

No. A08-2206

DEC 22 2008

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STATE OF MINNESOTA  
IN SUPREME COURT

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FILED

Norm Coleman,

*Petitioner,*

v.

The Minnesota State Canvassing Board, and Michelle DesJardin, Hennepin County  
Elections Manager, Cynthia Reichert, Minneapolis Elections Director, and Hennepin  
County Canvassing Board, 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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**REPLY MEMORANDUM IN SUPPORT OF PETITION**

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## INTRODUCTION

Members of the Minnesota State Canvassing Board (“Board”) recognized that double-counting would likely occur if the Board refused to uphold the candidate challenges to original ballots for which no matching duplicate could be found (“Non-Matching Original Ballots”), but the Board nevertheless felt constrained by its limited statutory powers. This Court has the authority to correct an error that is about to occur in the Recount, namely, that votes *will* be double-counted. Minnesota law presumes that if more ballots are counted during the Recount than the number of voters who voted on Election Day, those ballots are illegal and cannot be counted. In order to preserve the integrity of the election and the principle of “one person, one vote,” this Court must intervene to prevent the double-counting of votes and the disenfranchisement of Minnesota voters. This can be done most consistently, while honoring the presumption of Minnesota Election law, by not counting Non-Matching Original Ballots.

The parade of factual horrors suggested by the Franken campaign is severely overstated and will not occur if Petitioner’s requested relief is granted. Both campaigns had Recount observers in every county and can identify the limited number of precincts where Non-Matching Original Ballots were present. The campaigns can promptly notify the relevant counties, who can in turn review those precincts and apply a simple and consistent rule to prevent wide-scale disenfranchisement by vote dilution: Non-Matching Original Ballots shall not be counted.

## RELEVANT FACTUAL BACKGROUND<sup>1</sup>

During meetings of the State Canvassing Board last week, Board members made clear that double counting had likely occurred, but expressed concern that the Board did not have authority to decide challenges based on the ballot being a Non-Matching Original.

I might just observe that as much as we have made it clear that we want to count all legally cast ballots, I don't want to count ballots twice. And I am sensitive to the fact that there appears to be an issue that there is double counting. I'm just not sure that it's an issue that we have the ability to resolve. But it's an issue that's gotta be resolved. There should not be double counting. And I think that we're simply arguing about in what forum that issue is dealt with. And I still . . . don't understand how I can, without considering evidence extrinsic to the ballots, make a decision as to whether a particular ballot was counted more than once. I don't know how I can do that.

Magnuson, C.J., transcribed from Dec. 17, 2008 video at 4:26:50 p.m. (emphasis added)  
available at [http://www.house.leg.state.mn.us/htv/archivessem.asp?ls\\_year=85](http://www.house.leg.state.mn.us/htv/archivessem.asp?ls_year=85).

I think I agree with where the Chief Justice was going, and I'm still not convinced that this will not take factual determinations that are beyond the scope of what it is we are doing here, so . . . I don't think anybody loses anything—it's just a question of forums and I think that's what he said. I think the forum is an election contest, if that comes to be.

Cleary, J., transcribed from Dec. 17, 2008 video at 4:34:18 p.m.

It seems to me that the counties have counted and they have made their returns to us, and if someone wants to challenge the action of the local officials, what I have consistently said

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<sup>1</sup> Except for what is supplemented below, the Petition at pages 1-7 contains the relevant factual background.

they should go to court to do that. If they have inaccurately run ballots through the machine or have lost the originals, or done something untoward in any way, there's a forum for resolving that, but we get the returns, and if someone says that return is inaccurate because the voter intent is different than was reported, we resolve that. . . . But we do not examine the procedure by which the local official got to the count. That's why we took the 133 votes from Minneapolis because that's what their report was, and I'm sympathetic to the issue, as I said the last thing I want to see is a double count of anybody's vote for anything, but it's not something that we can resolve on the face of the ballot.

Magnuson, C.J., transcribed from Dec. 17, 2008 video at 4:34:58 p.m.

