

No. A09-697

State of Minnesota
In Supreme Court

*In the Matter of the Contest of General Election held on November 4, 2008, for the purpose of
electing a United States Senator from the State of Minnesota,*

Norm Coleman and Cullen Sheehan,

Appellants,

vs.

Al Franken,

Respondent.

RESPONDENT'S BRIEF

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INTRODUCTION

On November 4, 2008, the citizens of Minnesota cast their ballots for United States Senator. After a meticulous hand recount of the 2.9 million ballots cast in the election, the Minnesota State Canvassing Board unanimously concluded that Al Franken had received the highest number of votes legally cast and that, accordingly, he is entitled to receive the certificate of election.

On January 6, 2009, Appellants filed this election contest to overturn the State Canvassing Board's certification. Appellants asserted a variety of claims but focused most of their attention on allegations that absentee ballots had been improperly rejected by officials throughout Minnesota. The trial court received evidence and heard argument for seven full weeks. It heard testimony from no fewer than 142 witnesses, received nearly 2,000 exhibits, and considered nearly 20,000 pages of pleadings, motions, and briefs. R.5. With the voluminous record before it, the trial court issued a unanimous decision on April 13, 2009, dismissing each of Appellants' claims on multiple, independent grounds. The court rejected Appellants' central attack—involving the treatment of absentee ballots—for a multitude of reasons, including improper pleading, insufficient proof, and failure on the law. It concluded, based on the "[t]he overwhelming weight of the evidence," that "the November 4, 2008 election was conducted fairly, impartially, and accurately." R.55. An appeal, nevertheless, has followed.

Before this Court, Appellants repeat their attacks on Minnesota's system of absentee voting and challenge numerous rulings by the court below. They claim certain evidence should not have been excluded, even though it was cumulative, irrelevant, and without effect on the outcome; they claim that the trial court erred in its resolution of an "accepted ballot" claim that was inadequately presented, insufficiently proven, and without legal merit; and they claim that this Court should substitute its judgment for the Legislature's by rejecting clear statutory provisions in favor of an invented regime that finds no support in the facts, has no basis in the law, and suffers from a host of procedural problems. Almost in passing,

Appellants raise two additional challenges: to a pretrial discovery ruling and to the counting of 132 Minneapolis ballots. Appellants do not even attempt to square these five claims with the trial court's findings and procedural rulings; all the claims should be rejected.

Even if this Court were to take Appellants' claims at face value, each fails as a matter of law. In most cases, Appellants' claims are also barred as a procedural matter, and, even more fundamentally, they fail for simple lack of proof.

On each of these grounds, Respondent respectfully requests that the Court affirm the trial court and make clear that Al Franken is entitled to receive the certificate of election.

RESTATEMENT OF ISSUES PRESENTED

- 1) Whether the trial court acted within its discretion when it excluded cumulative and irrelevant evidence that would not have affected the outcome of the trial.

Trial Court's Ruling: On multiple grounds, the evidence was properly excluded.

Authorities: *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003); Minn. R. Civ. P. 61.

- 2) Whether the trial court acted within its discretion when it prohibited Appellants from presenting evidence that had never been disclosed in discovery, where the effect was to preclude a claim that was procedurally barred, factually unsupported, and without legal merit.

Trial Court's Ruling: Appellants not only failed to meet their burden of proving that certain accepted absentee ballots affected the outcome of the election; they also waived these claims by failing to comply with discovery obligations.

Authorities: *Minn. Twins P'ship v. Hatch*, 592 N.W.2d 847, 850 (Minn. 1999); *Hahn v. Graham*, 225 N.W.2d 385, 386 (Minn. 1975).

- 3) Whether the trial court was correct to judge the acceptability of absentee ballots under Minnesota statutes and case law, rather than under an invented standard that finds no support in the statutes, the Constitution, or the facts, where the party advocating the alternative, invented standard inadequately raised the claim and presented insufficient proof in support.

Ruling: Appellants' claims fail on multiple grounds, and, in any event, Minnesota law governs the treatment of absentee ballots.

