

OFFICE OF
APPELLATE COURTS

DEC 16 2008

FILED

STATE OF MINNESOTA

IN SUPREME COURT

A08-2169

Norm Coleman et al..

Petitioners

vs.

AFFIDAVIT OF
CATHERINE E. MOHN

Mark Ritchie, Minnesota Secretary of State,
the Minnesota State Canvassing Board,
Isanti County Canvassing Board, et al.,

Respondents

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Catherine Mohn, being first duly sworn, deposes and says as follows:

1. I am Catherine Mohn, Executive Assistant to Secretary of State Mark Ritchie. I have held this position since January 8, 2007.
2. In my role as Executive Assistant, I have been assigned to prepare and distribute the minutes of the State Canvassing Board.
3. I attended the meetings of the State Canvassing Board held November 26, 2008 in Room 200, State Office Building, at 9:30 AM, and December 12, 2008 in Room 15, Capitol, Saint Paul, Minnesota, commencing at 9:30 A.M. for the purpose of taking the minutes of those meetings and otherwise assisting Secretary Ritchie, the Chair of the State Canvassing Board.

4. I took minutes of those meetings, relying upon my own notes and the electronic video of those State Canvassing Board meeting available at:

http://www.house.leg.state.mn.us/htv/archivessem.asp?ls_year=85

see the entry for November 26, 2008,

and

http://www.senate.mn/media/media_list.php?ls=85&archive_year=2008&category=special&type=video#header

see the entry for December 12, 2008.

5. The draft minutes based on those notes and the video are attached to this Affidavit as Exhibits A (November 26, 2008) and B (December 12, 2008). The minutes of the November 26, 2008 meeting have been approved by the State Canvassing Board. The minutes of the December 12, 2008 meeting have not yet been reviewed or approved by the members of the State Canvassing Board. The Board members will discuss and approve the minutes, possibly with corrections and other changes, at the meeting scheduled for Noon, December 16, 2008.
6. In Paragraph 3 of the Court's Order in A08-2169, *Coleman et al v. Ritchie, et al*, the Court requests, "In addition, the Secretary of State or the State Canvassing Board shall provide a record or whatever documentation is available to inform the court of the action taken at the Board's December 12, 2008 meeting with respect to rejected absentee ballots."
7. In the penultimate paragraph of page 11 of the draft minutes attached as Exhibit B, the draft minutes state:

Judge Cleary's motion was then restated as follows: The state canvassing board recommends that county canvassing boards that have not already done so reconvene and separate allegedly wrongfully rejected absentee ballots into five categories, the first four categories being the reasons for rejection set forth in *Minnesota Statutes* 203B.12 and 203B.24, the fifth category being those that are not included in any of the four categories for rejection.
8. In the first paragraph of page 12 of the draft minutes (Exhibit B), the draft minutes state:

There being no further discussion, the motion passed unanimously.

9. Thus the action taken by the State Canvassing Board at the December 12, 2008 meeting is as stated in paragraphs 7 and 8 of this affidavit.
10. Other discussion regarding this motion took place and is described on pages 7 to 10 of the draft minutes attached as Exhibit B.
10. Also provided to the Board at the November 26, 2008 meeting was an opinion of the Attorney General relating to rejected absentee ballots, attached to this affidavit as Exhibit C.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated: December 16, 2008


Catherine E. Mohn

Subscribed and sworn to before me
on this December 16, 2008



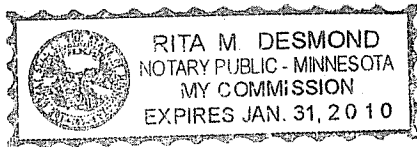


EXHIBIT A

Minutes

STATE CANVASSING BOARD

November 26, 2008, 9:30 a.m.

**State Office Building, Room 10
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, Minnesota**

1. Call to Order and Adoption of Agenda

Secretary of State Mark Ritchie called the meeting to order at 9:27 a.m. Members of the canvassing board present included Secretary Ritchie, Minnesota Supreme Court Chief Justice Eric Magnuson, Minnesota Supreme Court Associate Justice G. Barry Anderson, Second Judicial District Court Chief Judge Kathleen Gearin, and Second Judicial District Assistant Chief Judge Edward J. Cleary. Also present were Deputy Attorney General Christie Eller, Solicitor General Alan Gilbert, and Assistant Attorney General Kenneth Raschke from the Office of the Attorney General, Deputy Secretary of State Jim Gelbmann, Director of Elections Gary Poser, and other staff from the Office of the Secretary of State.

Secretary Ritchie thanked those present for attending and for their ongoing interest in the recount process. He called the board to order pursuant to Article VII, Section 8 of the Constitution of the State of Minnesota which states:

The returns of every election for officeholders elected statewide shall be made to the secretary of state who shall call to his assistance two or more of the judges of the supreme court and two disinterested judges of the district courts. They shall constitute a board of canvassers to canvass the returns and declare the result within three days after the canvass.

Chief Justice Magnuson made a motion to adopt the agenda for the meeting. Judge Cleary seconded the motion. The motion was passed without opposition.

2. Approval of Minutes of November 18, 2008 State Canvassing Board Minutes

Chief Justice Magnuson moved to approve the minutes of the November 18, 2008 meeting of the State Canvassing Board, with two minor typographical corrections.¹ Judge Cleary seconded the motion. The motion was passed without opposition.

3. Presentation of Recount Report for Completed Legislative Recounts

Mr. Gary Poser, Director of Elections for the Office of the Secretary of State, presented a recount summary report and canvassing report to the State Canvassing Board. Mr. Poser gave a summary of the races for which the mandatory recounts are complete.²

¹ See attachment A for a corrected version of the minutes for the November 18 meeting.

² See attachment B for the document presented to the board by Mr. Poser.

Judge Gearin moved to accept the report. Chief Justice Magnuson seconded the motion. Secretary Ritchie thanked Mr. Poser for his work on the recounts. There being no further discussion, the motion passed unanimously.

4. Report on the Number of Challenged Ballots to Date and Presentation of a Proposal for Pre-Review of Ballot Challenges

Secretary Ritchie stated that he wants to ensure that the challenged ballots reviewed by the board are not ones that have been challenged frivolously, so as not to waste the time of the State Canvassing Board. Attorneys from both campaigns have stated publicly that they could meet to discuss the reduction of challenged ballots and Secretary Ritchie suggested this would be a great benefit to the State Canvassing Board.

Justice Anderson stated that the fewer ballots having to be reviewed by the board, the better for all concerned. Judge Gearin stated that legitimately challenged ballots are important for the board to review but that she has concerns about the number of frivolously challenged ballots.

The board then heard the testimony of Ms. Luci Botzek, Sherburne County Deputy Administrator.

Ms. Botzek reported that she has been present in Sherburne County during the recount process. Ms. Botzek stated that she had pulled 24 ballots from the ballots challenged yesterday and offered copies of them to the State Canvassing Board as examples of frivolously challenged ballots. So far, the two campaigns have challenged a total of 801 ballots, out of roughly 30,000 ballots cast in the county.

The board declined to review the copies of the ballots in question because of the possibility of having to review them later. Secretary Ritchie remarked that 800 challenged ballots seemed like a lot coming from a relatively small county. Chief Justice Magnuson stated that it is the State Canvassing Board's responsibility to consider and rule on challenged ballots, whether the challenges in questions are legitimate or not. However, he said both campaigns have the responsibility to be thoughtful in the challenges they raise. The fewer ballots challenged by the campaigns, the more carefully the board will be able to consider the merits of the challenged ballots. He urged both parties to reconsider the merits of some of their challenges. Chief Justice Magnuson stated that the board wants to decide all legitimate challenges, but does not want to spend time they do not have reviewing ballots that do not need to be looked at.

Secretary Ritchie asked the board if any motion needed to be made regarding the number of challenged ballots or to compel the campaigns to meet with the Office of the Secretary of State in order to reduce the number of challenged ballots.

Justice Anderson stated that he believed no motion was required, but asked the campaigns to be consistent in their challenges and suggested that the legal counsel for both candidates do whatever they can to reduce the number of challenged ballots.