My view is that I think we are, in fact, going down the road where it is very likely we will have double counting. I understand Mr. Elias's argument that it's a theory, it is a persuasive theory to me, the problem for me—and I haven't decided how I feel about this and where I may come out when we're faced with challenges tomorrow—the problem for me—and I want to be very candid and blunt—is that the parties agreed to a certain process and I think this is a very serious issue, I think it is very likely—I can't say it is certain—but I think it's very likely that there was double counting. I think it's very likely that there will be election challenges. There will be election challenges on this issue, I think regardless of what we decide . . . I think, although it's not expressly stated, is what chapter statute 206.86, subdivision 5, seems to require. The question then becomes can we determine that on the face of the ballot? It seems to me that it is an administrative or ministerial duty to match up the original with the duplicate, and if they don't match, that you would then have the ability to say we're not going to count that ballot. It is also true, it seems to me, that [the campaigns] may very well have arguments that they were unfairly treated in this process with respect to specific counties, and I think those—like other factual issues—are matters for an election contest. So, I think you could do it administrative and ministerially, I think it's a serious issue, but I am disturbed . . . I do think there is a potential double counting here and it concerns me that . . . I think the statute . . . contemplates running the duplicate and matching it up

with the original. I have to concede it doesn't expressly state that a match is required. . . . I frankly think that there is a very good likelihood that there is double counting going on here.

Anderson, J., transcribed from Dec. 17, 2008 video at 4:36:49 p.m. (emphasis added).

And it seems to me that the most sensible way to deal with this issue is to let everybody go back to the local election officials and since the challenge is to their conduct, which we don't review, and have them start at an, you know, even Steven and, you know, to the extent it's got to be hashed out, hash it out. But I'm just -- I have to say that I think I understand this a little better now, but I'm terribly uncomfortable placing my imprimatur on something that I think basically requires more facts than I've got.

Magnuson, C.J., Dec. 18, 2008 Tr. at 59 (emphasis added).

## ARGUMENT

Petitioner merely requests that local election officials and county canvassing boards, which are required to meet prior to the end of the year to consider previously rejected absentee ballots, be ordered to review any instances of likely double counting of votes. This problem exists in only a limited number of precincts. The campaigns can identify each precinct, if any, within a county where original ballots were counted without a corresponding marked duplicate being removed from the ballots.

### **I. The Board Has Already Relied on the Election Night Total From One Precinct That Reported a Vote Total Discrepancy.**

Nominal Respondent The Hennepin County Canvassing Board ("HCCB") and Michelle Desjardin state that "[o]nly duplicate ballots (identified and unidentified) were part of county canvasses. In other words, *no Original Ballots were included in county canvasses.*" Resp. of M. Desjardin and The Hennepin County Canvassing Board at 10 (emphasis in original); *see also* Desjardin Aff., ¶ 2 ("The results certified did not include

any 'Original Ballots'...only the duplicates were included and not the 'Original Ballots.'"). The HCCB thus asserts that because its initial canvass did not include any Non-Matching Original Ballots, its November 10, 2008 canvass already complies with Petitioner's requested relief. *See Resp. of Desjardin & HCCB* at 10. While this may be correct, it ignores the fact that many Non-Matching Original Ballots were challenged in Minneapolis and Hennepin County. *See Reichert Aff.* ¶ 8 ("In the cases where the number of original ballots exceeded the number of duplicates and no match to a duplicate could be made, the original was placed back into the count, but immediately challenged."). Based on the State Canvassing Board's decision to reject these challenges, those ballots will be added to the count and double counting will occur.<sup>2</sup>

An analogous situation has already arisen in Minneapolis. After allegations that approximately 133 ballots had been lost during the Recount from Ward 3, Precinct 1, the City of Minneapolis, through the Hennepin County Canvassing Board, certified the election night totals, instead of the Recount totals for that precinct. *See Walstien Aff.* ¶ 11. If such action was appropriate in that instance to prevent possible disenfranchisement, ordering counties *not* to count and certify Non-Matching Original Ballots that exceed the number of votes certified in the initial canvass is appropriate here to prevent disenfranchisement by vote dilution.

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<sup>2</sup> While the Franken campaign incorrectly calls the fact that double counting has occurred or will occur "rank speculation," Cynthia Reichert essentially confirms that double counting will occur. *See Reichert Aff.* ¶ 8. Tellingly, she made no challenge to a media report cited in the Petition, which states, "Director of Elections for Minneapolis, Cindy Reichert, seems to concur with Coleman's assessment [about double vote counting.]" *Walstien Aff. Ex. 8.*