Authorities: *Cranford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008); *Bell v. Gannaway*, 227 N.W.2d 797 (Minn. 1975); Minn. Stat. §§ 203B.02 *et seq.*

- 4) Whether the trial court acted within its discretion when it determined that Appellants had failed to show a need for certain pretrial inspections.

Trial Court's Ruling: On multiple grounds, Appellants failed to meet their burden.

Authorities: Minn. Stat. § 209.06.

- 5) Whether the trial court properly refused to overturn the certification by the State Canvassing Board, where the latter had determined, after a hearing and on advice of the Attorney General, that the Election Day returns were the best evidence of the votes in a certain Minneapolis precinct.

Ruling: The Board acted correctly and Appellants presented insufficient evidence to overturn its certification.

Authorities: *Moon v. Harris*, 142 N.W. 12 (Minn. 1913).

RESTATEMENT OF THE CASE

Appellants' statement of the case pays little heed to the record on review. For this reason, Respondent provides the following restatement of the case.

I. General Background

On November 4, 2008, the citizens of Minnesota elected their United States Senator in an election that was fair, impartial, and accurate. R.55. Minnesota's election officials proved themselves to be well-trained, and they performed their duties in a manner that was fair and conscientious. R.56. "[T]he general election resulted in a 'fair expression' of the voters of Minnesota." R.55.

The election was so close that state law required an automatic hand recount, which began on November 19, 2008. The recount was the largest in American history. On January 5, 2009, the State Canvassing Board certified the results. Al Franken had received 225 more votes than any other candidate. R.3.

Appellants Norm Coleman and Cullen Sheehan immediately initiated this lawsuit. Over three months later, the trial court concluded that Appellants' claims were without merit. It confirmed that Franken had received the highest number of ballots lawfully cast and was therefore entitled to receive the certificate of election.

II. Treatment of Absentee Ballots

A. Treatment of Absentee Ballots on and Before Election Day

Minnesota permits its citizens the privilege of voting by absentee ballot. R.22. In the 2008 general election, approximately 300,000 absentee ballots were cast. Of these, fewer than 13,000 were rejected. R.9.

The rejections occurred in accordance with the standard set by Minnesota's legislature, which permits individuals the privilege of voting by absentee ballot only in certain circumstances and sets forth clear, specific restrictions on the practice. *See, e.g.*, Minn. Stat. § 203B.02 ("General eligibility requirements"), 201.054 ("Methods of registering"), 203B.08 ("Marking and return of absentee ballots"), 203B.12 ("Election judges to receive and count

ballots"). The state-wide standards "clearly and unambiguously enumerat[e] the specific grounds upon which an election judge may accept or reject an absentee ballot," and they are "explicit and apply in every county and city in the state." R.46.

In reviewing these ballots and standards, the trial court "heard compelling testimony that election officials and election judges throughout the state's 87 counties and 4,128 polling stations were trained under a comprehensive training program based upon Minnesota law." R.46. The training ensured "consistent and uniform" application of the election laws. R.10.

On Election Day, Minnesota's election judges "act[ed] in good faith and exercis[ed] their best judgment and discretion." R.10. Still, they occasionally erred in determining whether to accept or reject certain absentee ballots. R.38. There is, however, no evidence that such errors were deliberate or intentional or that they affected the outcome of the 2008 senatorial election. R.51, 53. It is also the case that certain cities and counties adopted somewhat different procedures for handling absentee ballots. R.42. The different procedures were consistent with the different resources, personnel, and technology available to each county and city. R.42. Indeed, the differences in resources "*necessarily* affected the procedures used by local election officials reviewing absentee ballots." R.12 (emphasis added).

Despite these minor variations, election officials were governed by Minnesota's uniform laws; the record is devoid of any evidence of clear or intentional discrimination; and officials did not act arbitrarily or contrary to law when they adopted and employed their procedures. *See* R.42, 51. To the contrary, "[b]ased upon the weight of the testimony and evidence presented, the Court [found] local officials and election judges operated under uniform standards on Election Day." R.46. The discretion exercised by local officials was neither arbitrary nor irrational; rather, it "was exercised only as provided for by the uniform standards of Minnesota law and under a comprehensive, state-wide training program." R.52. "By all accounts, election officials performed their duties on Election Day to the best of

their abilities, given the resources available to them." R.43. Appellants failed to show that any alleged error or irregularity affected the outcome of the 2008 senatorial election. R.53.

