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State of Minnesota  
In Supreme Court

*Norm Coleman, et al.*

Petitioners,

vs.

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

Respondents,

and

*Al Franken for Senate and Al Franken,*

Intervening Respondents.

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**BRIEF OF AL FRANKEN FOR SENATE AND  
AL FRANKEN IN OPPOSITION TO AMENDED PETITION AND MOTION  
FOR INJUNCTIVE RELIEF**

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## INTRODUCTION

More than 280,000 Minnesota citizens who exercised their fundamental right to vote in the November 2008 election did so by submitting absentee ballots.<sup>1</sup> Yet, in this extraordinarily close election, a significant number of those ballots were not counted—and not for any of the four reasons upon which an absentee ballot can be rejected under Minnesota law. Rather, they were left uncounted for “no reason” or because of conceded or obvious error on the part of local officials. As the State Canvassing Board recognized on December 12, 2008, such disenfranchisement is both contrary to law and fundamentally unfair. County canvassing boards have the statutory authority to correct errors, count improperly rejected absentee ballots and submit amended returns to the State Canvassing Board. Doing so is not only consistent with state statute, precedent, and practice, but is essential to the fundamental principles of voting rights, enfranchisement, and equal protection.

Petitioners concede that state law is clear that absentee ballots can be rejected only for four statutory reasons, and they do not dispute that hundreds of ballots have been erroneously rejected in violation of law. Nonetheless, they ask this Board to direct the county canvassing boards, the Secretary of State, and the State Canvassing Board not to consider any of the improperly rejected absentee ballots. In so doing, they stand the Equal Protection Clause on its head. Contrary to petitioners’ argument, to count absentee ballots left uncounted for no statutory reason is not only fully consistent with the Constitution, but

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<sup>1</sup> Others voted by mail or pursuant to the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”). All arguments contained herein apply to mail ballots and UOCAVA ballots, as well as absentee ballots.

to *fail* to do so would violate equal protection and the fundamental right to vote. As this Court has observed, “To now hold that the results of this election must be based on the return[s] that everyone concedes [are] erroneous would be a perversion of our whole election process.” *In re Application of Andersen v. Donovan*, 119 N.W. 2d 1, 10 (Minn. 1962).

Because petitioners’ claims are without merit, their request for injunctive relief must also fail: they have not shown a likelihood of success on the merits or that a weighing of the relative hardships favors their position. As a result, this Court should deny the Motion for a Temporary Restraining Order and a Temporary Injunction.

Ultimately, this Court should deny the amended petition for an order to show cause pursuant to Minn. Stat. § 204B.44, and allow the Board’s unanimous motion to stand. To the extent the Court wishes to issue an affirmative order addressing the substantive matters raised by the petition, Al Franken and Al Franken for Senate (collectively “the Franken Parties”) respectfully request that this Court issue an order requiring that election officials correct errors and count each absentee ballot validly cast in the November 4, 2008 election.

#### **STATEMENT OF ISSUES PRESENTED**

There can be no dispute on the principles most central to this action: first, that Minnesota law clearly sets forth the grounds upon which absentee ballots may be rejected; second, that Minnesota law grants county canvassing boards the authority to correct errors; and third, that equal protection under the law must be provided to all voters in the exercise of their fundamental right to vote. Yet, petitioners seek to stop the county canvassing boards from counting absentee ballots that were rejected with no statutory basis, effectively preventing counties from treating such voters equally to others who cast lawful ballots.

The issues presented by the amended petition are:

1. Whether the State Canvassing Board properly recommended that county canvassing boards correct errors and count absentee ballots that were erroneously rejected for a reason not authorized by Minnesota law?
2. Whether counting erroneously rejected absentee ballots is consistent with the Equal Protection Clause of the United States Constitution, while failure or refusal to count such ballots would raise grave constitutional problems?
3. Whether procedures for identifying and counting previously uncounted ballots should include, among other things, unprecedented opportunities for candidate challenges, a piecemeal adoption of recount procedures, and the evisceration of secret-ballot protections?
4. Whether petitioners' motion for extraordinary injunctive relief must be denied because they have failed to demonstrate a likelihood of success on the merits, failed to show irreparable harm, and failed otherwise to demonstrate that they are entitled to such relief?

### STATEMENT OF THE CASE

More than 280,000 Minnesotan citizens who exercised their fundamental right to vote in the November 2008 election did so by submitting absentee ballots. Pursuant to statute, there are only four specific grounds upon which an absentee ballot received on or before Election Day may be rejected. *See* Minn. Stat. § 203B.12, subd. 2.<sup>2</sup> The statute could not be clearer on this point: “There is no other reason for rejecting an absentee ballot.” *Id.*

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<sup>2</sup> In full, the provision reads as follows:

Two or more election judges shall examine each return envelope and shall mark it accepted or rejected in the manner provided in this subdivision. If a ballot has been prepared under section 204B.12, subdivision 2a, or 204B.41, the election judges shall not begin removing ballot envelopes from the return envelopes until 8:00 p.m. on election day, either in the polling place or at an absentee ballot board established under section 203B.13.

Yet as Deputy Secretary of State Jim Gelbmann explained to the State Canvassing Board on December 12, election officials have already identified over 600 absentee ballots that remain uncounted for reasons *other* than the four identified in Minn. Stat. § 203B.12, subd. 2. (*See* Transcript of State Canvassing Board Meeting (“Tr.”) at 31, attached at Appendix (“A-”) 8.) Moreover, Mr. Gelbmann estimated that a total of 13.2% of all uncounted absentee ballots, or approximately 1,600 ballots, were uncounted on Election Day for reasons other than the four grounds permitted by statute. *Id.* Though the errors at

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The election judges shall mark the return envelope “Accepted” and initial or sign the return envelope below the word “Accepted” if the election judges or a majority of them are satisfied that:

- (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.

