely what seven Justices in *Bush* found to violate equal protection. 531 U.S. at 108-112.

The cases Franken cites are not to the contrary. In *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008), for example, on which Franken places great reliance, the Ninth

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[5] Courts since then have typically addressed variations in voting technologies used, not whether an official is able to verify information required by statute. Even in the former context, courts have differed on whether variations in technology can implicate the guaranty of equal protection. *Compare Black v. McGuffage*, 209 F. Supp.2d 889, 899 (N.D. Ill. 2002), *with Wexler v. Anderson*, 452 F.3d 1226, 1233 (11th Cir. 2006).

[6] The situation might be different if officials in one county checked registration against the SVRS while those in another used poll rosters. Both officials are checking government records. *Cf. Fl. State Conference of N.A.A.C.P. v. Browning*, 569 F. Supp.2d 1237 (N.D. Fla. 2008) (Resp't Br. at 18) (no constitutional violation where some officials checked social security records and some checked driver's license records). The evidence here, however, was that in many jurisdictions, local elections officials did not even check—regardless of whether they had access to SVRS or sufficient personnel and time.

Circuit affirmed the dismissal of an equal protection claim involving Oregon's process for evaluating voter referendum petition signatures. In addressing standards that called for counties to check petition signatures against those on voter registration cards, the court relied on three important elements not present in this case: first, the method by which signatures were gathered raised a real potential for fraud; second, the petition at issue specifically informed voters to "[s]ign your full name, as you did when you registered to vote," 538 F.3d at 1104; and third, the standard being challenged included a provision subjecting any rejected signatures to review by "higher county elections authorities," which the court found ensured that "voters in different counties [were treated] equally." *Id.* at 1104, 1106. Nor did the plaintiffs in that case present specific evidence of material disparity among counties. Here, there is substantial evidence of disparity.

Similarly, in *Snowden v. Hughes*, 321 U.S. 1 (1944), the Court faced a claim that local officials had failed to follow state law in nominating candidates, without any allegation they had done so purposely or based on anything other than a mistake. The Court held that a mere mistake did not implicate equal protection. It did not purport to hold that a specific intent to discriminate against a specific person was required before there could be a constitutional violation. Indeed, the facts in *Bush* itself would have failed such a test: the lack of uniform application of a uniform standard was at issue, not whether officials in Palm Beach County discriminated against specific voters.

It is true equal protection may "not demand that laws operate with rigid sameness upon all persons within a state." *Fairview Hosp. Ass'n v. Public Bldg. Serv.*, 64 N.W.2d

16, 29 (Minn. 1954). It is equally true equal protection will not tolerate deliberately disparate treatment of similarly situated persons without a rational basis: in this Court's own words, "by treating similarly-situated voters differently with no rational explanation," the counties' disparate application of the statute was arbitrary, and it therefore "violates equal protection guarantees." *Erlandson,* 659 N.W.2d at 732. Such a result is unacceptable.

The contention that equal protection cannot be invoked to protect citizens who submitted "invalid" ballots, Add.90-91 and Resp't Br. at 23, is based on a false assumption.[7] Finding a ballot envelope is not properly completed is not to say, as the trial court did, that the voter has "failed to comply with the basic eligibility requirements." Add.93. To be eligible to vote absentee, a person need merely be registered and submit an application averring to her unavailability on election day. Minn. Stat. § 203B.02. The goal here is not to count illegal votes; it is to enfranchise eligible voters who, pursuant to Minn. Stat. § 203B.12, subd. 2, completed their ballot certifications in good faith (as the trial court recognized, Add.49 at ¶ 34) and in substantial compliance with the prescribed directions—just as other voters who did the same thing, but resided in different areas, had theirs counted. Equal protection demands no less.

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[7] In *Johnson v. Tanka*, the only case Franken cites to support his assertion that a constitutional remedy cannot include counting such ballots, the Court did not even address constitutional violations; it merely construed the election statutes regarding the appropriate procedure when the number of ballots exceeds the number of voters and some ballots are not marked by election judges. 154 N.W.2d at 186.