Chief Justice Magnuson and Judge Gearin both stated that they would be disappointed if the campaigns did not meet with Director of Elections Gary Poser to reduce the number of challenged ballots prior to the meeting of the State Canvassing Board on December 16.

Secretary Ritchie thanked Ms. Botzek for her time.

5. Signing of Certification of Completed Recounts in Districts Where Recount Reports are Adopted

The members of the State Canvassing Board proceeded to sign the certification of the legislative recount races.

6. Alternate Presidential Electors

Secretary Ritchie asked that a motion be made that the State Canvassing Board Certification of November 18, 2008 for Presidential Electors be amended to include Alternate Presidential Electors. Justice Anderson made the motion. Judge Cleary seconded. The motion passed without opposition.

7. Consideration of Improperly Rejected Absentee Ballots

Secretary Ritchie began by suggesting a general discussion among the canvassing board members. He stated that in this election, roughly 288,000 Minnesotans voted by absentee ballot, and estimated that over 12,000 of those absentee ballots were rejected.

Secretary Ritchie noted concerns that today's meeting is not legal because of the November 17, 2008 Minnesota Attorney General's opinion regarding the counting of rejected absentee ballots.³ Secretary Ritchie clarified that the Attorney General opinion in question pertains to the recount process and does not comment on actions of the State Canvassing Board.

Justice Anderson stated that the best way to move forward in the discussion would be to make a motion. As such, Justice Anderson made a motion for the Minnesota State Canvassing Board to reject the request that rejected absentee ballots be included in the recount of the 2008 U.S. Senate election and any applicable canvassing reports. Chief Justice Magnuson seconded.

Justice Anderson stated that he has reviewed all materials submitted by both campaigns and that the motion he just made is a purely procedural motion and is not intended to suggest any outcome of legal issues that may arise in the future relating to rejected absentee ballots. He believes that irregularities, if any, can be addressed through the election contest⁴ process, and the motion put forth does not indicate a position on any challenges that may arise through the contest process.

Furthermore, Justice Anderson stated that the statute regarding the duties of the State Canvassing Board does not directly grant authority for the board to accept and include rejected absentee ballots. Additionally, the relief being requested from the board by the Franken campaign is extraordinary and there are no cited instances of this board performing similar actions in the past. A review of the citations provided in the briefs submitted by the campaigns reveals that cases which have dealt with absentee ballots have dealt with those ballots through the election contest process, not the

³ See attachment C for a copy of the opinion.

⁴ Throughout the meeting, the words "contest" and "challenge" were often used interchangeably to refer to the process in which an election is decided through the courts. For the sake of clarity, in these minutes "contest" will be used to refer to the judicial process and "challenge" will be used when referring to the process of disputing the voter intent of cast ballots.

administrative recount process.⁵ Finally, Justice Anderson noted that in *Minnesota Statutes* 204C.31 and 204C.35 Subd. 3 the legislature did not use broadly inclusive language, but rather limited the jurisdiction and authority of the State Canvassing Board.⁶ Therefore, Justice Anderson stated that the board should reject the request made by the Franken campaign to include rejected absentee ballots in the recount.

Judge Cleary thanked the lawyers from both campaigns and stated that he agreed with Justice Anderson for the most part, but had several differences. He stated that approximately nine percent of the ballots cast in the election were absentee ballots, and of those ballots about five percent were rejected. He stated that he respectfully disagrees with portions of the November 17 opinion provided by the Minnesota Attorney General regarding whether a rejected absentee ballot is a cast ballot, specifically case law cited from Washington state and California. Since these cases are based upon the election law of their respective states, they are of little help in Minnesota. Judge Cleary remarked that there was no case law in Minnesota to cite as precedent.

Judge Cleary said that he agrees with Justice Anderson that the board is being asked by the Franken campaign to extrapolate the duties of a judge presiding over an election contest⁷ who would be making findings of fact and reaching conclusions of law. He agreed that this is not an appropriate function for the State Canvassing Board to undertake, and agrees that there is no specific authority that grants the board the ability to do what the Franken campaign is asking.

However, Judge Cleary believes that rejected absentee ballots should be reviewed and if there are grounds for rejection—under the four reasons stipulated in statute⁸—the ballots should be retained for the purpose of the election contest. They should be sorted into five piles, one pile for each of the four allowable reasons to reject a ballot, plus a fifth pile of ballots that have been improperly rejected. If ballots have been rejected without basis, election judges should review the ballots, open them, and challenges by the campaigns should only be allowed on the basis of voter intent. The Office of the Secretary of State could be the responsible agency for the sorting. He believed that an election contest will almost certainly follow and the sorting process will help in preparation for an anticipated contest.

Justice Anderson stated that he did not want the sorting provision as a friendly amendment on his motion, believing that the issues warrant separate discussion.

Judge Cleary then made a motion to amend Justice Anderson's motion to include the stipulation that uncounted absentee ballots mistakenly rejected should be identified, opened, and counted, subject only to challenges from the parties based on voter intent, in which case challenged ballots would

⁵ See attachment D for materials submitted to the State Canvassing Board by the Franken and Coleman campaigns.

⁶ See attachments E and F for copies of the statutes cited.

⁷ Judge Cleary used the term "election judge" when referring to a jurist presiding over legal proceedings contesting an election. "Election judge" can also refer to a poll worker or someone involved in the recount process. To make a clear distinction between the two, this document will use the terms "judge presiding over an election contest" and "poll worker" instead of the more vague "election judge." Also, there are several instances when members of the board used to the term "election judge" to refer to a local election official, such as a county auditor. The term "election official" has been substituted in these cases to avoid confusion.

⁸ See attachments G and H for a copy of the applicable statutes.

come before the State Canvassing Board. He also mentioned the proposal submitted by Hennepin County Attorney Mike Freeman regarding the logistics of carrying out the sorting process.⁹

Judge Gearin then stated that she was concerned about any absentee ballots that may have been rejected without reason and would prefer to have the issue addressed in a separate motion.

Secretary Ritchie suggested that Judge Cleary withdraw his motion for the moment in order to keep the scope of the discussion broader, and indicated that the motion could be reintroduced later in the discussion as an amendment to Justice Anderson's motion.

Judge Cleary agreed to this and withdrew his motion.

Judge Gearin returned to the topic of the motion proposed by Justice Anderson. She stated that reasonable minds can disagree and that there has been public criticism of both sides. After reviewing the briefs submitted by both campaigns, she found both sides' arguments reasonable. She stated that this is why in the previous meeting the board had requested more time to consider the request that rejected absentee ballots be included in the recount.

Judge Gearin stated that she believes respect for the voters is paramount. More people voted by absentee ballot in this election than ever before. The brief from the Franken campaign stated that is not right that improperly rejected ballots not be counted. She agrees with that point and believes it would be absurd to argue against it. However, her concern being discussed today is one of jurisdiction—whether it is within the scope of the State Canvassing Board's authority to examine the reasons that absentee ballots were rejected, especially since a significant percentage were rejected. She noted the difference between the authority granted to judges when on the bench and the authority granted to judges when they are serving as a member of the State Canvassing Board.

She commented that she does not think the board has the authority to review rejected absentee ballots. She stated that she was not particularly happy about that, but the question at hand is not whether improperly rejected ballots should be counted, but rather who should review the actions of poll workers or absentee ballots boards in the rejection of these ballots.

Judge Gearin also stated that she remains concerned that there could be some absentee ballots that were neither rejected nor counted (because they were improperly rejected) and she thinks that there should be a review by local election officials to determine if there are such ballots. She concluded by stating that she supports Justice Anderson's motion.

Secretary Ritchie stated that it appeared that the board was agreeing that it does not have the authority to review rejected absentee ballots. He asked for the board's opinion regarding how the ballots in question should be handled. He also stated that he was curious as to whether the Attorney General's opinion addresses this issue.