There is no other reason for rejecting an absentee ballot. In particular, failure to place the ballot within the security envelope before placing it in the outer white envelope is not a reason to reject an absentee ballot.

The return envelope from accepted ballots must be preserved and returned to the county auditor.

If all or a majority of the election judges examining return envelopes find that an absent voter has failed to meet one of the requirements prescribed in clauses (1) to (4), they shall mark the return envelope “Rejected,” initial or sign it below the word “Rejected,” and return it to the county auditor.

The procedures for ballots submitted under UOCAVA are slightly different, *see, e.g.*, Minn. Stat. §§ 203B.16-203B.27, but the four statutory bases for rejection of UOCAVA ballots set forth in Minn. Stat. § 203B.24, subd. 4, are similar to those set forth in § 203B.12.

issue vary, the characteristic unifying all these ballots is clear: none meets the criteria for rejection set forth in Minn. Stat. § 203B.12, subd. 2; all such ballots should have been counted. For example, the ballot of Robert Smith, an eligible Minnesota voter, was never counted because of admitted “office error.” (*See* Smith Affidavit (“Aff.”), Ex. 1, attached to Lillehaug Summary Affidavit at A-127-30; *see also* A-352.) The ballot of another eligible Minnesota voter, Mary J. Legris, remained uncounted due to “EJ error.” (*See* Legris Aff., A-93; *see also* A-352.) The list goes on: Eligible Minnesota voters Andrew Heinen, Richard Goggin, Joe Neal, and Elia S. Nelson all have had their validly cast ballots remain uncounted on account of “Clerical error” (Heinen), “no reason given” (Goggin), “Other reason—ballot delivered to wrong precinct . . . Unable to deliver on time to correct precinct on election night” (Neal), and “other” (Nelson). (*See* Heinen, Goggin, Neal & Nelson Affs., A-60, 65, 105, 110; *see also* A-352.) These are but a few examples of the hundreds of voters whose ballots have remained uncounted due to admitted or other clear error.

After campaign officials and voters brought evidence of this disenfranchisement to the attention of the State Canvassing Board—made up of Secretary of State Mark Ritchie, Chief Justice Eric J. Magnuson, Justice G. Barry Anderson, Chief Judge Kathleen R. Gearin, of the Second Judicial District, and Judge Edward J. Cleary, of the Second Judicial District—the Board met on November 26th, 2008, to address the issue. At this meeting, the Board requested that the Secretary of State encourage election officials to sort the uncounted absentee ballots into five piles, each directly in accord with Minn. Stat. § 203B.12, subd. 2. The first pile would consist of absentee ballots rejected for the first reason identified in § 203B.12, subd. 2; the second pile would consist of absentee ballots rejected for the second

reason identified in § 203B.12, subd. 2, and so on, with the fifth pile consisting of uncounted absentee ballots meeting *none* of the requirements for rejection set forth in § 203B.12, subd. 2—and therefore which, pursuant to that same statute, should have been counted on Election Day. The proposed sorting process was simple, clear, and directly aligned with the statute. Some counties began the sorting process; others determined to await further guidance from the State Canvassing Board.

On December 12, 2008, the State Canvassing Board reconvened. The Board had before it written briefs submitted by both the Franken and the Coleman campaigns on the question of the uncounted absentee ballots. It also had received written advice from the Office of the Attorney General, which concluded that counting the ballots would be appropriate. (*See* AG Letter at 6, A-29) (“It is our opinion . . . that reviewing court would likely uphold a determination by the State Canvassing Board to accept amended returns from county canvassing boards that include absentee ballots of voters who complied with all legal requirements but whose votes were improperly rejected by election officials due to administrative errors.”). Attorney General Lori Swanson also addressed the Board orally at the hearing and explained the basis for her Office’s advice:

We start with the premise that every lawful vote should count in a democracy . . . . [W]hat we’re dealing with here is the so-called pile five and some subset of voters who did everything right on Election Day, followed all of the rules that were put in place for them by the government of the State of Minnesota and yet had their votes rejected due to no fault of their own. . . . . [T]his body [has authority to] request that the county canvassing boards reconvene for the purposes of tabulating improperly rejected absentee ballots and then can thereafter give you amended reports which you may accept setting forth any new tallies for the candidates based on that review.

(Tr. at 30-31, A-8.)

After thoughtful discussion, the members of the Board unanimously adopted a motion recommending that county canvassing boards reconvene to identify absentee ballots that were erroneously rejected for a reason not permitted by law; open and count the ballots; and finally submit the amended returns to the Board for its canvass. The five Board members separately explained his or her decision. (*See, e.g.*, Tr. at 42-43, A-11) (statement of Cleary, J.) (“It appears to me . . . that there is absolutely no reason why that fifth pile should not be submitted to this board, subject to challenge by either candidate for intent. . . . [Otherwise] I think we’re disenfranchising voters who follow the command of the law, who submitted absentee ballots according to the law, and it would be unjust and disrespectful to those voters not to count those votes.”); *id.* at 43 (statement of Magnuson, C.J.) (“I agree wholeheartedly with Judge Cleary. The idea here is to count ballots that were properly cast.”); *id.* at 47 (statement of Secretary Ritchie) (“I think what we've been talking about are things that we would all agree would be obvious errors.”); *id.* at 44 (statement of Gearin, J.) (“I find it difficult to understand why some counties wouldn’t do it. People showed up and had to make efforts to get their absentee ballots. They did it. They wanted to do this. Ordinary citizens want their vote to be counted. They followed the procedures. I just don’t understand why some of the counties wouldn’t want to do this.”); *id.* at 46-47 (statement of Anderson, J.) (“As the attorney general has said, it’s a function of every legal ballot, every lawful ballot being counted.”).