B. Treatment of Absentee Ballots During the Recount

During the recount, Appellants' representatives took the position that the statutory grounds for rejecting absentee ballots were "very clear and objective," that the "decisions of local election officials should be presumed to have been accurate and correct," that "the absentee voter statutes, so far as the acts and duties of the voter are concerned, must be held to be mandatory in all their substantial requirements," and that neither a "substantial compliance" standard nor the Equal Protection Clause applies to absentee ballots. R.12. They objected to a review of rejected absentee ballots and tried to stop it by filing a petition with this Court. R.12. On December 18, 2008, this Court issued an order mandating that local election officials review their rejected absentee ballots and identify those wrongfully rejected. R.12-R.13. Of the 1,346 absentee ballots subsequently identified, the parties agreed that 933 should be opened and counted. When the Secretary of State opened and counted these ballots on January 3, 2009, Franken's margin over Coleman increased by 176 votes. R.12-R.13.

C. Treatment of Absentee Ballots in Appellants' Notice of Contest and Discovery Responses

On January 6, 2009, Appellants filed a Notice of Contest. A.31-A.40. Although it alleged that "a material and significant number of [additional] absentee ballot envelopes . . . were improperly rejected," A.34, it identified no claim based on either equal protection or due process.

On January 19, 2009, as ordered by the trial court, Appellants responded to Respondent's interrogatories. Despite Respondent's request that Appellants specifically identify each rejected absentee ballot they planned to challenge, and the trial court's direction that they respond, Appellants refused to provide specific information and instead referred Respondent generally to an indeterminate fraction of all the absentee ballots rejected on

Election Day. R.80. In response to Respondent's request that Appellants specifically identify each accepted absentee ballot they planned to challenge, Appellants failed to identify any ballots at all. R.14; R.80. Appellants never remedied their failure to comply with their discovery obligations. R. 24.

The first time Appellants raised an equal protection claim was in their summary judgment motion, five days before the start of trial. *See* Memorandum of Law in Support of Motion for Summary Judgment, docket #45 (Jan. 21, 2009). The first time Appellants raised a challenge to previously counted absentee ballots was February 20, nearly five weeks into trial. A.215-A.223. Appellants never adequately raised the due process claim they now bring before this Court. The closest they came was on March 13, during *closing argument*, when counsel first referred to "a substantive due process problem." R.281.

D. Treatment of Absentee Ballots in the Trial Court Proceedings

Charged with the arduous task of managing a complicated, seven-week trial, the trial court issued several unanimous mid-trial orders to help facilitate the proceedings. *See, e.g.*, R.127-R.143. It is difficult to overstate the trial court's accomplishment in this respect, given the dozens of evidentiary and trial-management disputes arising on a daily basis. R.5. The trial court also made a considerable effort to ensure that more evidence and argument, rather than less, came before the court. R.218 ("I will tell counsel this is a court trial, and our inclination is to allow evidence in and give it whatever weight we feel it deserves when we make our findings."); R.210; R.216; R.222. The trial court maintained this deliberately permissive approach throughout the litigation, and, so doing, it gave the parties every opportunity to make their case and their record. "The Court did not impose time limits on the length of the election contest nor did it limit either party's opportunity to call witnesses or to introduce evidence." R.181. As a result, Appellants were permitted over five weeks to present their case; the trial court heard testimony from over 140 witnesses; and nearly 2,000 exhibits were received. R.5. Appellants were permitted to present evidence of allegedly disparate standards. *See, e.g.*, R.224-R.226 (witness addressing how Ramsey County officials

check for voter registration); R.248 (same, for Meeker County); *see also* R.42-R.43 (making findings based on this evidence). The trial court excluded evidence of allegedly disparate standards to the extent it was cumulative and irrelevant. *See, e.g.*, R.243-R.244 (evidence excluded as cumulative); R.244 (same, as irrelevant).