B. The Trial Court Impermissibly Changed the Rules of the Game.

1. The trial court's application of the standard violated due process.

The trial court held the still rejected absentee ballots before it to a higher standard than that used on election day and, indeed, one higher than the statute requires. The court held an absentee ballot is not legally cast unless the record "confirm[s]," Add.52 at ¶ 48, each of the four subsections of Minn. Stat. § 203B.12, subd. 2, has been met. What the trial court meant by "confirms" is quite different, however, from the standard local officials applied on election day and from what the statute requires. On election day, the localities relied on presumptions to be "satisfied" a ballot met the statutory requirements; the trial court refused to allow reliance on those same presumptions. For example, it insisted an SVRS record be produced, even if registration was not the reason for rejection. On election day, most localities presumed a voter to be registered, and did not check the SVRS, if the envelope included an "R", the state's designation for registered.

The court's position had two effects: it badly skewed Coleman's burden of proof, requiring a much greater showing than was required for any voter on election day; and it meant ballots many officials would have accepted on election day (and during the recount) were rejected by the court or, conversely, thousands of ballots that did not meet the court's standard were erroneously accepted on election day (and during the recount). This means the trial court changed the rules after the game had been played, a violation of due process. *See Bush*, 531 U.S. at 110; *Roe v. State of Alabama*, 43 F.3d 574, 581 (11th Cir. 1995).

Franken's contention that there can be no violation because no voter relied on a substantial compliance standard misses the point—most local officials used that standard. Local officials sought to apply the absentee ballot standard in a way that enfranchised as many voters as possible. Add.54 at ¶¶ 66-67. Certainly if Carver County had known there was no requirement to check witness registration on the SVRS if a Minnesota address was given (as it was on all but two of the 181 ballots it rejected), and that doing so went beyond what the statute required and wrongly disenfranchised its voters, it would not have done so. Thus, the trial court's decision created a due process violation.

Coleman is not asking the Court to "interfere with the everyday administration of elections," as Franken alleges. Resp't Br. at 22-23. He is asking the Court to right the wrong created by the trial court's rulings, which left a record of "fundamental" and "broad-gauged" unfairness, like that the courts found actionable in *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978), and *Roe*, 43 F.3d at 580. As but one example, a ballot rejected by a county, like Carver, which needlessly checked the SVRS for witness registration, would have been accepted in virtually every other Minnesota jurisdiction on election day—and it should have been accepted by the trial court. Due process demands no less.[8]

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[8] The lack of an opportunity for voters to correct their mistakes also implicates due process concerns, particularly when only 413 of them even were notified their ballots had been rejected. *See Zessar v. Helander*, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006).

2. Coleman did not waive the due process claim.

The Court need not tarry long with the notion that Coleman somehow waived his right to pursue this due process claim. Franken's contention that the claim was not timely raised, for instance, is preposterous. The claim derives from the trial court's February 13, 2009 decision changing the rules of the game; it did not exist before then. Coleman raised it immediately thereafter and, contrary to Franken's representation, in fact briefed it to the trial court. A.215-222; Contestants' Proposed Findings of Fact and Conclusions of Law (March 17, 2009).

Similarly, the purported waiver imposed by the court as a discovery sanction, Add.67 at ¶ 141, does not end the matter. The court's ruling, imposed after trial and in passing without discussion, came without a motion to compel and without an opportunity for Coleman to respond. *Cf. Beal v. Reinertson*, 215 N.W.2d 57, 58-59 (Minn. 1974) (trial court's dismissal as discovery sanction was "too drastic" where defendants "made no showing of particular prejudice" and where trial court failed to fix a deadline to produce the documents and failed to warn of potential sanctions for noncompliance). Moreover, despite the court's previous rulings that any such evidence of "illegal" ballots counted on election day was irrelevant, as well as the nature of the claim not lending itself to the ready identification of all specific ballots, Coleman nonetheless identified approximately 450 such ballots, and offered to prove the existence of thousands more, in his written offers of proof. A.570-591; A.704-919. That was more than sufficient to meet discovery obligations. *Cf. Cornfeldt v. Tongen*, 262 N.W.2d 684, 697 (Minn. 1977)

(courts must not unduly hamper search for truth by excluding relevant evidence where other means are available to protect a party).