Within hours of the Board’s recommendation, petitioners filed a petition, pursuant to Minn. Stat. § 204B.44, attacking the recommendation of the Board and demanding that the

ballots remain uncounted, or, in the alternative, that a complicated and new counting process be established.<sup>3</sup> Petitioners then moved for a temporary restraining order and a temporary injunction, seeking to halt the counting of validly cast and erroneously rejected absentee ballots.

## ARGUMENT

### I. The State Canvassing Board Correctly Recommended that County Election Officials Identify and Count Absentee Ballots that, Pursuant to Clear Minnesota Law, Were Erroneously Rejected.

There is no doubt that voters who have complied with all legal requirements, but whose ballots were improperly rejected, should have their votes counted.” (AG Letter at 2, A-25.). As this Court has recognized, “[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 Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 729 (Minn. 2003) (“Our review must be informed by the recognition that ‘[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. Other rights, even the most basic, are illusory if the right to vote is undermined.’”). The state’s election laws are intended “to safeguard the right of the people to express their preference in a free election.” *Andersen*, 119 N.W.2d at 8; *see also Contest of Sch. Dist. Election Held on May 17, 1988 v. Gross* (“School

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<sup>3</sup> Petitioners named as respondents not only Mark Ritchie, Minnesota Secretary of State, and the Minnesota State Canvassing Board, but also Terry Treichel, the Isanti County Auditor and Treasurer, “individually and on behalf of all county and local election officials and county canvassing boards.” Notably, however, petitioners do not allege any error on the part of the Isanti officials—or any reason to believe Isanti plans to take any unlawful action. In addition, while petitioners purport to name Isanti County as a respondent “on behalf of all county and local election officers and county canvassing boards,” implying a class of respondents, they do not allege that any of the officers or boards committed any error.

*District*”), 431 N.W.2d 911, 915 (Minn. Ct. App. 1988) (“purpose and intent behind absentee voting legislation is the preservation of the enfranchisement of qualified voters”).

Accordingly, the “[e]lection laws should be liberally construed so as to secure to the people the right freely to express their choice.” *Dougherty v. Holm*, 44 N.W.2d 83, 85 (Minn. 1950).

Consistent with these bedrock principles of democracy, county canvassing boards have both the ability and the obligation under state statute and precedent to review uncounted absentee ballots and count those that were not lawfully rejected. As noted above, Minnesota law expressly provides for absentee voting and allows absentee ballots to be rejected only for four specific enumerated reasons. Election judges “*shall*” accept an absentee ballot that meets the four statutory criteria. Minn. Stat. § 203B.12, Subd.2. “There is no other reason for rejecting an absentee ballot.” *Id.*

To the extent that ballots have been improperly excluded, Minnesota statutes expressly provide for county canvassing boards to correct errors: “A county canvassing board may determine by majority vote that the election judges have made an obvious error in counting or recording the votes for an office.” Minn. Stat. § 204C.39. *See also* § 204C.38 (providing for the correction of obvious errors by canvassing board upon agreement of candidates). Moreover, as this Court has recognized, errors resulting in erroneous returns cannot be allowed to stand and mere technicalities or irregularities cannot be used to exclude ballots. *Andersen*, 119 N.W.2d at 8; *School District*, 431 N.W.2d at 915.

Petitioners argue that the canvassing boards lack authority to count previously-rejected absentee ballots and that to allow canvassing boards to amend reports would be unprecedented, but they are mistaken. In fact, in *Andersen*, ten counties amended their

election results to correct errors discovered by county election officials after the initial election results had been submitted. In one county, 31 absentee ballots that were personally delivered to the election judges were originally not counted. The county board, upon reconvening, considered these ballots, counted them, and submitted amended results. The Court ruled that the amended tallies must be accepted and that the previously-rejected absentee ballots should count. 119 N.W.2d at 10-11. “To now hold that the results of this election must be based on the return[s] that everyone concedes [are] erroneous,” the Court wrote, “would be a perversion of our whole election process.” *Id.* at 10.

Requiring the counting of erroneously rejected absentee ballots is also consistent with the holdings 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 ballots that had been erroneously rejected by election officials).

The cases of *O’Ferrall v. Colby*, 2 Minn. 180 (1858), and *Taylor v. Taylor*, 10 Minn. 107 (1865), decided in the mid-19th Century, in no way contradict these well-established principles. Those cases not only involved entirely different factual circumstances, but they involved a different statute, Rev. Stat. 50, ch. 5 § 43, that pre-dated the legislature’s expansion of the authority of the State Canvassing Board and counties in connection with their electoral activities. In 1887, the legislature granted the State Canvassing Board more robust authority, including the duty to certify a “correct” report of the election returns. *See* Minn. Laws 21 (now codified at Minn. Stat. § 204C.33, subd. 3). Similarly, in 1955, the legislature granted counties the authority to correct obvious errors. *See* 1955 Minn. Laws 243

(now codified at Minn. Stat. § 204C.39). Importantly, after *O’Ferrall* and *Taylor* were decided, this Court, followed by the Court of Appeals, provided clear direction about the importance of interpreting the election laws in favor of enfranchisement. See, e.g., *Andersen* 119 N.W. 2d 1; *School District*, 431 N.W.2d 911.