## II. Minnesota Law Creates a Presumption that Duplicate Ballots Were Made and Counted.

Due to the mandatory nature of the statute, which requires duplicates to be created and counted, the presumption should be that where an original ballot is found without a corresponding duplicate ballot, a duplicate ballot was made but was not properly marked. See Minn. Stat. § 206.86, Subd. 5 (“a true duplicate copy *must* be made . . . and *must* be substituted for the damaged ballot card”) (emphasis added). Further, each Non-Matching Original was removed from sealed envelopes entitled “Ballots for which duplicates were or are to be made.” Minn. Rule 8230.3850(E). There would be no reason for local election officials to mark a ballot “Original” if they did not create a duplicate, whether or not they properly marked the duplicate with the word “Duplicate.” Moreover, it was the duplicates, not the originals, that were cast and tabulated on election night. Thus, consistent with Minnesota’s Recount law that allows only “ballots cast in the election and the summary statements certified by the election judges [to] be considered in the recount process,” no Non-Matching Original Ballots should be counted.<sup>3</sup>

The presumption that Unmarked Duplicate Ballots exist is especially appropriate in precincts in which the number of ballots counted in the Recount exceeds the number of ballots cast on election night (both in-person and by absentee) by exactly the number of Non-Matching Original Ballots. Where there are more ballots than voters who voted on

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<sup>3</sup> The plain language of the statute does not allow any duplicated originals to be counted during the Recount. However, the procedure of reviewing and counting the originals, after removing the corresponding duplicates, made practical sense during the Recount when officials were charged with counting *and* determining voter intent—intent can only be determined by reviewing the original ballot filled out by the voter.

Election Day, Minnesota law presumes that such excess ballots are illegal and, therefore, cannot be counted. See *Johnson v. Trnka*, 154 N.W.2d 185, 187 (1967) (noting that where there are more ballots than voters who voted on election day, the votes cast over the number of voters “cannot be said to be legal”). “The outcome of an election should rest upon ballots received according to law and should not be determined by illegal votes.” *Id.*

While the presumption should be that Unmarked Duplicate Ballots were made and therefore Non-Matching Original Ballots cannot be counted, in limited situations, the campaigns may develop evidence to show that duplicates were not made for some Original Ballots. However, evidence that duplicate ballots were not made can only be raised in an election contest to rebut the presumption that the duplicate ballots were made, but simply not marked, and that these Unmarked Duplicates were counted during the Recount. Local election officials, county canvassing boards, and the State Canvassing Board must presume during the Recount and the Canvass that duplicates were made for each original. The law requires as such.

### **III. Courts Presented with the Issue of Non-Matching Original Ballots Have Refused to Count Them.**

Although Minnesota courts have not addressed these issues, other jurisdictions with similar statutes have concluded that despite the strong public policy that ballots should be counted even where there is a clerical error, Non-Matching Original Ballots should not be counted because to do so would be to “ignore the clear written law on the subject, and create a situation that would authorize procedures that would frustrate the

proper handling of ballots and even create methods for fraudulent mischief in the counting of the votes.” *Wright v. Gettinger*, 428 N.E.2d 1212, 1223 (Ind. 1981). As an Illinois Court has stated: “The legislature intended to insure certainty in the matching of duplicate ballots with the damaged original ballots. . . . [T]he language of the statute is mandatory and quite clear. If there were to be exceptions or if the legislature had intended that these procedures be merely directory, it would seem that language to that effect would appear somewhere in The Election Code.” *Larson v. Bd. of Educ. of Bement Comm. School Dist. No. 5*, 455 N.E.2d 866, 868 (Ill. App. Ct. 1983).

These statutory requirements “substantially contribute to the integrity of the election process. These requirements are a reasonable means of eliminating opportunities for election fraud and uncertainty.” *Id.* “Valid, mandatory statutory provisions that contribute substantially to the integrity of the election process must be enforced by the courts.” *Id.* Thus, Non-Matching Original Ballots should not be counted, even where “there is not even an inference that there was any fraud or mischief” because “the statute provides that when a duplicate is made of an original, that duplicate should be counted and not the damaged original.” *Wright*, 428 N.E.2d at 1222.

#### **IV. The “Agreement” Does Not Allow for the Counting of Non-Matching Originals.**

The Franken campaign, in the Brief of Al Franken for Senate Committee, makes much of the “agreement” that led to Rule 9 of the Secretary of State’s Recount Plan. Importantly, Rule 9 does not specifically contemplate the situation where there are marked duplicates for some, but not all, of the originals. Respondent Cynthia Reichert

acknowledges that Rule 9 does not address this situation. *See* Response of Cynthia Reichert at 2 (Rule 9 “did not address this particular situation.”).