Justice Anderson stated that there seem to be two issues being discussed. One is the discussion of how to sort and organize rejected absentee ballots. He stated that he initially finds no problems with sorting rejected absentee ballots into appropriate categories for future use. His concern is about the opening of those ballots. He stated he would support Judge Cleary's suggestion to sort the ballots in

⁹ See attachment I for a copy of the letter and proposal submitted by Mr. Freeman.

advance. He said that he believes the ballots have been rejected, but he does not want the board to be in the business of saying whether the rejected ballots have been properly rejected and whether they should be counted.

Secretary Ritchie stated that he is hearing a high rate of concern about the issue. He stated that he was worried that the sorting being proposed could potentially be a large amount of work for the county election officials, considering that there may be as many as 12,000 to 13,000 rejected absentee ballots statewide. He suggested that the ballots be sorted into the five separate piles, but that the board not take any additional responsibility for the ballots in question or advocate opening the ballots.

Judge Gearin suggested that each county should review its rejected absentee ballots to ensure that there are not ballots that have been mistakenly rejected.

Secretary Ritchie replied that it is recount procedure that all ballots not rejected must be counted. He stated that there have been several instances when approved or accepted ballots were mistakenly rejected in the past.

Judge Gearin replied that it is because of instances like Secretary Ritchie just cited that all improperly rejected absentee ballots should be opened and counted.

Chief Justice Magnuson stated that the discussion has been a good one. He wanted to return to the discussion of the motion originally made by Justice Anderson. Chief Justice Magnuson stated that he does not hear anyone on the board arguing with the idea that the right of every citizen to have their vote counted is important and vital. The decision being made today is only about what the canvassing board has the authority to do.

The role of the State Canvassing Board is administrative, not adjudicative, and this is consistent with the view of the state for the last one hundred and fifty years. He noted the Attorney General's opinion which states that the function of the State Canvassing Board is to count ballots that have been cast and that rejected absentee ballots by definition are not cast ballots. To support this argument, he then cited *O'Ferrall v. Colby*, 2 Minn. 180¹⁰, and quoted the following from page 184 of the opinion:

If the judges of election have failed to perform their duty, or have decided erroneously in any essential particular, the constitution and laws have provided an ample remedy, either by contest before the legislature, each branch of which is the judge of the election and eligibility of its members; or by application in the courts, where all matters can be fully investigated, and the parties have compulsory process for witnesses.

Chief Justice Magnuson then went on to cite *Taylor v. Taylor*, 10 Minn. 107¹¹, quoting the following:

It was not competent for them [the State Canvassing Board] to undertake to decide whether the errors or irregularities complained of invalidated the election in the towns named. That was a question for judicial, not ministerial officers—a question that could only be decided by

¹⁰ See attachment J for a copy of the cited case.

¹¹ See attachment K for a copy of the cited case.

DRAFT—Minutes are not official until approved by the State Canvassing Board

a court that could call in witnesses, hear evidence, and decide questions of law and fact. Irrespective of the above statutory provision, it is quite clear that this question could not be properly decided by the canvassing board.

Chief Justice Magnuson stated that he wants to make sure that every vote is counted, and the board will not stand in the way of making determinations of whether a vote is legally cast, but the board itself does not have the authority to make such determinations. He concluded by stating that he is confident that the ballots in question are secured and will be kept safe until the right body is able to address them. He stated that he strongly supported Justice Anderson's motion.

Judge Cleary responded to Chief Justice Magnuson, stating that he believes the ministerial capacity of the canvassing board has been expanded by statute since the cases cited by Chief Justice Magnuson. He reiterated again that many of the nine percent of voters casting absentee ballots are doing so out of necessity and it is important that their right to vote be taken as seriously as anyone else's. He stated that he was frustrated that the certification of the senate race will be signed prior to an election contest, at which point it will be subject to review.

Secretary Ritchie offered a friendly amendment to simplify the language of the motion to read, "The State Canvassing Board will reject the request to include rejected absentee ballots in the recount." Justice Anderson agreed to the re-wording of the motion.

Judge Cleary asked that it be clarified that in regard to the sorting of rejected absentee ballots that the fifth pile—any absentee ballots that have been mistakenly or improperly rejected, which he referred to as uncounted ballots—be distinguished from the motion on the table so that the motion does not remove that group of ballots from the purview of the board. The board agreed with this clarification.

There being no further discussion, the motion passed without opposition.

Secretary Ritchie then returned to a discussion of the fifth pile. He estimated that perhaps somewhere between 500 and 1000 improperly rejected absentee ballots exist. He asked if it was up to each citizen to take the issue to court, and if county attorneys should participate in the sorting process. He asked the board for a discussion of what should be done with any improperly rejected absentee ballots.

Chief Justice Magnuson asked how the Office of the Secretary of State instructs local election officials and canvassers to proceed. He asked if the Office of the Secretary of State has the authority to ask for the sorting process to begin without a motion from the canvassing board.

Secretary Ritchie replied that it is an issue both of authority and human relations, and that the proposal submitted by the county attorneys was useful in addressing the amount of people needed to perform a sorting of the rejected absentee ballots. Secretary Ritchie stated that he believed county officials should be asked to sort rejected absentee ballots into five piles. He stated that he understands that this is asking a lot of local officials but that it may be the only way to identify absentee ballots that were wrongly rejected.

Chief Justice Magnuson mentioned that the issue addressed in *Anderson v. Rolvaag*, 119 N.W. 2d 1,¹² was whether the State Canvassing Board could accept amended returns from a county canvassing board. Chief Justice Magnuson asked if recount officials are directed by the Office of the Secretary of State to also determine if there are improperly rejected ballots, would it still be possible for the county canvassing board to submit amended returns.

Secretary Ritchie suggested this might be a matter where the advice of counsel would be helpful.

Justice Anderson stated that he was not troubled by requiring counties to sort rejected absentee ballots. The work will be needed in the event of an election contest. However, the matter of opening the ballots and counting the votes falls under the jurisdictional issue discussed earlier. He stated he would be reluctant to move in that direction without advice from the Attorney General's office.

Judge Cleary stated that if the procedure outlined in statute is followed, there are four grounds for rejecting absentee ballots. Any ballot that does not meet the requirement for rejection is not a rejected ballot, but rather an uncounted ballot. He stated that the statute is very specific on this matter.¹³

Secretary Ritchie suggested that the Office of the Secretary of State be instructed by the State Canvassing Board to work with local election officials and county attorneys to sort rejected absentee ballots into their proper categories and identify improperly rejected ballots in order to help inform the State Canvassing Board's next steps.

Judge Gearin stated that she was comfortable in moving in that direction. She stated again that if absentee ballots are rejected for one of the four reasons allowed under statutes then those ballots should not be opened because they are subject to an election contest. If there is no reason for rejection, then the absentee ballot should be counted. The question is how to determine whether the ballots were improperly rejected.

Chief Justice Magnuson stated that at some point in the process the vote totals need to be certified and the counting done. The question he has is if the State Canvassing Board is currently at a point where additional ballots can still be counted.

Secretary Ritchie replied that until the board signs the certification papers, vote totals may be amended.

Chief Justice Magnuson then stated in that case the counties can be asked again to count their rejected absentee ballots. The problem is that the State Canvassing Board does not have the authority to tell an election official or poll worker how to rule on any particular ballot. Ballots in the fifth pile should be taken up through the election contest process, not by the State Canvassing Board. He stated that he agrees with the proposal from the county attorneys as a mechanical way of sorting things, but stops short of being able to direct election judges as to what to do with the ballots in question.

¹² See attachment L for a copy of the cited case.

¹³ See attachment G for a copy of the applicable statutes.

Judge Cleary disagreed, stating that if an absentee ballot was not rejected because one of the four reasons, it is an uncounted ballot and should be counted now.

Justice Anderson countered that ballots which have been rejected, even if the reason for the rejection is not properly listed, will likely be dealt with under the election contest process. He stated that it would be helpful to have input from the Attorney General's office on this question, since it again deals with the issue of authority discussed earlier in the meeting.