Finally, past practice in Minnesota, including in this election, demonstrates that counties have a duty to count all ballots that have not been rejected, even if the ballots were not counted at an earlier stage of the process. To date, during this recount process alone, election officials in numerous locations have counted ballots that they had originally failed to count. Specifically, officials in Becker County, Itasca County, Winona County, Scott County, and the cities of Golden Valley and Crystal have counted validly cast ballots during the recount process that they had inadvertently failed to include in their initial vote totals for the office of United States Senator. Indeed, in an email from counsel Tony P. Trimble, sent on December 4, 2008, representatives for petitioner Coleman advised the Secretary of State’s Office that the Scott County ballots should be counted because they were not “rejected” absentee ballots, but were “ballots that were not opened election night and not dissimilar to absentee ballots opened in Itasca, Becker, Golden Valley, etc.” (A-23.)

In short, consistent with state statute, precedent, and past practice, the State Canvassing Board correctly recommended that counties and local election judges count all ballots falling within the fifth category—*i.e.*, uncounted but not statutorily rejected absentee ballots—and include those numbers in amended reports to the Secretary of State for the Board’s canvass. To fail to count these ballots would contradict past practice and statute, improperly disenfranchise voters, and could allow “the loser to become the winner in spite

of the vote of the people.” *See Andersen*, 119 N.W. 2d at 12; *see also School District*, 431 N.W. 2d at 915.

**II. While Counting Erroneously Rejected Absentee Ballots Raises No Constitutional Concerns, Refusing To Count Them Would Violate Equal Protection.**

**A. The Board’s Recommendation Is Fully Consistent with the Federal and State Constitutions.**

Petitioners’ demand for relief ultimately depends on a single argument: that election officials violate the Constitution when they correct errors by identifying and counting ballots that, pursuant to clear Minnesota law, were erroneously rejected. As the State Canvassing Board implicitly recognized, this argument is without merit.

There is no sound basis for petitioners’ assertion that the direction to count improperly rejected absentee ballots would create non-uniform and unconstitutional standards. In fact, the standard that counties will use for accepting absentee ballots, pursuant to the State Canvassing Board’s decision, is perfectly clear—and is the same standard that has been in place throughout this election.

As petitioners recognize, “Minnesota law is clear on the grounds upon which absentee ballots may be rejected.” *See Amended Petition* at 4. Minn. Stat. § 203B.12, subd. 2 sets forth four specific reasons for rejection. If election officials conclude that one or more of the four reasons applies, the absentee ballot must be rejected. If election officials conclude that none of the four reasons applies, the absentee ballot must be opened and counted. The standard could not be clearer. Thus, there is no problem with unclear standards and no constitutional issue: Where the counting of ballots is governed by “specific rules designed to ensure uniform treatment,” and where, as here, the state is simply

asking that the clear standard be applied, voters have received equal protection. *See Bush v. Gore*, 531 U.S. 98, 106 (2000).

Furthermore, the standard governing the treatment of the uncounted absentee ballots recommended by the State Canvassing Board is precisely the same standard that was used on Election Day—and that has been used in Minnesota elections for decades. Tellingly, however, petitioners are not challenging the treatment of absentee ballots on Election Day. To the contrary, they are asking this Court to *require* election officials to treat some absentee ballots differently—in the face of clear error. The inconsistency reveals a second fundamental defect in petitioners’ position. If, as petitioners claim, “a strong likelihood exists that [the standards governing the grounds upon which absentee ballots may be rejected] will be interpreted differently, indeed on an *ad hoc* basis, by each county that engages in [the] process” (Amended Petition at 4), the exact same was true on Election Day, and there can be no principled reason (much less one based in the Constitution) for regarding the later set of more accurate results as more arbitrary than the earlier, less accurate results.

Moreover, the same standard has been used for decades in Minnesota; if it were *ad hoc*, then the validity of every Minnesota election for decades would be impeached. For the same reasons, petitioners’ contention that other basic statutory provisions governing absentee ballots will cause confusion and result in unequal treatment is without merit. *See* Amended Petition at 8 (citing, e.g., Minn. Stat. § 203B.07 (governing delivery of envelopes, design of envelopes, and eligibility certification); Minn. Stat. § 203B.08 (describing procedures for receipt of ballots)). The same provisions have existed throughout this

election and for decades. Petitioners offer no evidence (or even speculation) as to how these rules cause confusion.

In short, petitioners have failed to offer--and cannot offer--any example of Minn. Stat. § 203B.12, subd. 2, or other provisions, failing to provide sufficient clarity to pass constitutional muster. Instead, the allusions to errors that petitioners make are to mere mistakes in the application of these clear standards. Petitioners acknowledge as much when they state: “Just as mistakes may have been made in rejecting absentee ballot envelopes on election night, mistakes will inevitably be made in second-guessing these initial rejections.” (Amended Petition at 5.) Isolated mistakes, made in the face of a clear standard, simply do not present an Equal Protection problem, and petitioners cite no law to the contrary.<sup>4</sup>

Petitioners’ claim that counting the ballots at issue would cause “the votes of absentee voters who met the statutory requirements . . . [to] be diluted in contravention of the Equal Protection Clause” is nonsensical. (Amended Petition at 6.) The ballots at issue—those that remain uncounted without any statutory basis for rejection—are the “votes of absentee voters who met the statutory requirements.” And if they are not counted, their votes will not be merely diluted; they will be wholly discarded. In short, petitioners’ constitutional argument is without merit. *Bush v. Gore* in no manner precludes the counting of ballots validly cast pursuant to Minn. Stat. § 203B.12, subd. 2—rather, as set forth *infra*, it *requires* it.