Rather, Rule 9, as explained by the Secretary of State’s office, supports Petitioner’s position. The Secretary of State’s office offered this direction to the counties: “If no ballots marked as duplicates, no reason to go to Original Envelope, there is no way to pull out duplicates to replace with originals.” Franken Br. at 5 (citing Sautter Aff., Ex. D, p. 2.). Similarly, Mr. Poser stated, “If there are no duplicate ballots found during the sorting process, the canvass board has not authorized the envelope of original ballots to be opened and the original ballots envelope should remain sealed.” Walstien Aff. Ex. 7 at p. 2.

The Secretary of State, the Board and the parties clearly understood that even if an envelope full of original ballots was found it could not be opened and counted unless ballots marked as “duplicates” were first found during the sorting. If the counties were expected to disregard an entire envelope of originals when no duplicates were found, it follows that an individual original ballot without a corresponding marked duplicate cannot be counted. There was no agreement that Non-Matching Originals would be counted.

Guidance to the counties to remove the duplicate ballots and review original ballots in their place made practical sense when the focus was on voter intent. It was not, however, intended to deal with the fundamental issue of counting, and preventing double counting. The Franken campaign’s argument that the parties’ limited agreement related

to Rule 9 creates an estoppel is wrong.<sup>4</sup> It instead consistently supports Petitioner's request for relief.

**V. The Counties Can Certify the Correct Results by Correcting Their Obvious Errors.**

The issue here is counting, or more specifically, double counting of ballots. If a county canvassing board counted Non-Matching Original Ballots, then it necessarily "made an obvious error in counting or recording the votes for an office." Minn. Stat. 204C.39, Subd. 1. This Court should, pursuant to Minn. Stat. 204B.44, order all county canvassing boards and local election officials to refrain from counting any Non-Matching Original Ballots. Any county canvassing boards that have included Non-Matching Original Ballots in their Recount summary statements should be ordered to amend their returns so that Non-Matching Original Ballots are not counted, thus preventing any double counting of ballots.

Such an issue is ripe for obvious error treatment. The Secretary of State gave unclear and incomplete guidance to local election officials during the Recount about how to handle situations in which some duplicates and originals were correctly marked, but additional originals are found for which there is no corresponding marked duplicate. In such situations, most local election officials allowed campaign representatives to

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<sup>4</sup> The Franken campaign's laches and waiver arguments similarly fall short based on this important fact: During the Recount, representatives of the Coleman campaign challenged Non-Matching Original Ballots to maintain their objection and try to prevent the double counting of votes. See Response of Cynthia Reichert at 3. The Coleman campaign has also argued strenuously before the Board that challenges to Non-Matching Original Ballots must be upheld to prevent double counting.

challenge the original ballots, assuming the State Canvassing Board would resolve the issue. Once the Secretary of State learned that there were Non-Matching Original Ballots in some precincts, he should have instructed local election officials to sort and count only original ballots with a corresponding marked duplicate. Now that county canvassing boards have been ordered to reconvene, they have the opportunity to ensure that no votes have been double counted. The instruction to them should be simple and clear: Any original ballot that does not have a corresponding marked duplicate shall not be counted.

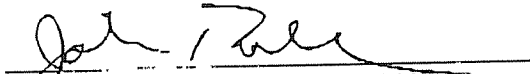
As long as the campaigns are allowed to identify all precincts where Non-Matching Original Ballots were present, and the county canvassing boards are ordered not to count them, there will be no Equal Protection concerns and the Constitutional "one person, one vote" principal will be protected.

### CONCLUSION

For the reasons stated in the Petition and above, Petitioner respectfully requests that this Court order all county canvassing boards that counted Non-Matching Original Ballots during the Recount to amend their summary statements so that they count only original ballots for which there are corresponding marked duplicates. This Court should also restrain the Board from finalizing its Canvass until it has received these amended summary statements.

Dated: December 22, 2008

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December 22, 2008

**VIA MESSENGER**

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Re: Norm Coleman vs. The Minnesota State Canvassing Board et al.  
Docket No.: A08-2206

Dear Mr. Grittner:

Enclosed for filing in the above-referenced matter are the original and eight copies of  
Petitioner's Reply Memorandum in Support of Petition.

By copy of this letter and enclosures, all counsel and/or parties are hereby served.

Thank you for your assistance.

Very truly yours,

Gretchen A. Agee

Enclosure

- cc: Minn. State Canvassing Board,  
c/o The Honorable Lori Swanson (w/ enc.) (via messenger)
- Michelle DesJardin (w/ enc.) (via messenger)
- Cynthia Reichert (w/ enc.) (via messenger)
- Hennepin County Canvassing Board c/o M. Freeman, Esq. (w/ enc.) (via messenger)
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