That leaves *Bell v. Gannaway*, 227 N.W.2d 797 (Minn. 1975), as the sole support for the waiver contention. Nothing in *Bell*, however, prevents this Court from resolving the presence of illegal votes. Neither the trial court nor Franken points to any evidence that under current law and practice a party has the right or opportunity to challenge that existed when this Court decided *Bell*. As set forth in the Opening Brief, the testimony, the documentary evidence, the Secretary of State's own regulations, and the statutes themselves confirm that neither candidate had the right to challenge absentee ballots, whether at the precinct-level on election day or at non-public pre-election day meetings of absentee ballot boards established under Minn. Stat. § 203B.13. Accordingly, Coleman cannot be said to have waived a right he did not have.

Nor was he able to ascertain, before the election had occurred, precisely how local election judges would apply the statutory standard. *See* Professor Edward B. Foley, *State Law Issues Loom Large in Coleman v. Franken Appeal* at 6.[9] This post-election claim is not like those involving challenges to the preparation and distribution of ballots, to which this Court has been willing to apply such a laches rationale. *See Peterson v. Stafford*, 490 N.W.2d 418, 419 (Minn. 1992); *Clark v. Pawlenty*, 755 N.W.2d 293, 303 (Minn. 2008).

In sum, Coleman has presented clear constitutional claims this Court should weigh. When it does so, the Court will conclude those violations must be remedied.

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[9] Available at http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=6075.

V. THE APPROPRIATE REMEDY IS TO ENFRANCHISE MORE VOTERS.

Any remedy must address the three flaws in the trial court's decision. First, the evidence demonstrated disparate standards applied on election day led to the disparate treatment of similar ballots. Second, the trial court's interpretation of § 203B.12, subd. 2, served to continue the disenfranchisement of valid ballots. Third, the trial court's construction—imposed long after election day and not practiced by any Minnesota jurisdiction—results in "illegal" votes being included in the count.

If this Court adopts the trial court's interpretation of the statute, the possible remedies for the illegal votes in the count are unpalatable as noted in the Opening Brief at 32-33—subtracting the "illegal" votes from the vote totals, either by identifying them specifically or through proportionate reduction on a precinct basis. *Hanson v. Emmanuel*, 297 N.W. 749, 755 (Minn. 1941) ("illegal votes may be apportioned where it cannot be ascertained for whom they were cast"). A far more palatable remedy, which is consistent with this Court's long established goal of enfranchising voters, would be to hold that the trial court impermissibly ignored the unequal treatment of voters and applied the statutory standard incorrectly and to direct the trial court to count absentee ballots cast by eligible voters who substantially complied with the anti-fraud directives of Minn. Stat. § 203B.12, subd. 2.[10]

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[10] The U.S. Supreme Court has dictated constitutional violations such as those resulting here must be remedied:

> We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us....

Applying the standard used on election night to all remaining rejected absentee ballots does not mean the Court would be turning a blind eye to the statutory requirements. Rather, it means instead the Court will apply the basic presumptions of regularity, deliberately used by many, if not most, local election officials.[11] Those presumptions are:

a. If a voter received a registered voter's envelope, the presumption is officials originally determined he was registered;

b. If a witness has a Minnesota address, the presumption is she is registered;

c. If a witness is designated as a notary or a person authorized to take oaths, the presumption is that is true;

d. If a voter submits an absentee ballot, the presumption is he made application for it; and

e. If a person signed the ballot envelope, the presumption is that it is his genuine signature.

(*Footnote continued from previous page*)

> [T]he weight of a citizen's vote cannot be made to depend on where he lives.... A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause.

Reynolds v. Sims, 377 U.S. 533, 566-68 (1964). The remedy Coleman suggests is consistent with the Court's conclusion that "any relief accorded can be fashioned in the light of well-known principles of equity." *Id.* at 585.

[11] Minnesota's constitution dictates that every violation of it requires a remedy. Minn. Const., Art. I, § 8. There is no question that a violation of the Fourteenth Amendment is also a violation of Minnesota's constitution. This Court accordingly cannot simply say, as the trial court did, Add.67 at ¶¶ 142-43, that Minnesota law does not provide a remedy—it must remedy the specific wrong done in this election.