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<sup>4</sup> Petitioners also have a district court remedy to correct any isolated errors that occur. *See* Minn. Stat. § 204C.39.

**B. The Vague References Petitioners Make to Potential Complications Are Without Basis in Fact or Law.**

Unable to point to any lack of clarity in the state law governing the acceptance of absentee ballots, petitioners have muddied the issue by vaguely alluding to a series of concerns and complications supposedly implicated by the Board's recommendation. None of these objections has merit.

First, petitioners claim that “the Board failed to provide uniform guidance to the counties on how to determine whether or not any absentee ballot envelopes . . . were improperly rejected.” (Amended Petition at 3.) They further criticize the non-binding “guidance” that has been provided by the Secretary of State. (*Id.* at 4.) But their descriptions of alleged problems are confused (*Id.* at 4-5), and even under petitioners' own logic, their criticisms are misplaced. Both the Board and the Secretary have encouraged county officials to sort the ballots in accord with Minn. Stat. § 203B.12, subd. 2—a statute that petitioners themselves acknowledge provides officials with clear guidance. (*See* Amended Petition at 4 (“Minnesota law is clear on the grounds upon which absentee ballots may be rejected.”); *see also* Tr., A1-17; Detailed Instructions for Sorting Rejected Absentee Ballots at 4-5, A-371-72.) In effect, therefore, petitioners are claiming that the process routinely employed on election days in Minnesota—applying Minn. Stat. § 203B.12, subd. 2 and opening all absentee ballots not rejected pursuant to its four prongs—a process about which they have never raised concerns before, has become constitutionally deficient since November 4, 2008. Notwithstanding petitioners' attempts to criticize officials' guidance regarding this statute after taking it out of context (*see, e.g.*, Amended Petition at 4), this cannot be the case.

Second, petitioners allege that “counties have adopted differing standards,” with “some counties hav[ing] refu[sed] to engage in the process at all.” (*Id.* at 4-5.) But the failure of some counties to comply with the law and correct errors in accordance with state statute, in no way leads to the conclusion that all counties should remain non-compliant. To the contrary, all counties should comply to avoid a constitutional violation. *See infra*, at 19-21. Furthermore, petitioners’ concerns will be alleviated, if not fully allayed, once their own litigation is not delaying the process. A number of counties have been awaiting the State Canvassing Board’s resolution of the uncounted-ballot issue (and some have delayed awaiting this Court’s decision) before proceeding with the count. (*See Tr.* at 40, A-10.) Once this Court has ruled on the instant petition, and in light of the conclusions already reached by the State Canvassing Board, these counties will be able to decide how best to proceed. In the meantime, the vague claims petitioners make about allegedly inconsistent treatment of particular ballots cannot stop the statutorily and constitutionally mandated counting of ballots.

Third, petitioners question the authority of the State Canvassing Board to “consider” the ballots in question. (Amended Petition at 6.) But the authority of the State Canvassing Board is not at issue in this action, which petitioners brought in an attempt to prevent *county election officials* from correcting conceded and obvious errors. Perhaps more importantly, however, both statute and case law confirm that petitioners’ understanding of the Board’s authority is mistaken. Among other things, Board members must “certify” the “correctness” of a report that includes the “number of votes received by each of the candidates.” Minn. Stat. § 204C.33, subd. 3. By definition, a Board member cannot certify the correctness of a

report he or she knows to be in error. As a result, the Board necessarily has the ability to consider absentee votes that, pursuant to statute, should be counted.

Petitioners' more specific claim—that the State Canvassing Board lacks authority to consider the ballots in question because the ballots “are not part of the ‘summary statement’” (*id.*)—at best begs the question. The Secretary of State, for the State Canvassing Board, will receive amended reports incorporating these votes once the county canvassing officials have had the opportunity to count them. What is more, there is controlling precedent for corrections of this sort. Minn. Stat. §§ 204C.38 and 204C.39 provide for the correction of errors. While the statutes do not specify any time period within which such corrections must be made (other than noting that there should be no unreasonable delay), this Court has confirmed that the county canvassing boards have inherent authority to correct errors after they have certified their initial reports but before the results of the election have been finalized. *See Application of Andersen*, 119 N.W.2d 1 (Minn. 1962). As the Attorney General recently explained, “*Andersen* supports a flexible reading of sections 204C.38 and 204C.39 to allow local canvassing officials to amend their election returns pursuant to those statutes before the election results are finalized in order to correct errors in the vote for the 2008 election for United States Senate.” (Attorney General Letter at 4, A-27.) As a result, petitioners' reference to “summary statements” is mistaken.<sup>5</sup>

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<sup>5</sup> Petitioners mistakenly argue that the Board lacks authority to consider the ballots in question because they were not “cast in the election”—an apparent reference to Minn. Stat. § 204C.35, which addresses administrative recounts, not the authority of the State Canvassing Board. Even if Minn. Stat. § 204C.35 circumscribed the authority of the Board, absentee ballots that are received but uncounted 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

Fourth, petitioners allude to concerns over evidence being “lost or destroyed.” (Amended Petition at 7, 8.) Yet petitioners have failed entirely to explain the basis for this concern, and it is not at all evident. To the extent petitioners are attempting to “preserve[]” evidence for the purpose of eviscerating the secrecy of the ballots, *see id.* at 7, 8, petitioners’ underlying goal is unconstitutional and should be disregarded. *See Elwell v. Comstock*, 109 N.W. 698, 699 (Minn. 1906); *Matter of Contest of School Dist. Election*, 431 N.W.2d 911, 915 (Minn. Ct. App. 1988); *see also infra*.