Appellants' unilateral strategic litigation decisions affected their ability to present evidence. The trial court held, for example, that Appellants had limited their absentee-ballot claims to the approximately 4,800 ballots they had specifically identified prior to beginning trial. R.4; R.122. Appellants voluntarily stipulated, moreover, officials acted "properly and lawfully" on January 3 when they opened, counted, and included 933 ballots in the certified results. R.4; R.119-R.120.

On February 13, at the request of *both* parties, the trial court issued an order identifying the legal requirements for absentee voting. R.14; *see also* R.127-R.143. The court carefully considered Minnesota's statutory scheme, which establishes eligibility requirements, requires that voters follow directions for casting absentee ballots, and otherwise imposes clear, explicit restrictions on the privilege of absentee voting. *See, e.g.*, Minn. Stat. §§ 201.054, 203B.08, 203B.12. The court identified as compulsory those requirements that were "mandated" by the Legislature. R.133.

For the remainder of the trial, the court made case-by-case assessments as to the admissibility of specific proffers of evidence. Its numerous evidentiary rulings were reached on a multitude of different grounds. *See, e.g.*, R.244 (sustaining objection to absentee-ballot-related evidence on relevance grounds); R.243-R.244 (same, on grounds the evidence was cumulative); *see also* R.212-R.213 (same, on best-evidence grounds); R.246 (evidence withdrawn as inadequately disclosed during discovery).

On March 31, the court ordered delivery of 400 rejected absentee ballots to the Secretary of State and, on April 7, ordered that 351 be opened and counted. Franken's margin increased by another 87 votes, to a total margin of 312. R.15.

E. Treatment of Absentee Ballots in the Final Order

In its final order, the trial court rejected Appellants' absentee-ballot claims on multiple, often independent grounds.

First, the trial court rejected all but a small number of Appellants' absentee-ballot challenges for simple failure of proof. Appellants vigorously maintained, for example, that only the votes of registered voters should be counted, a standard the trial court accepted. R.15. For the vast majority of ballots that Appellants challenged, however, the record contains no evidence at all of registration; Appellants offered nothing to meet their own standard. In total, the court received evidence of valid voter registration for fewer than 700 absentee voters, R.48, and the bulk of this evidence was proffered by Respondent. Contrary to Appellants' assertions, the status of Minnesota's Statewide Voter Registration System in no way affected Appellants' ability to present proof of registration. R.8 ("No party . . . has been prejudiced by [delays in updating the SVRS] because the data . . . is readily available from other sources.").

Second, the trial court held that Appellants' claims failed on the merits because the court was not empowered to open and count absentee ballots that did not comply with Minnesota law. R.26 (citing *Wichelmann v. City of Glencoe*, 273 N.W. 638, 639-640 (Minn. 1937); *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975)). The court had identified the relevant statutory requirements in two prior orders, which it then incorporated into its final decision. R.127-R.143; R.174-R.205.

Third, the trial court found that Appellants failed to prove that any alleged irregularity actually affected the election's outcome. R.14; R.26; R.53. As the trial court acknowledged, the record supported the *opposite* conclusion. R.15, R.53 (noting that opening absentee ballots on January 3 and April 7 increased Franken's margin by a similar percentage and "[t]here is no evidence to suggest that opening and counting additional ballots will reverse this trend").

Fourth, the trial court found that Appellants failed to provide evidence to support a

viable equal protection claim. They failed to show "intentional or arbitrary" treatment of absentee ballots, R.51; they provided "no evidence of malfeasance or ill-will on the part of Minnesota's election officials or . . . judges," R.52; and they failed to show that local election officials violated Minnesota law in their treatment of absentee ballots, R.53.

Finally, the trial court held, "[Appellants'] claim that election officials violated the Equal Protection [Clause] . . . fails on the merits."¹ R.25. The court identified a litany of reasons. "[T]he implementation of procedures unique to each county does not, without more, create an equal protection problem." R.40. "[E]lection officials at the local level must have some discretion to operate elections in a manner that best harmonizes with the unique circumstances present in their jurisdiction." R.41. In the 2008 Minnesota election, "[e]lection officials were governed by uniform laws and did not arbitrarily disregard the statutory elements of absentee voting in adopting [local] procedures." R.42.