Secretary Ritchie asked the Attorney General's office to give an opinion regarding the ability of local election officials and county attorneys to sort the rejected absentee ballots in order to determine the number of absentee ballots that may have been improperly rejected. The question of what will be done with the ballots in question is a matter that does not need to be addressed today, but any input the Attorney General's office has to offer in the matter would be helpful.

Christie Eller, Deputy Attorney General, stated that the Office of the Attorney General has not seen the proposal put forth by the county attorneys and therefore she did not want to comment on the proposed plan.

Secretary Ritchie asked Ms. Eller if the Office of the Attorney General could review the plan this week.

Ms. Eller replied that she would. She added that *Minnesota Statutes* 204C.38 addresses the issue of correction of obvious errors when candidates agree.¹⁴

Judge Cleary countered that he does not believe that 204C.38 is applicable to the current situation. He asked Ms. Eller if, in the situation where the candidates do not agree on anything, whether election officials can review whether rejected absentee ballots fall under one of the four categories. In that case the ballots could be challenged on the basis of intent only.

Ms. Eller replied that the Attorney General's office would like some time to review the issue further before offering an opinion.

Judge Cleary stated that he believed if election officials sorting rejected absentee ballots is not an issue, then the issue of what to do with ballots in the fifth pile should not be an issue, either.

Mr. Alan Gilbert, Solicitor General, stated that the question posed by Judge Cleary regarding the fifth pile gets back to the jurisdictional issues discussed earlier in the meeting.

Chief Justice Magnuson stated that a fifth pile should be created through the sorting process, but it is not within the State Canvassing Board's province to dictate what should be done with those ballots. He asked for assistance from the Attorney General's Office.

Judge Gearin reiterated that any ballots in the fifth pile are by definition uncounted and should therefore be opened and counted and it is at the discretion of election officials and their staff whether an absentee ballot should be in the fifth pile.

¹⁴ See attachment M for a copy of the referenced statute.

Mr. Gilbert stated that he understands and the Attorney General's Office will review the issue further.

Judge Cleary asked if it was possible to reintroduce the motion he had put forth earlier and then withdrawn.

Justice Anderson asked if the board should wait until receiving advice from counsel.

Secretary Ritchie suggested that the board should wait for an opinion from the Attorney General's office and then work on crafting something for consensus. He stated that he was hearing general agreement on the sorting of rejected absentee ballots, and that the board can later address the questions raised by Judge Gearin and Judge Cleary. Secretary Ritchie asked the board if they were comfortable with proceeding in this fashion.

Chief Justice Magnuson remarked that he believes it would be unwise to make a decision without input from the Attorney General and the Franken and Coleman campaigns. He suggested a need for the board to meet again.

Judge Gearin made a motion to commend the state's local election officials and the work they are doing in the recount process. Judge Cleary seconded the motion. The motion passed without opposition.

8. Recess

Secretary Ritchie then made a motion for the board to go into recess. Chief Justice Magnuson seconded the motion. The motion passed unanimously.

The meeting was adjourned at 10:27 a.m.

EXHIBIT B

Minutes

STATE CANVASSING BOARD

December 12, 2008, 9:30 a.m.

Minnesota State Capitol, Room 15
75 Rev. Dr. Martin Luther King, Jr. Blvd
Saint Paul, MN 55155

1. Call to order

Secretary Ritchie called the meeting to order at 9:34 a.m. Members present included Minnesota Supreme Court Chief Justice Eric Magnuson, Minnesota Supreme Court Justice G. Barry Anderson, Second Judicial District Court Chief Judge Kathleen Gearin, Second Judicial District Court Assistant Chief Judge Edward J. Cleary, Minnesota Attorney General Lori Swanson, Deputy Attorney General Christie Eller, Assistant Attorney General Kenneth Raschke, Deputy Secretary of State Jim Gelbmann, Director of Elections Gary Poser, Executive Assistant Kate Mohn, Business and Legal Analyst Bert Black, and other staff from the Office of the Secretary of State.

Secretary Ritchie began by noting that because of fire code concerns, members of the audience would not allowed to stand in the room and instead should head to the overflow seating provided in the capitol cafeteria. He asked the members of the public and campaign representatives approach the proceedings respectfully.

2. Adoption of agenda, approval of minutes from the November 26, 2008 State Canvassing Board Meeting, and waiving of attorney-client privilege in regard to the December 10, 2008 Attorney General opinion provided to the State Canvassing Board.

Secretary Ritchie asked the board for a motion to approve the agenda for the meeting. Judge Cleary offered the motion and was seconded by Justice Anderson. The motion passed without opposition.

Judge Cleary made a motion to adopt the minutes of the November 26, 2008 State Canvassing Board meeting, noting that he had offered one correction to the minutes prior to the meeting and the correction had already been made. Justice Anderson seconded the motion. The motion passed without opposition.

Secretary Ritchie asked the board for a motion to waive attorney-client privilege in regard to the December 10, 2008 letter from the Office of the Attorney General to the State Canvassing Board regarding absentee ballots rejected in error. Judge Gearin made the motion. Justice Anderson seconded the motion. The motion passed without opposition. Copies of the opinion were distributed to members of the audience.

3. Update on Challenged Ballots

Secretary Ritchie recognized Mr. Gary Poser, Director of Elections for the Office of the Secretary of State.

Mr. Poser reported that when the board had last convened there were 3,594 challenged ballots that had been reported. Upon completion of the recount, that number increased to a total of 6,655 challenged ballots. The candidates have submitted over 2,000 withdrawals of challenges, but this leaves 4,472 remaining challenged ballots for the board to review. Mr. Poser noted that the Office of the Secretary of State continues to be hopeful that the campaigns will withdraw more challenges prior to when the board meets to review challenged ballots.

Judge Gearin asked to hear the number of remaining challenges again and offered a comment related to respecting the voters of the state. She remarked that she hopes that the challenges offered are serious. She has heard comments in the press from representatives of both campaigns accusing the other side of frivolous challenges. The canvassing process is about each individual Minnesotan's right to vote and right to have their ballot treated with respect. She remarked that she has not looked at the ballots online but that one would have to be intellectually challenged to have not heard the public wondering if in fact all the challenges brought by the campaigns are serious. Again, she urged the campaigns to be serious in raising challenges.

Justice Magnuson echoed Judge Gearin's remarks. He stated that he wants to count every legitimate vote, and needs all the help he can get in order to do so efficiently and fairly while spending the time needed considering the real questions. To the extent that the board is asked to look at issues that are not really issues, it detracts from the board's ability to give fair consideration to the real issues.

Secretary Ritchie then addressed the procedure of how to physically withdraw challenged ballots that that have had their challenges waived from the rest of the challenged ballots prior to the boards reconvening next Tuesday. Secretary Ritchie proposed the following language outlining the appropriate process:

To facilitate the review of challenged ballots, the State Recount Official is directed to open the challenged ballot envelopes to remove those challenged ballots which have been withdrawn by each of the two candidates or their representatives. The State Recount Official shall report to the Board the allocation of votes resulting from the withdrawal of these challenges.

The withdrawn challenged ballots shall be sealed into separately labeled envelopes for return to the jurisdiction from whence they were received.

The State Recount Official will arrange for this process to occur in an appropriate room and at an appropriate time and shall inform the candidates and the public of the time and location so that they may observe if they so desire. The State Recount Official may designate any member of the staff of the Office of the Secretary of State to assist in this task.

The remaining challenged ballots shall be sealed into separately labeled envelopes by jurisdiction from whence they were received and be kept secure for review by the Board.

Secretary Ritchie then made a motion to approve the proposal for withdrawing challenged ballots that have had their challenges waived. Chief Justice Magnuson seconded the motion and commended the Office of the Secretary of State for preserving the election materials as evidence if needed for an election contest.

Justice Anderson asked if the Office of the Secretary of State had been in conversation with the Coleman and Franken campaigns about the process of withdrawing waived challenged ballots.

Secretary Ritchie replied that the office has not. The office is proposing the language to facilitate the process while allowing the public and campaigns to attend.

Justice Anderson stated that it was not his opinion that the campaigns needed to be consulted in this regard. He stated that he would be willing to adopt the process and that any concerns regarding the process should be directed to the Office of the Secretary of State, and the board will consider input from others.