Finally, petitioners imply that the ballots should be ignored unless and until there is an election contest. But an election contest is neither the proper forum for addressing uncounted ballots in the first instance nor the exclusive forum. The canvassing process—not the contest—is designed to tally and certify the “correct” number of votes. *See* Minn. Stat. § 204C.33, subd. 3. Even if this provision is read to encompass only “accepted” votes, there is no basis for excluding uncounted, erroneously rejected absentee ballots. It is critical that the certified vote count be as accurate as possible. “No voter should be required to rely on an election contest to ensure his or her vote is counted by the State Canvassing Board.” (Detailed Instructions at 1, A-368.)

Minnesota’s election law is designed to provide several layers of review, all of which supply an essential safeguard. A contest is not an adequate replacement for the canvass, but is rather an additional layer of review. Unlike in the initial count and canvass, the burden of proof in an election contest rests upon the contestants. *See Green v. Independent Consol. School*

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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” and therefore uncountable ballots).

*Dist. No. 1*, 89 N.W.2d 12, 16 (Minn. 1958); *Sullivan v. Ebner*, 195 Minn. 232 (1935).

Consequently, to require absentee ballots left uncounted without a statutory basis for rejection to be dealt with in a contest, while scrutinizing all other uncounted ballots in the canvass and recount, would not provide an equal remedy for those voters, causing serious constitutional violations. *See infra*. Finally, a contest involves delay and litigation and Minnesota precedent makes clear that the statutory framework aims to achieve “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)), and to “avoid the necessity of an election contest where possible,” *Andersen*, 119 N.W.2d at 5.

Petitioners, in short, have set forth a scattershot of arguments in an attempt to bolster their central theory that county election officials somehow violate the Constitution when they correct errors by identifying and counting absentee ballots that, pursuant to clear Minnesota law, were erroneously rejected. None of petitioners’ arguments—central or otherwise—has merit. To the contrary, county election officials must correct these errors; doing so raises no constitutional concern; and the State Canvassing Board was correct to recommend this course of action.

**C. To Fail To Count Ballots Left Uncounted without a Statutory Basis for Rejection Would Violate the Federal and State Constitutions.**

Petitioners’ constitutional argument is not only wrong; it is backward. To *fail* to count the ballots in question would violate the principles of equal protection set forth in *Bush v. Gore*. Once a State has created the right to vote by absentee ballot and established certain governing rules for the process, it cannot retroactively deprive those voters who have substantially complied with the process of their right to have their ballots counted. In few

circumstances is this clearer than in the case of uncounted ballots where officials have identified no statutory basis for rejection and/or admitted error in rejection of ballot. Such arbitrary disenfranchisement would violate both the state and federal constitutions. “It is beyond cavil that voting is of the most fundamental significance under our constitutional structure.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (internal quotation makes omitted). “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)); see also *Kahn v. Griffin*, 701 N.W.2d 815, 832 (Minn. 2005) (“It is undisputed that the right to vote is a fundamental right under both the federal and state constitutions.”)).

“Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections.” *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). But the Constitution protects “more than the initial allocation of the franchise.” *Bush v. Gore*, 531 U.S. 98, 104 (2000). Rather, it is well-settled that the Constitution protects the right of all qualified voters to have their votes counted equally. *Reynolds*, 377 U.S. at 554 (citing *United States v. Mosley*, 238 U.S. 383 (1915)). A contrary rule would make no sense, for the right to vote would be meaningless if votes cast in compliance with law were not counted—or not counted equally. As the United States Supreme Court has repeatedly emphasized, “[t]he right of suffrage can be denied by a debasement or the dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Bush v. Gore*, 531 U.S. 98, 105 (2000) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

The right to vote, and to have votes counted equally, extends to absentee ballots. Though the state need not create a universal right to vote absentee, once the state has extended to its citizens that right, it cannot refuse to count votes that comply with its own processes. *See Bush*, 531 U.S. at 104 (individual has no federal constitutional right to vote for electors for President but once the state extends that right, it becomes fundamental); *see also School District*, 431 N.W.2d at 915 (citing *Bell v. Gannaway*, 227 N.W.2d 797, 802 (1975)). Thus, because Minnesota has granted individuals a right to vote absentee, it “may not, by later arbitrary and disparate treatment,” value non-absentee ballots over validly cast absentee ballots. *See Bush v. Gore*, 531 U.S. at 104-105 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)). “[E]qual weight” must be “accorded to each vote,” for “equal dignity [is] owed to each voter.” *Bush*, 531 U.S. at 104; *see also League of Women Voters v. Brunner*, \_\_\_ F.3d \_\_\_, 2008 WL 4999087 (6th Cir. 2008)(A-375.)

When a regular ballot is cast at the polls and accepted, but then not counted by county officials (for example, due to an overvote or analogous defect), that ballot is subject to review by county officials, 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—or, at an absolute minimum, to error correction by county officials after such officials have *already identified the absentee ballot in question* as not triggering any of the statutorily defined grounds for rejection. To ignore documented errors and refuse to address absentee ballots left uncounted without a statutory basis for rejection, while considering and 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. Rather, such “unequal evaluation of ballots” would violate the U.S. Constitution’s basic principle of one-person, one-vote. *Id.* at 106-07; *see also Pierce v. Allegheny Cty. Bd. Of Elecs.*, 324 F. Supp. 2d 684 (W.D. Pa. 2003) (plaintiffs stated equal protection claim by alleging disparate treatment of absentee ballots across the state).