Moreover, the court noted, Appellants' proposed remedy ran directly contrary to Minnesota law, and it would lead to an absurd result. R.47 ("In essence, [Appellants] ask the Court to ignore the clear requirements of Minnesota's absentee voting laws."); R.49 ("Following [Appellants'] argument to its conclusion, the Court would be compelled to conclude that if one county mistakenly allowed felons to vote, then all counties would have to count the votes of felons.").

The trial court carefully considered *Bush v. Gore*, 531 U.S. 98 (2000), but found it had limited applicability to the 2008 Minnesota election, both on the facts and the law. *See, e.g.*, R.46 ("Unlike the factual situation presented in Florida, the Minnesota legislature enacted a standard clearly and unambiguously enumerating the specific grounds upon which an election judge may accept or reject an absentee ballot."); R.54-R.55 ("Equal protection cannot be invoked to protect citizens who did not follow the law when casting absentee

¹ The court held that it lacked jurisdiction to consider Appellants' Equal Protection claim to the extent it challenged "'deliberate, serious, and material violation[s]" of Minnesota Election Law. R.37-38. Appellants contend this is not the Equal Protection claim they raise on appeal. *See App.Br.*7-8.

ballots. . . . Rather, the benefits of Equal Protection should work to protect qualified voters who conscientiously adhered to Minnesota's absentee voting laws.").

Each of Appellants' absentee-ballot claims was therefore rejected on multiple, independent grounds.

III. Treatment of Appellants' Verified Petition for Inspections

Appellants began the contest by alleging that "double-counting . . . occurred in numerous precincts throughout the State of Minnesota." A.35. According to Appellants, the alleged double counting occurred because certain duplicate ballots were improperly marked and therefore inadvertently counted during the recount. *Id.*

Less than two court days before the start of trial, Appellants filed a verified petition requesting an inspection of ballots pursuant to Minn. Stat. § 209.06. R.99-R.106. It sought much more than what was permitted under the inspection statute. R.99. The following day, the court denied the petition. R.107-R.110. The court held that Appellants had failed to meet their burden of showing that an inspection was needed to prepare for trial. R.108-R.110. It noted that the parties had already viewed the ballots during the recount; that Appellants had conceded at oral argument that they would be able to prove their case without an inspection; and that trial was statutorily required to begin on the following court day. R.109-R.110.

At trial, Appellants entered into evidence the very same materials they claimed they had needed to inspect. *See* R.268. Appellants not only had both subpoena power and the ability to request public records, but invoked the power repeatedly and extensively, collecting tens of thousands of ballot envelopes, precinct rosters, and a variety of related documents, much of which was assembled and introduced into evidence. Having considered this evidence, the court found Appellants had failed "[to] prove by a preponderance of the evidence that any double counting of votes occurred." R.25; *see also* R.17-R.19, R.31-R.32 (identifying numerous explanations other than double counting for the discrepancies alleged

by Appellants); R.18 n.1 (expressing confusion over the significance of certain exhibits in light of Appellants' failure to present adequate explanatory testimony).

IV. Treatment of Ballots Missing in Minneapolis Precinct 3-1

In Minneapolis Precinct 3-1, an envelope went missing after Election Day but before the administrative recount. R.20. The envelope contained 132 ballots from Minneapolis Precinct 3-1 that had been cast and properly counted on Election Day. *Id.* An exhaustive search did not uncover the missing envelope, which remains missing. R.20; R.220; R.265. The record contains no allegations or evidence of fraud or foul play with respect to the missing envelope of ballots, and no evidence to suggest that the Election Day totals from Minneapolis Precinct 3-1 were anything but an accurate count of the ballots cast. *Id.*

After receiving a report from the Minneapolis Elections Official and considering legal memoranda from both candidates, the State Canvassing Board determined that the envelope in question had been lost. *Id.* The Board also sought legal advice from the Attorney General, who advised the Board in open session to use the Election Day returns from Minneapolis Precinct 3-1 to determine the vote totals in the recount. *Id.* The Board accepted the advice and unanimously voted to include the 132 ballots in the certified vote totals from the recount. *Id.*