There being no further discussion, the motion passed without opposition.

Secretary Ritchie stated that the procedures for the review by the board of challenged ballots will be discussed further. He also stated a reduction in challenged ballots will result in a smooth process for reviewing the challenges.

Ballots from Minneapolis Ward 3, Precinct 1

Secretary Ritchie began by describing the way he intended this portion of the meeting to proceed. He stated that he will first call on Ms. Cindy Reichert, the Elections Director for the City of Minneapolis, to testify to the board. He will then ask for the Attorney General to offer comments on the guidance offered by the office, and then to hear from the members of the board with questions for Ms. Reichert or the Attorney General, followed by discussion of the matter.

Secretary Ritchie then recognized Ms. Reichert.

Ms. Reichert began by thanking the board for offering her the opportunity to testify. Ms. Reichert has been a city clerk or chief elections official for 12 years and has worked on 13 elections. She then gave the board an overview of the events surrounding the 133 missing ballots from Minneapolis Ward 3, Precinct 1.

Sometime prior to December 2, during the course of conducting the hand recount of ballots, Minneapolis elections staff noticed that the envelopes from the precinct had unusual numbering. There was one golden envelope containing ballots with write-in candidates and numbered 1/1. There were also four tyvek envelopes numbered 2/5, 3/5, 4/5 and 5/5, but not one labeled 1/5. Initially the staff thought that perhaps the envelope was stacked in a different ward's pile at the election warehouse, as there were many ballots stacked on pallets. As elections staff proceeded, the thought they would identify whether the ballots had been misplaced and would locate the envelope. On Tuesday, December 2, the staff had finished counting all the ballots at the warehouse and confirmed that the envelope in question was not there.

One initial theory was that because election judges are instructed to place 500 ballots in each tyvek envelope and that the precinct in question had just over 2,000 voters that the envelopes from the precinct had been mis-numbered. Elections staff contacted the chair election judge from the precinct and asked about the numbering of the envelopes. The chair election judge stated that he had been doing other duties at the time and was not the person who numbered the envelopes. The chair election judge referred the staff to another poll worker from the precinct, who was also contacted. This poll worker did confirm that there were five tyvek envelopes in addition to the gold envelope.

On Wednesday, December 3rd, the envelopes for the precinct in question were opened for counting. After table officials noted that one envelope appeared to be missing, election staff accompanied by representatives from the campaigns, searched through the stacks of all envelopes at the warehouse, including spoiled ballot envelopes, envelopes containing voter receipts, and other materials.

Election officials next reviewed precinct statistics and found that the tape from the optical scan machine from Election Night contained some arithmetic errors. At that time, the elections staff speculated that perhaps the discrepancy in 133 votes was either due to a mathematical error or that poll workers ran a set of ballots through the optical scan machine twice. A count of the number of write-in ballots was conducted, with staff operating on the theory that those ballots had been removed from the compartment in the optical scan machine and run through a second time. Although the numbers were close, they did not match.

At this point, Ms. Reichert returned to her office and began counting the materials that the voting statistics are based upon, such as the roster and Election Day voter registration cards. The results of this review were forwarded to the Secretary of State's office.

On Thursday, December 4, elections staff conducted another search of the warehouse for the missing ballots. Ms. Reichert returned to city hall and with the aid of her staff counted all the signatures from the voter roster used on Election Day. After comparing the number of signatures to the number of ballots contained in the four tyvek envelopes and one golden envelope, elections staff determined definitively that 133 ballots were missing. Shortly after noon on this day, Ms. Reichert was joined by Deputy Secretary of State Jim Gelbmann. Together they contacted the precinct chair judge, who recalled that all ballots from the precinct were delivered to the warehouse shortly after midnight on Wednesday, November 5. The ballots were delivered via car by the chair judge and another poll worker, as is standard procedure. The chair judge subsequently searched his car, but was unable to locate the missing envelope of ballots.

Mr. Gelbmann and Ms. Reichert then contacted the pastor of University Lutheran Church, which was the building that housed the polling place for Ward 3, Precinct 1. Mr. Gelbmann and Ms. Reichert discussed the situation with the pastor as well as the custodian of the church. Neither of these people had any knowledge of materials being left behind after Election Day. Nonetheless, they conducted a search of the church. The ballots were not found.

Mr. Gelbmann and Ms. Reichert continued by contacting the staff person who checked in the materials at the election warehouse following the close of the polls on Election Night. The staff member in question stated that she normally checks ballot envelope numbering but could not definitively remember doing so for the precinct in question. Again, the check-in for Ward 3 Precinct 1 occurred after midnight and the elections staff had worked a very long day.

A search was then conducted of all elections materials housed at Minneapolis city hall, as well as the van that is used by the city for transporting election materials. The ballots were not found. A press conference was called that afternoon by the city, at which time both Ms. Reichert and Mr. Gelbmann stated that they believed the ballots were missing, but that the envelope in question was probably checked into the warehouse following the close of polls on Election Night.

On Friday, December 5 elections staff again searched the warehouse.

Elections staff also talked with another poll worker who had been present at Ward 3, Precinct 1 and had taken in part in packing the ballots at the end of the night. She confirmed that there were indeed six envelopes from the precinct. Ms. Reichert believed that the first five envelopes would have been filled with 500 envelopes, but that missing envelope in question could have contained far fewer ballots.

Ms. Reichert then directed the attention of the board to some of the comparisons made in the administrative review presented to the board. The results tape summary, printed from the optical scan machine at the precinct, shows a total of 2,028 ballots cast. While there were some mathematical errors for the number reported on Election Night, the number of voters registering on Election Day, plus the number of pre-registered voters, plus the number of absentee ballots should indicate the number of people voting at the precinct.

The mathematical errors on Election Night and the result that the numbers stated above did not match lead the elections staff to their initial supposition that a group of ballots had been run through the optical scan machine twice. However, after reviewing the number of signatures on the voter roster, the staff definitively determined that this was not the case and that the ballots were in fact missing.

Therefore, Ms. Reichert requested that for the purposes of the recount the canvassing board move to use the results reported from the optical scan machine tape instead of the hand count of the ballots from Ward 3, Precinct 1.

Secretary Ritchie then turned to Attorney General Swanson and asked for her guidance on the matter.

Attorney General Swanson noted that a similar issue arose in Senate District 27 in 2002, where 17 ballots were missing and therefore unavailable for a hand recount. At that time, the Attorney General's office issued an opinion to the State Canvassing Board that it was permissible to use election night returns from the precinct in question for the purpose of tabulating election results for a recount, based on the Minnesota Supreme Court decision in *Moon v. Harris*, 122 Minn. 138, 142 N.W. 12. The State Canvassing Board thereafter voted 4-1 to do so.

An election contest was filed thereafter in Mower County District Court, where Judge Joseph Quinn, presiding by assignment, overruled the decision of the State Canvassing Board and decided the ballots should not be counted. Attorney General Swanson said that she believed the relevant case law and authorities have been brought to the board's attention by the campaigns. Ultimately, there is a fact issue for the State Canvassing Board's consideration and determination—does the board believe that the ballots were cast and counted on Election Night, such that the returns from

Election Night are the best evidence available to the board? If the board does believe that to be the case, then it has the authority to include the election night machine tape numbers in the returns for the recount.

Secretary Ritchie then asked the members of the board if they had any questions for either Ms. Reichert or Attorney General Swanson.

Judge Gearin asked Attorney General Swanson if the district court decision overturning the actions of the State Canvassing Board in 2002 was ever appealed. Attorney General Swanson replied that it was not.

Chief Justice Magnuson noted to Attorney General Swanson that whatever actions the board takes today will be subject to an election contest. He noted that all the cases cited by the parties related to this issue were election contest cases. There were no special writs directed at the State Canvassing Board.

Chief Justice Magnuson then asked Ms. Reichert to clarify that 1,978 pre-registered voters, as reported in the materials she provided the board, was indeed the correct number of pre-registered voters from Ward 3, Precinct 1.