Likewise, the Minnesota Constitution prohibits such disparate treatment. This Court “has recognized that our state constitution embodies principles of equal protection synonymous to the equal protection clause of the Fourteenth Amendment to the United States Constitution.” *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (citing *State v. Forge*, 262 N.W.2d 341, 347 n. 23 (Minn. 1977)). Indeed, if anything, the Minnesota Constitution requires even more “stringent” review and a more robust guarantee of equal protection. *See Russell*, 477 N.W. at 889.

**D. Petitioners’ Proposed Procedures Would Produce a Disruptive, Illegal, and Unconstitutional Result.**

Tacitly acknowledging the weakness of their central position—that the uncounted ballots should be simply disregarded—petitioners propose an “alternative” approach. (*See Amended Petition* at 7.) Yet petitioners’ proposed alternative, a five-pronged regime for opening and counting the ballots, would give unprecedented opportunities for candidate challenges, inappropriately incorporate elements of a recount, and eviscerate the system of voting by secret ballot. This unprecedented request for last-minute judicial rule-making should be rejected. Instead, the existing and well-established procedures governing absentee ballots should be followed.

First, petitioners propose that campaign representatives “be permitted to challenge a decision to open an absentee ballot.” (*Id.* at 7.) This proposal misunderstands the error being corrected. Because the ballots in question satisfy none of the criteria set forth in Minn. Stat. § 203B.12, subd. 2, each should have been opened and counted on Election Day, just like the over 250,000 other absentee ballots that already were so opened and counted. An election official’s power and obligation to open an absentee ballot is not subject to an Election Day challenge by candidates, and there is no reason it should be subject to challenge here. Indeed, to allow it to be subject to such a candidate challenge—while ballots opened on Election Day were not—raises serious Equal Protection concerns. *See supra.*

Second, petitioners demand that each ballot, with its votes revealed, be “tied” to the opened envelope, with the voter’s name displayed. (*Id.* at 8.) This proposal is constitutionally precluded, as it would eviscerate the secret ballot. *See, e.g., Elwell v. Comstock*, 109 N.W. 698, 699 (Minn. 1906) (describing ballot secrecy as a constitutional mandate); *Matter of Contest of School Dist. Election*, 431 N.W.2d 911, 915 (Minn. Ct. App. 1988) (describing the “purpose and intent behind absentee voting legislation” as, *inter alia*, “the preservation of the secrecy of the ballot”).<sup>6</sup>

Third, to implement new procedures that are different from the procedures created by the statute would require this Court to usurp legislative authority. In *Breza v. Kiffmeyer*, 723 N.W.2d 633 (Minn. 2006), the petitioners sought to enjoin a ballot question on the

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<sup>6</sup> Petitioners also suggest that campaign representatives receive information relating to the process of opening and counting the ballots. To the extent that such data would be available pursuant to the Minnesota Government Data Practices Act, Minn. Stat. § 13.03 *et seq.*, the Franken Parties have no objection.

grounds that it was unconstitutionally misleading. The Court held that the language was clear enough to submit it to the voters and that to do otherwise would “invade the province of the legislature.” 723 N.W.2d at 636. Similarly here, this Court should not interfere with the Canvassing Board’s direction that the counties follow procedures already set out in the applicable Minnesota statutes that require absentee ballots to be counted.

In short, petitioners’ proposals are flawed and even unconstitutional, and they should be rejected.

### **III. Petitioners’ Motion for Temporary Relief Should Be Denied Because Petitioners Have Not Shown That They are Entitled to Extraordinary Relief.**

Parties who seek temporary injunctive relief face a difficult burden, which petitioners cannot overcome. Most significantly, petitioners’ claims are without merit, as demonstrated in Section II, *supra*. What is more, petitioners have failed to show that a weighing of the relative hardships favors their position. As a result, this Court should deny the motion for injunctive relief.

A temporary injunction is an extraordinary equitable remedy. *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982). The decision to issue an injunction rests within the Court’s broad discretion. *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 26 (Minn. 1981).

In exercising its discretion, the Court considers five factors:

1. The nature of the relationship between the parties before the dispute giving rise to the request for relief;
2. The relative hardship which will be suffered by the parties if the injunction is granted compared to if the injunction is denied;
3. The likelihood of success on the merits of the plaintiff’s claim;
4. The public interest; and

5. The administrative burden on the court.

*Dahlberg Bros. Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965). Here, none of the *Dahlberg* factors warrant temporary relief.

Most significantly, as shown above, petitioners are not likely to succeed on the merits of their Amended Petition. Once the Court has found a failure to show a likelihood of success on the merits, as the Franken Parties have demonstrated, the remainder of the *Dahlberg* factors carry little weight. See *Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 379 (Minn. Ct. App. 1999) (“With no likelihood of success on the merits, the other *Dahlberg* factors are almost academic.”).

Furthermore, petitioners have failed to make the required showing of irreparable harm. See *Costley v. Caromin House, Inc.*, *supra*, at 28; *Eason v. Independent School Dist. No. 11*, 598 N.W.2d 414, 418 (Minn. Ct. App. 1999); *Miller v. Foley*, *supra* at 712-13. Petitioners argue, in effect, that opening and counting the absentee ballots will affect their ability to bring challenges in an election contest. Yet if this constitutes “irreparable harm,” then every absentee ballot already opened by election officials has caused such harm to all parties interested in this election.