At trial, Appellants conceded that the envelope of ballots existed but had been lost, R.220, R.265, but still argued that the trial court should have overturned the State Canvassing Board's decision to include the 132 ballots. The trial court explained that, under Minnesota law, "to overcome the result of an official canvass by a resort to the ballots it must be shown that they are intact and genuine and have not been tampered with." A.245 (quoting *Moon v. Harris*, 142 N.W. 12, 14 (Minn. 1913)). Appellants never proffered evidence sufficient to overcome the result of the official canvass, and the court therefore rejected Appellants' claim. R.25.

ARGUMENT

I. Legal Framework and Standards of Review

In an election contest for United States Senator, the court must decide "which party to the contest received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of election." Minn. Stat. § 209.12. The contest is an "adversary proceeding," *In re McConaughy*, 119 N.W. 408, 422 (Minn. 1909), and "[t]he court shall proceed in the manner provided for the trial of civil actions so far as practicable," Minn. Stat. § 209.065.

The burden of proof rests squarely upon the contestants. *Green v. Indep. Consol. Sch. Dist.*, 89 N.W.2d 12, 16-17 (Minn. 1958); *see also Berg v. Veit*, 162 N.W. 522, 522 (Minn. 1917) (canvassing board certification constitutes "prima facie [evidence] that the contestee had been elected to the office"); *State v. Schmiesing*, 66 N.W.2d 20, 26 (Minn. 1954) ("In the absence of convincing evidence to the contrary, . . . the presumption of regularity of official acts applies.").

Moreover, Minnesota has, for over 100 years, required that contestants bear the burden not only of proving "that there were irregularities," but also proving "*that they affected the result.*" *Taylor v. Taylor*, 10 Minn. 107 (1865). As a result, "violation of a statute regulating the conduct of an election is not fatal to the election in the absence of proof that the irregularity affected the outcome or was the product of fraud or bad faith." *Hahn v. Graham*, 225 N.W.2d 385, 386 (Minn. 1975); *accord Ganske v. Indep. Sch. Dist. No. 84*, 136 N.W.2d 405, 406 (Minn. 1965). This rule is settled, clear, and undisputed.

For purposes of appeal, "where the trial court makes findings of fact without a jury, such findings shall not be set aside unless clearly erroneous on the record as a whole." *Bell*, 227 N.W.2d at 801. A reviewing court gives these findings "great deference" and will not disturb those findings unless it reaches the definite and firm conviction that a mistake has been made and no evidence provides reasonable support for the findings. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). Legal conclusions are reviewed for error.

Schweich v. Ziegler, Inc., 463 N.W.2d 722, 729 (Minn. 1990). Evidentiary rulings require that the reviewing court "look to the record as a whole to determine whether, in light of the evidence therein, the district court acted 'arbitrarily, capriciously, or contrary to legal usage.'" *State v. Profit*, 591 N.W.2d 451, 464 n.3 (Minn. 1999). The trial court exercises similarly "broad discretion" in managing discovery, and its rulings stand absent an abuse of discretion. *Minn. Twins P'ship v. Hatch*, 592 N.W.2d 847, 850 (Minn. 1999).

II. Appellants' Claims Fail as a Matter of Law.

Appellants challenge the trial court's unanimous decision on several grounds. Each fails on multiple, independent grounds. At the outset, most have been waived, and none has been adequately proven. On appeal, Appellants ignore these procedural and evidentiary shortcomings, and on that ground alone the trial court's decision should be affirmed. *See State v. Grecinger*, 569 N.W.2d 189, 193 n.8 (Minn. 1997) ("[I]ssues not argued in briefs are deemed waived on appeal.").

Moreover, even if this Court were to take Appellants' claims at face value—even if it were to accept the allegations in Appellants' brief as somehow supported by the record—Appellants' claims in all instances would fail as a matter of law. Appellants rely on fundamental misconceptions relating to three central issues: Equal Protection, Due Process, and Minnesota's absentee voting requirements. In light of these errors, even if Appellants' erroneous characterization of the case were correct, their claims would fail.