Thus, absent a showing a particular absentee ballot was cast by an ineligible voter or was tainted by fraud or bad faith, it will be opened and counted.

The trial court itself deviated from its holding that the statutory provisions "cannot be waived or altered by election officials," Add.52 at ¶ 49, in several instances. It adopted standards not found in the statute but widely practiced on election day: officials need not confirm a witness is a registered voter if a Minnesota address is given (*compare* Add.66 at ¶ 136(h) *with* Minn. Stat. § 203B.07),[12] a voter's signature may be in a location on the envelope other than the certification (*compare* Add.66 at ¶ 136(f) *with* Minn. Stat. § 203B.12, subd. 2); and the absence altogether of a voter's signature is acceptable if he submitted his ballot by hand to a government official (*compare* Add.66 at ¶ 136(e) *with* Minn. Stat. § 203B.12, subd. 2). In the latter respect, the trial court adopted a partial compliance standard directly contrary to its reading of *Bell*, 227 N.W.2d at 803, which it cited in other instances as authority for its strict compliance standard.

In other words, not even the trial court could consistently follow its own strict compliance dictate. The court, unfortunately, stopped short of what it should have done—there is no principled distinction between the substantial compliance it allowed and what it did not. Having heard overwhelming evidence of disparate standards, the court should have accepted those ballots where county officials applied the standard in a

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[12] After ruling on February 13, 2009 that a voter's witness must be registered, Add.36, the trial court reversed course on March 31, 2009, concluding as a matter of law that merely providing a Minnesota address could be sufficient to satisfy the witness requirement, A.306. This was well after Coleman had, in reliance on the February 13, 2009 ruling, submitted his evidence and concluded his case.

manner that disparately disenfranchised their voters. This includes not only the ballots of those jurisdictions that checked witness registration and rejected ballots for lack thereof, but also ballots rejected for other errors that still substantially complied with the statutory standard.

Franken's assertion that the Legislature made the absentee ballot standard "deliberately strict," Resp't Br. at 25, misses the point: the absentee ballot statutes are "mandatory in all their substantial requirements," *Bell,* 227 N.W.2d at 803, but that does not mean that each and every element of Minn. Stat. § 203B.12, subd. 2, is substantial. Indeed, consistent with Minnesota's longstanding policy of enfranchising voters wherever not inconsistent with clear statutory directive, an eligible absentee voter who casts his ballot substantially as prescribed by the directions accompanying the certification has "satisfied" those anti-fraud requirements.[13] *Cf. State ex. rel. Skaggs v. Brunner*, 588 F. Supp.2d 828, 840 (S.D. Ohio 2008) (rejecting strict compliance because such a reading "would lead to unequal and inadvisable results, in direct violation of the principle that election laws should be construed to promote voter participation, not to discourage it"). Simply announcing that the statute's requirements are mandatory, as Franken does, assumes that which he is alleging. Neither the statute nor the case law supports that assumption.

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[13] For these reasons, the trial court was incorrect in imposing the burden that parties to the contest must prove each element of a voter's eligibility, as opposed to proving just the reason for which local officials rejected an absentee ballot.

As set forth at length in the Opening Brief, Minnesota's longstanding policy of enfranchising voters demands a fair standard fairly applied. *Cf. Erickson*, 65 N.W.2d at 202 (statutes considered directory after election so that, in the absence of fraud or bad faith or constitutional violation, voters are enfranchised); *accord Johnson*, 154 N.W.2d at 187; *Andersen v. Rolvaag*, 119 N.W.2d 1, 10 (Minn. 1962) ("[O]nce the true vote of the people is ascertained, mere irregularities will be overlooked."). Only then can the Court—and the public—be assured that the outcome of the election represents the will of the free electorate.