Perhaps petitioners are advancing a far more radical claim: that this Court should work to preserve their ability to cross-reference each ballot with the envelope in which it came. This would allow petitioners to match particular voters to their votes. This proposal is not only unprecedented; it is constitutionally precluded, as it would eviscerate the secret ballot. See, e.g., *Elwell v. Comstock*, 109 N.W. 698, 699 (Minn. 1906) (describing ballot secrecy as a constitutional mandate); *Matter of Contest of School Dist. Election*, 431 N.W.2d 911, 915

(Minn. Ct. App. 1988) (describing the “purpose and intent behind absentee voting legislation” as, *inter alia*, “the preservation of the secrecy of the ballot”).<sup>7</sup>

Moreover, the petitioners’ request that this Court judicially impose a last minute jerry-rigged set of rules to govern the opening and counting of ballots that were erroneously rejected is completely unnecessary, as the legislature has provided a perfectly constitutional and time-tested method for handling exactly such situations: Minn. Stat. § 204C.39.

Subdivision 1 provides that county canvassing boards “may determine by majority vote that the election judges have made an obvious error,” and contains a detailed specification of how candidates are to be notified of such determinations. An aggrieved candidate has a right to immediate review of the canvassing board’s decision in the district court.

Subdivision 2 provides that the county canvassing board shall thereafter give sufficient notice of its meeting at which ballots will be inspected in the presence of the candidates or their representatives, and any errors in the canvass may then be corrected. Subdivision 3 specifies how the county canvassing boards are to thereafter report the results. Given this specific statutory scheme, there is no need for this Court, at the eleventh hour in an election recount, to create a new and different set of procedures as petitioners suggest.

Furthermore, a court must balance the relative hardship that will be suffered by the parties if the injunction is granted compared to if the injunction is denied. *Dahlberg*, 137 N.W.2d at 321-22. Here, issuance of an injunction would cause far greater harm to all other

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<sup>7</sup> Although this Court’s December 15, 2008, order required county officials and boards to preserve this information for the two-day period between the date of the order and the December 17 hearing, the constitutionality of applying this procedure to all “fifth pile” absentee ballots had not yet been briefed. The procedures specified in Minn. Stat. § 204C.39, discussed *infra*, provide adequate protection to petitioners.

interested parties, including the named respondents and every Minnesota voter: “[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*, 659 N.W. at 729 (internal quotation marks omitted). As discussed above, postponing the counting of valid votes to an election contest, rather than at the pre-contest canvassing stage, would harm the voters—and Minnesota’s entire electorate—irreparably. To require absentee ballots that were erroneously left uncounted to be dealt with in a contest, while scrutinizing all other uncounted ballots in the canvass and recount, would not provide an equal remedy for those voters. *See Bush v. Gore*, 531 U.S. 98, 104 (2000).

Petitioners’ request for relief is undermined even further by their own characterization of the relationship between the parties. According to petitioners, “[t]he preexisting relationship between the parties to be preserved is the uniform application of objective, statewide standards in determining what constitutes a valid vote in the general election and/or during the recount.” (TRO Motion at 4.) Petitioners’ proposal would interrupt the process so carefully set forth in statute and methodically implemented by election officials. Indeed, petitioners’ requested relief would drastically alter the relationships between the parties by, among other things, inappropriately circumventing the duties and authority of election officials and supplanting those duties and authority with a hypothetical, future election contest.

This point is set in even starker relief upon consideration of the public interest. The public interest would not be served by halting the process until an election contest. An election contest involves delay and litigation and, as this Court has made clear, the statutory

framework aims to “avoid the necessity of an election contest where possible,” *Andersen*, 119 N.W. at 5. The public interest is advanced by *avoiding* election contests, not by making election contests a practical necessity.

Most fundamentally, the public interest is advanced significantly when election officials count all validly cast votes. *See, e.g., 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) (“Denial of a candidate’s access to the ballot implicates important constitutional rights that are central to preservation of our democracy: the right to vote and the right to associate in pursuit of common political ends.”) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983)). The disenfranchisement of eligible voters certainly does *not* advance the public interest, even where one party is apparently under the impression that there will at some point be an election contest—which, as noted, imposes procedures and burdens above and beyond those applicable at the canvassing stage.

Finally, petitioners misstate the administrative burden of granting their motion. Were this Court to grant the requested relief, it would abruptly stop a process that has been underway for weeks, and significantly complicate the straightforward mandate that election officials are prepared to follow. It would not in any manner alleviate the need to address the particular category of ballots—that is, those erroneously rejected—at issue in this action. What is more, the administrative burden of denying temporary relief is low. *See City of Mounds View v. Metropolitan Airports Comm’n*, 590 N.W.2d 355, 359 (Minn. Ct. App. 1999); *see also Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 379 (Minn. Ct. App. 1999)

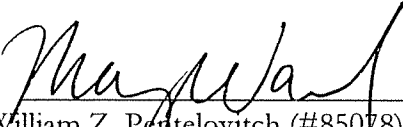
(“While the existence of administrative burden associated with an injunction might be a significant factor counseling against granting the injunction, the absence of such a burden is not a very strong argument in favor of extraordinary relief.”).

### CONCLUSION

For the foregoing reasons, the Franken Parties respectfully request that this Court issue an order denying the relief sought by petitioners. To the extent this Court wishes to issue an affirmative order addressing the substantive matters raised by this action, the Franken Parties respectfully request that this Court issue an order requiring that election officials correct errors and count each absentee ballot validly cast in the November 4, 2008 election.

Respectfully submitted,

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