Ms. Reichert noted that this was the number of votes cast reported on Election Night, and as stated before that there were some mathematical errors in the numbers reported by poll workers following the close of the polls. This number is 900 too high. The administrative review checked the materials themselves instead of the numbers reported election night.

Chief Justice Magnuson then clarified that Ms. Reichert's request to the board was to include the vote totals from that night that reported a total of 2,028 votes cast in the precinct. Ms. Reichert replied that this was correct.

Justice Anderson then asked that Ms. Reichert to clarify that the number she was asking the board to certify would be the number that includes the 133 ballots that are missing. Ms. Reichert replied that this was correct.

Judge Cleary asked if Ms. Reichert gives any credence to the idea that the ballots are not missing but instead that some ballots were fed into the optical scan machine twice. Ms. Reichert replied that she does not. The idea that some ballots were fed in twice was a theory from the first day before the elections staff had reviewed all the materials and spoken to the poll workers. After doing so, she is convinced that the totals reported election night are the correct totals.

Secretary Ritchie then asked Ms. Reichert to clarify some of the numbers, asking how many voters signed in at the precinct and how many ballots were cast, as reported by the optical scan machine.

Ms. Reichert reported that the number of absentee ballots plus the number of people signing the roster is 2,030, and the number of ballots scanned is 2,028. She noted that it is not unusual for the roster count to be slightly off from the number of ballots because of people signing in to vote but then leaving due to time constraints.

Secretary Ritchie then stated that the number of people voting in the precinct was the same as the number of ballots cast that night. Ms. Reichert again stated that there were 2,030 entries on the roster and 2,028 ballots cast.

Secretary Ritchie then asked the board if they think there are missing ballots and if so what should be done. He asked the board to discuss.

Chief Justice Magnuson noted that as he read the opinion provided by the Attorney General as well as the cases cited, it seems to him the returns reported on election night are *prima facie* evidence of what occurred at the precinct that evening. If someone seeks to challenge that, they are free to do so, but they must have some evidence. He believes that Minnesota has a good system for keeping track of ballots and that the officials have acted in the best interest of the public. He also has no doubt that whatever the board decides will be subject to the proceedings of an election contest, which is the right of the parties. He believes the board has neither authority nor reason to direct to the City of Minneapolis to report anything other than the returns from Election Night. He then made a motion for the board to accept the returns presented by the City of Minneapolis.

Justice Anderson seconded the motion. He stated that he was in general agreement with what Chief Justice Magnuson outlined. He also noted that he was not sure as to when this question will get ultimately resolved—the lawyers can argue about that as there is the possibility of an election contest. It is his view that the board has a ministerial capacity, not a adjudicative capacity and as they have *prima facie* evidence and on that basis he is prepared to accept the returns with the understanding that a judge in an election contest might disagree.

At this point, Secretary Ritchie was asked by counsel for a clarification on the language of the motion on the table.

Secretary Ritchie then stated that the motion was that the State Canvassing Board accept the machine totals as reported by the City of Minneapolis for the purposes of the canvass of the 2008 election.

There being no further questions or discussion the motion passed without opposition.

Secretary Ritchie thanked both Ms. Reichert and the Attorney General's office for their work on the matter.

Ms. Reichert thanked the board on behalf of herself and her election judges.

Improperly Rejected Absentee Ballots

Secretary Ritchie outlined a similar procedure as the one used in the section above for the presentation, questions and discussion related to improperly rejected absentee ballots. He then recognized Jim Gelbmann, Deputy Secretary of State.

Mr. Gelbmann gave an update on the progress of counties and cities sorting rejected absentee ballots, as requested by the board during its November 26, 2008 meeting. The purpose of the request was to determine how many ballots were improperly rejected in the state in this election.

Mr. Gelbmann noted that he has seen very good cooperation from the counties and cities, although many officials are concerned about the numbers of Data Practices Act requests they are receiving from the campaigns. He noted that the sorting process is now underway and will continue through the end of next week. 49 counties and municipalities have completed their sorting and reported their results to the Secretary of State. Another three have finished their sorting but have not provided their results. 24 additional counties and municipalities will be sorting within the next week. There have been 4,823 total rejected absentee ballots sorted by the 49 counties and municipalities. Of these, it has been determined that 638 of those ballots were wrongfully rejected.

Chief Justice Magnuson asked who was making these determinations. Mr. Gelbmann replied that the decision makers were local election officials, as well as the trained poll workers hired to assist them in this sorting process.

Mr. Gelbmann continued, stating that it appears that roughly thirteen percent of all absentee ballots have been wrongfully rejected. If this trend holds, it is estimated that 1,587 wrongfully rejected absentee ballots exist in Minnesota.

In particular, Mr. Gelbmann cited numbers provided by the city of Duluth. Although neither Duluth nor St. Louis County has agreed to sort rejected absentee ballots, the St. Louis County Auditor's office did provide the Office of the Secretary of State with a spreadsheet listing the reasons why absentee ballots were rejected in Duluth. Out of the 319 ballots rejected in Duluth, 99 were rejected because the witness did not date his or her signature. 21 were rejected because the voter did not date his or her signature, and 7 were rejected because neither the voter nor the witness dated their signature. This means that in Duluth roughly 40 percent of the rejected absentee ballots were rejected improperly, as the Office of the Secretary of State could find nothing in statute or rules that allows the rejection of absentee ballots based on the lack of a dated signature.

Secretary Ritchie thanked Mr. Gelbmann and then asked the Attorney General to provide the board with guidance on the matter.

Attorney General Swanson gave an overview of the opinion provided to the State Canvassing Board regarding the issue of improperly rejected absentee ballots. She stated that the opinion was based on the premise that every lawful vote should count in a democracy. This is a right not just of the voters, but of the entire electorate. The opinion outlines four statutory procedures to allow correction of errors. The case law cited in the opinion has two reoccurring themes—one, that every lawful vote should be counted, and two, that canvassing boards have wide latitude given by the courts. So long as canvassing boards are acting in good faith, their decisions are sustained by the courts.

Based upon the review of statutes and case law, Attorney General Swanson believes that the State Canvassing Board can request that the county canvassing boards reconvene for the purposes of tabulating improperly rejected absentee ballots and provide amended reports, which can be accepted by the State Canvassing Board.

Justice Anderson asked Attorney General Swanson if there is any precedent for a State Canvassing Board issuing an order for county canvassing boards reviewing and considering wrongly rejected absentee ballots. Attorney General Swanson replied that pursuant to the decision in *Application of Andersen v. Rolvaag*, 119 N.W. 2d 1, there is nothing to prohibit or prevent the board from doing so.

Judge Gearin then stated that it was her understanding that the Attorney General was saying that the State Canvassing Board has the authority to take two actions: First, to recommend to local canvassing boards that they review and count rejected absentee ballots that were rejected for nonstatutory reasons. Second, to accept the amended reports from the county canvassing boards that would be issued as a result of the reviewing the rejected ballots. Judge Gearin stated that since some counties have already done the sorting process, that the board will have to make a decision on the accepting of amended returns.

Attorney General Swanson replied that she believes that Judge Gearin understands correctly. She believes that the board can make requests and can accept amended returns.

Judge Gearin stated if the State Canvassing Board does not recommend that wrongfully rejected absentee ballots be counted that this process will be part of an election contest. Likewise, if they do order the counting that too will probably be part of an election contest. Nevertheless, Judge Gearin stated that she believes she has a hard time understanding why the board would not make the request to the counties for the review and counting of wrongly rejected absentee ballots.

Chief Justice Magnuson asked if any counties have submitted amended returns.

Mr. Gelbmann replied that Itasca County has submitted an amended return. Mr. Poser stated that he was not sure if totals were amended during the recount process, but nothing has been submitted through a county canvassing board report.

Chief Justice Magnuson asked for a confirmation that until the State Canvassing Board certifies the results of an election is can receive amended returns from the county canvassing boards and asked if St. Louis County was the only county so far to decline to do the sorting of rejected absentee ballots.