On remand, the trial court should be directed to allow Coleman to present evidence regarding the remaining 4,400 uncounted absentee ballots identified in the contest to show they were cast by eligible voters who substantially complied with the statutory directives—that is, the voters were eligible and they completed the ballot envelope substantially as prescribed by the directions.[14] A validly cast absentee ballot is one in an envelope marked "R" (or "NR" where independent evidence of registration exits), bearing the voter's genuine signature and address (unless personally handed to a government official), and signed by a witness with a discernable Minnesota address or a

[14] Indeed, the Court has the equitable power to order that all 4,400 ballots be opened provisionally and, together with their envelopes, be made a part of the record. Doing so at this juncture would ensure transparency, so that Minnesotans have confidence in the election system and the contest process, and would preserve evidence for the U.S. Senate's consideration. It also would be a practical way to avoid an unnecessary constitutional ruling—if the candidates' vote totals were not to change sufficiently after all ballots were opened, then the claims could not affect the outcome.

person, such as a notary, authorized to administer oaths, where there is evidence from an official source the voter did not otherwise vote in the election.

The standard this Court should direct the trial court to apply is not "undefined;" nor does it invite ignoring the law. Instead, such a standard actually ensures that in the context of this election there is no disparate treatment of similarly-situated voters and that all legal ballots are counted.[15]

VI. A STATUTORY INSPECTION WAS MANDATORY.

Despite Respondent's contention, Minn. Stat. § 209.06, subd. 1, simply does not require any showing of "necessity" or otherwise impose time limits on requesting inspections. The trial court's conclusion, and Franken's assertion, otherwise is wrong. Nor does it grant the contest court discretion to deny the inspections.

Moreover, there is no case law to support Respondent's contrary propositions. *O'Gorman v. Richter*, 16 N.W. 416, 417 (Minn. 1883), on which Respondent relies, merely held the inspection right is not ripe until a contest has been instituted. Similarly, *Christenson v. Allen*, 119 N.W.2d 35, 39-40 (Minn. 1963), concluded that an improperly-pled notice failed to trigger the inspection right. Neither case grants a trial court the authority to deny an inspection.

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[15] It is not true, as Franken suggests, that if the Court applies a substantial compliance standard to the remaining unopened absentee ballots it will give Franken an equal protection claim. In applying substantial compliance, the Court is not changing the rules—it is merely recognizing the de facto standard (and required quantum of proof) applied on election day and ensuring that the same is applied to all absentee ballots, regardless of where the voter lived. *Roe v. Alabama*, 43 F.3d at 581; *see also State ex. rel. Skaggs*, 588 F. Supp. 2d at 839 (counting provisional ballots will not dilute voting rights).

The trial court's erroneous denial of Appellants' statutory right to inspect duplicate ballots in ten Minneapolis precincts prejudiced their ability to introduce evidence that double-counting occurred. Its decision should be reversed.

VII. MISSING BALLOTS SHOULD NOT BE INCLUDED IN THE TALLY.

The situation in Minneapolis Ward 3, Precinct 1 represents the ultimate chain of custody deficiency. Despite Minnesota's clear statutory policy preference for a manual recount, Respondent would ignore the recount results in this single precinct and instead rely only on election night machine totals. Including ballots not located during the recount, however, results in certification of votes not "legally cast." Respondent fails to cite any case supporting the notion that machine count results should stand in place of manual recount results.

Because the Minnesota Legislature in 2008 adopted a specific policy position in favor of hand recounts, machine results representing ballots which were neither viewed, counted or subject to challenge by the parties for voter intent, simply cannot be certified as accurate. Accordingly, the trial court's decision should be reversed.

CONCLUSION

In order to satisfy Minn. Stat. § 209.12 and the constitutional guarantees of equal protection and due process, the Court should vacate the order for judgment and reverse and remand with instructions to count the remaining absentee ballots cast by eligible voters who substantially complied with the directives of Minn. Stat. § 203B.12.

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CERTIFICATE OF COMPLIANCE
WITH MINNESOTA RULE OF CIVIL APPELLATE
PROCEDURE 132.01, SUBD. 3

The undersigned hereby certifies, pursuant to Minnesota Rule of Civil Appellate Procedure 132.01, Subd. 3(a)(1), that this brief (exclusive of the cover page, the table of contents, the table of authorities, and any certificates of counsel), contains 6,820 words, as ascertained by using the word count feature of the Microsoft® Word 2003 word-processing software used to prepare the brief, and conforms to the typeface and type style requirements of the Rules by being in 13-point Times New Roman format.

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