Mr. Gelbmann replied that there are many counties that have not yet done the sorting. Some counties have not been responsive, other counties have declined. Many that have declined have stated that they wanted to wait and see what the canvassing board does today to see if the exercise will be a useful one.

Chief Justice Magnuson then stated that parties are allowed to petition the district court if counties are refusing to correct errors and asked Attorney General Swanson if there were any statutory guidelines on how to proceed on the matter.

Attorney General Swanson replied that in addition to district court, *Minnesota Statutes* 204C.39 applies.

Chief Justice Magnuson noted that 204B.44 applies as well, and asked if there was a similar provision that grants the State Canvassing Board the authority to be able to make the county canvassing boards do anything.

Attorney General Swanson replied that there was not such a provision in statutes.

There being no further questions, Secretary Ritchie moved the matter to discussion.

Judge Cleary began by reminding the board that the last time they met they unanimously decided they would not review absentee ballots that have been properly rejected. However, the decision made at the previous meeting did not include what to do with improperly rejected absentee ballots, since they are not rejected ballots but rather uncounted ones. He stated that some counties have already voluntarily done the sorting and that there is no reason why absentee ballots that were rejected improperly should not be submitted to the board, subject to challenges by either candidate on the basis of intent. The board should not consider the first four piles of absentee ballots because doing so would require making findings of fact and conclusions of law, but the fifth pile should come before the state canvassing board, should be opened, and should be counted. He believes it is unjust to the voters to not count those votes.

Judge Cleary stated that he understands and agrees with Chief Justice Magnuson's and Justice Anderson's concerns that the State Canvassing Board cannot force the counties to do anything, but believes the board should recommend that the counties separate the ballots into five piles, count the ballots in the fifth pile, and submit amended reports to the State Canvassing Board.

Chief Justice Magnuson stated that he agrees with Judge Cleary. Chief Justice Magnuson wants to count ballots that are properly cast and would be surprised if the counties refused to submit amended returns. He noted that he does not believe the board has the authority to force the counties to submit amended returns, but that there are statutory remedies available to the parties if they believe there is an obvious error. They can petition the district court under 204C.39 and the district court can issue compulsory process, call an evidentiary hearing, compel witnesses, and issue orders. Until the board receives amended returns, he does not believe the board can take any action.

Judge Gearin concurred and reiterated that the board does not have the authority to issue orders to the county. She initially stated that she does not understand why counties would not do it. However, upon further reflection she stated that she understands that the counties have had a lot of burdens already and absentee ballots are more complicated than other ballots and require more scrutiny.

Justice Anderson remarked that he was inclined to go along with Judge Cleary's motion but was concerned that pile five actually consists of four of five subdivisions. He guessed that there will be obvious examples in the fifth pile of ballots that should be reconsidered. He is not troubled by the board recommending that the counties look into the issue, but there are also statutory requirements and discussions of whether people were properly registered. Those are not facts. Those are allegations. The board needs to be careful on this. It is not a function of every ballot counting; it is one of every lawful ballot being counted. With that caveat, he supports Judge Cleary's motion.

Secretary Ritchie states that he believes they are discussing things that would be obvious errors.

Secretary Ritchie then moved that the State Canvassing Board recommends that county canvassing boards review rejected absentee ballots for the purpose of identifying obvious errors, correcting them, and reporting their new totals to the State Canvassing Board for review.

Judge Cleary asked to make a friendly amendment to change the motion to read that the State Canvassing Board recommends that County Canvassing Boards that have not already done so reconvene and separate rejected absentee ballots into five categories, the first four categories being the statutory grounds found in 203B.12, Subd. 2 for proper rejection of absentee ballots. The fifth

pile would be those where there is no grounds or reason for the rejection of absentee ballots because it does not meet one of the four statutory reasons.

Mr. Black suggested that the motion be further amended to include the statutory requirements set for military and overseas voters and the proper rejection of their absentee ballots, as stipulated under 203B.24. Judge Cleary accepted this as a friendly amendment.

Secretary Ritchie asked if there was a second to the motion, the motion being part one of two parts.

Judge Gearin seconded the motion.

Secretary Ritchie asked if there was any further discussion.

Chief Justice Magnuson stated that he supports the spirit of the motion but he is uncomfortable with issuing recommendations as the county canvassing boards are independent and he does not want the State Canvassing Board to direct the county boards to undertake any actions. He would, however, hope that the county boards do what the State Canvassing Board is suggesting. He intends to vote for the motion, but again states that the board does not have the authority to compel the counties to undertake its recommendations and that 204C.39 is the statutory remedy for the correction of obvious errors, which can be pursued through the courts.

Secretary Ritchie stated that he shares the board's sentiments, but supports the motion because it is a recommendation and not intended to be prescriptive. The board will be respectful of the counties and how they decide to move forward.

Justice Anderson noted that he shares the reservations being expressed, but will vote for the motion. He asked that the motion be restated.

As Ms. Mohn and Mr. Black consulted on confirming the language of the motion as amended for restatement, Judge Gearin asked to clarify that when she was talking about respect for the voters earlier in the meeting she used an old-fashioned term that may have been insensitive. What she meant to express was that a person would have to be totally isolated to not know that the citizens of this state are frustrated with how long this process is taking, even though it is preceding in an orderly and respectful manner. She again encouraged both sides to make sure that they are respecting every individual that went to the effort to vote and to do away with nonserious challenges, and she apologizes if she said anything insensitive.

Chief Justice Magnuson then suggested that the language of the motion be changed to refer to allegedly improperly rejected absentee ballots.

Judge Cleary's motion was then restated as follows: The state canvassing board recommends that county canvassing boards that have not already done so reconvene and separate allegedly wrongfully rejected absentee ballots into five categories, the first four categories being the reasons for rejection set forth in *Minnesota Statutes* 203B.12 and 203B.24, the fifth category being those that are not included in any of the four categories for rejection.

When asked by Chief Justice Magnuson, Mr. Black confirmed that the revised language includes the statutory cite needed to cover overseas and military voters.

There being no further discussion, the motion passed unanimously.

The board then turned to the second part of the motion, which is the incorporation of obvious errors into county canvassing reports to be submitted for the State Canvassing Board to review.

Chief Justice Magnuson raised the concern that it may be premature for the State Canvassing Board to take any action on this matter as it is unclear if the counties will provide amended returns. He believes action should not be taken until the reports are submitted.

Judge Cleary disagreed, stating that he would prefer to keep this process moving and set the framework for acceptance as it is already nearly January.

Secretary Ritchie stated that he believes already that under the statute counties are allowed to identify and correct obvious errors and submit amended reports to the board. He asked the Attorney General if he was correct about this. She replied that he was correct.

Chief Justice Magnuson stated that from a process standpoint since the board has not yet accepted any reports, it seems premature to accept amended returns when the initial reports have not been accepted.

Judge Cleary asked if the Attorney General believed if it was premature legally for the board to outline a procedure for accepting amended returns. Attorney General Swanson replied that the board could do it either way as long as a clear request is made to the counties regarding what the State Canvassing Board is asking the counties to do.

Judge Cleary suggested that if the counties are asked to undertake this effort they should know that the amended reports will be accepted.

Secretary Ritchie stated that the county officials he has been hearing from have been wanting to hear the board's recommendation that the sorting process be undertaken and that he believes the board has made its wishes clear throughout this meeting. The board wants this sort done because it wants to count the votes of people who had their ballots rejected in error and they want this process done soon because they are trying to conclude this process by the 19th.

Justice Anderson stated he does not like making decisions he doesn't have to make. He is inclined to say that the board has made its recommendation and should see what transpires as the board is currently in uncharted territory.

Judge Cleary raised the question of what happens now that the board has made the recommendation to the counties to do the sorting of the ballots but has not stated it will accept the amended returns.

Chief Justice Magnuson stated that in the abstract he is inclined to accept amended returns, but until he actually sees an amended report and reviews it, he cannot commit to accepting it. He wants amended reports presented to the board so that the board members can accept them in the ordinary course of operations.

Judge Cleary then asked the Chief Justice if he was understanding him correctly that he wants the amended reports physically present before deciding to accept them.

Chief Justice Magnuson replied that he believes the process is clear and the board needs to wait to receive the reports before making any decisions on accepting them.

Judge Gearin agreed that initially she wanted to make a motion regarding the acceptance of amended reports from county canvassing boards, but now she does not think that is the correct way to proceed. She cannot think of a reason why the board would not accept an amended report regarding the wrongfully rejected absentee ballots, but the matter is not currently before the board.

Secretary Ritchie reiterated that the message of the State Canvassing Board was that they recommend that the county canvassing boards be reopened for the examination of obvious errors of allegedly wrongfully rejected absentee ballots and that if obvious errors are identified the reports be amended and sent to the State Canvassing Board. He suggested that perhaps the previous motion be amended to say that canvassing reports are open, amended, and sent to the State Canvassing Board. It does not commit the State Canvassing Board to accept the reports, but reassures the counties that the reports will be reviewed.

Chief Justice Magnuson again stated that the State Canvassing Board cannot tell local officials what to do, and that they understand that if they do not provide the State Canvassing Board with amended returns by the time that the review of challenged ballots is complete then there is a problem. Again, he stated that the parties have recourse through the courts under 204C.39 and does not want to micromanage the counties.

Mr. Poser gave a clarification that the board has not accepted any reports from the counties regarding the recount because recount reports go directly to the State Canvassing Board and bypass the county canvassing boards. Changes made by the counties as a result of the sorting process would have to be incorporated into the initial canvassing reports provided to the board in November.

Chief Justice Magnuson again pointed out that this speaks to his reasons for concern and his reluctance to make a motion on the acceptance of amended returns.

Secretary Ritchie replied he was comfortable with this. Clearly the board wants errors corrected but will not dictate how the counties do this. He noted that the review of challenged ballots will be conducted from December 16 to 19 and that he is displeased that the campaigns seem to have been concentrating their efforts on drafting competing legal briefs instead of focusing on withdrawing frivolous challenges.

Judge Cleary asked for a clarification on what was just decided on the amended reports. The review of challenged ballots begins next week. Amended reports may or may not be submitted. Is it necessary for the board to approve each amended report as it comes in?

Secretary Ritchie replied that the procedure for next week has not yet been set.

Judge Anderson stated that he believed it was possible to adopt all reports with a single motion, but it is also possible that the matter will require further review.

Secretary Ritchie stated that he has confidence in the board's ability to address these concerns. He asked for input from the board regarding concerns about the procedures of the board.

Judge Cleary stated that his concern is that as these amended canvassing reports come in the board is going to be engaged in a recount and must they stop and debate about canvassing reports? How should this be managed logistically?

Secretary Ritchie replied that he is not able to currently answer that question.

Judge Gearin asked if Secretary Ritchie believed the board can be done on the 19th.

Secretary Ritchie replied that he believes it is possible with the cooperation of the campaigns in reducing the number of challenged ballots.

Judge Cleary then asked to comment on the number of challenged ballots. He stated that the danger is that meritorious challenges will be swamped in a sea of frivolous ones. He urged the campaigns to reduce the number of challenges.

Secretary Ritchie then made a motion that the board go into recess at the call of the chair.

Chief Justice Magnuson seconded the motion.

There being no further discussion, the motion passed without opposition and the meeting adjourned at 10:58 a.m.

EXHIBIT C



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON
ATTORNEY GENERAL

November 17, 2008

SUITE 1800
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ST. PAUL, MN 55101-2134
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The Honorable Mark Ritchie
Secretary of State
180 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1299

Re: **Canvass of Rejected Absentee Ballots**

Dear Secretary Ritchie:

You request legal advice as to whether Minnesota law allows returned absentee ballots that were rejected by election judges pursuant to Minn. Stat. § 203B.12, subd. 2 (2008) to be reviewed in connection with the upcoming state-wide recount of the votes cast in the November 4 election for the U.S. Senate.

ABSENTEE BALLOT PROCESS

A person voting by absentee ballot, after marking the ballot in the presence of another registered voter, seals the ballot in a ballot envelope provided with the absentee voting materials. The ballot envelope is then placed into a return envelope, upon which is printed a "certificate of eligibility," to be signed and sworn to by the voter. The return envelope also contains a statement by the voter's witness that the unmarked ballot was displayed to the witness, the voter marked the ballot in the presence of the witness and, if not previously registered, the voter provided proof of residence required by Minn. Stat. § 201.061, subd. 3 (2008). See Minn. Stat. §§ 203B.07, 203B.08 (2008). The return envelope is then sealed and mailed or delivered by an agent to the county auditor or municipal clerk. Minn. Stat. § 203B.08 (2008).¹

On election day the unopened return envelopes are delivered to the election judges. Minn. Stat. §§ 203B.08, subd. 3, 203B.12, subd. 1 (2008). Two or more judges examine each return envelope. A return envelope is "Accepted" if a majority of the judges 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;

¹ Voters may also complete absentee ballots in person during the 30 days preceding the election at the office of the county auditor or other place designated by the auditor. Minn. Stat. § 203B.081 (2008).

- (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.

Minn. Stat. § 203B.12, subd. 2 (2008). The ballot envelopes are removed from the "Accepted" return envelopes and placed unopened in a separate absentee ballot container. *Id.*, subd. 4. After the last election-day mail delivery, each "Accepted" ballot envelope is opened, and the ballot contained therein is initialed by the judges and deposited in the ballot box.

If a majority of the election judges examining a return envelope find that the voter has failed to meet one or more of the above requirements, the return is "Rejected." The "Rejected" return envelopes are returned unopened to the county auditor.²

The procedures applicable to absentee ballots submitted by military personnel and persons residing outside the United States differ in certain respects from that described above. See Minn. Stat. §§ 203B.13-203B.27 (2008).³ However, the ultimate treatment of the "Accepted" and "Rejected" ballot return envelopes is similar.

APPLICABLE LAW

The purpose and scope of an administrative recount pursuant to Minn. Stat. § 204C.35, subd. 3 (2008) is as follows:

Scope of recount. A recount conducted as provided in this section is limited in scope to the determination of the number of votes validly cast for the office to be recounted. Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process.

² The "Accepted" return envelopes from which ballots have been removed are also retained and returned to the county auditor.

³ For example, pursuant to Minn. Stat. § 203B.23, subd. 2 (2008), an absentee ballot board examines all returned ballot envelopes immediately during the thirty days before the election, and a return envelope that is rejected at least five days before the election is treated as a "spoiled" ballot and the voter may submit a replacement in lieu thereof.

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Id., subd. 3 (Emphasis added). Likewise, the rules of the Secretary of State relating to recounts are directed to the recounting of "ballots cast" (Minn. R. 8235.0200) and "voted ballots" (Minn. R. 8235.0300, 8235.0700).

Courts that have reviewed this issue have opined that rejected absentee or provisional ballots are not cast in an election. *McDonald v. Secretary of State*, 153 Wash.2d 201, 204, 103 P3d 722, 723 (2004) (review of rejected absentee ballots not within the scope of statutory recount); *Nguyen v. Nguyen*, 158 Cal. App.4th 1636, 1665, N.27 (Cal. App. 2008) (registrar not permitted by statute to count rejected provisional ballots during recount). The Hand Count Instructions in the 2008 Recount Guide prepared by your office similarly state:

This is an administrative recount held pursuant to M.S. 204C.35 and M.R. 8235. It is not to determine who was eligible to vote. It is not to determine if campaign laws were violated. It is not to determine if absentee ballots were properly accepted. It is not - except for recounting the ballots - to determine if judges did things right. It is simply to physically recount the ballots for this race!

(Emphasis in original.) Further, your office has not advised us of any previous recount in Minnesota that has included reconsideration of rejected absentee ballot return envelopes.

This is not to suggest that there is no remedy for the wrongful rejection of absentee ballots. Minn. Stat. ch. 209 (2008) sets forth the process for an eligible voter or candidate to commence a judicial election contest to challenge, among other things, "an irregularity in the conduct of an election."

Very truly yours,



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