A. Appellants' Equal Protection Claim Is Without Merit.

Appellants' equal protection claim, straightforward when stated concisely, is that a county- and precinct-based system of elections violates the federal Equal Protection Clause. *See, e.g.*, App.Br.44 (arguing that "[t]here is no legitimate state interest in promoting local control over the allocation of resources" and citing one of Minnesota's state-wide absentee-voting laws); *see also id.* at 41 (complaining that Minnesota's "single statutory standard for accepting absentee ballots . . . was applied differently and inconsistently in the different counties and cities on election night"). This bold proposition finds no support in the law.

At the outset, Minnesota's statutes are presumed to be constitutional. *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000). A court will not strike down a statute (much less a related series of statutes, such as those governing absentee voting) unless the challenging party demonstrates its unconstitutionality beyond a reasonable doubt. *Id.* Appellants have not even come close to making this showing.²

First, Appellants rely almost exclusively on a case that is entirely inapposite. In *Bush*, 531 U.S. 98, the Court found an equal protection violation where the state court had ordered a "standardless" manual recount conducted by officials with no training, mandated that only portions of the recount results be included in the totals, and permitted at least one county to change its evaluative standards mid-recount, all while prohibiting candidates from objecting or otherwise actively participating in the process. The Court held that "[t]he recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer." *Id.* at 109.

The facts in *Bush* were unique, and its holding is extremely limited. It held only that "[w]hen a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." 531 U.S. at 109. The Court described its analysis as "limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." *Id.* The Court even went so far as to exempt the very claim Appellants now raise: "The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* This is, of course, precisely the question Appellants have brought before this Court. *See, e.g.*, App.Br.10-12 (addressing systems for implementing witness-registration requirements). In other words, Appellants' expansive reading of *Bush* not only finds no support in the case; it directly contradicts it.

² Nor have Appellants given notice to the Attorney General that Appellants are attacking the constitutionality of Minnesota's absentee ballot system. *See* Minn. R. Civ. P. 5A; Minn. R. Civ. App. P. 144.

Despite Appellants' attempts to allege facts they regard as analogous to those in *Bush*, the cases remain factually distinct on numerous, significant grounds. Rather than challenging a "special instance" such as that presented in *Bush*, Appellants attack a long-established, statutorily imposed regime for processing absentee ballots (one similar to others used across the country). Rather than questioning a system that is "standardless," Appellants attack statutory standards that are extensive, uniform, and explicit. R.46. And rather than challenging a state's interpretation of accepted ballots, Appellants challenge its treatment of absentee ballots—which, prior to acceptance, are entitled to significantly less constitutional scrutiny. See *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 733 (Minn. 2003) ("[W]here only the ability to vote by absentee ballot, and not the right to vote generally, has been at issue, the United States Supreme Court has applied rational basis analysis.") (citing *McDonald v. Election Comm'rs*, 394 U.S. 802 (1969)). In short, even when Appellants' allegations are taken at face value, the treatment of absentee ballots in Minnesota's 2008 general election is quite "[u]nlike the factual situation presented in Florida." R.46.

Second, Appellants' claim falls short when judged against apposite case law. The Ninth Circuit recently rejected an equal protection claim closely analogous to Appellants'. See *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008). After the state rejected a referendum petition for insufficient signatures, voters in support of the petition alleged that Oregon's county-based procedures for verifying signatures violated their equal protection rights. Relying on *Bush*, the voters argued that Oregon "lack[ed] uniform statewide rules for verifying [the] signatures." *Id.* at 110. The Ninth Circuit held:

Even were *Bush* applicable to more than the one election to which the Court appears to have limited it, Oregon's standard for verifying referendum signatures would be sufficiently uniform and specific to ensure equal treatment of voters. The Secretary uniformly instructs county elections officials to verify referendum signatures by determining whether each petition signature matches the signature on the signer's voter registration card.

Id. at 1106; see also *id.* ("This standard ensures equal treatment."). The court further noted that various governmental efforts—including the training provided by the Secretary of

State—helped to provide "sufficient guarantees of equal treatment" to defeat the equal protection claim. *Id.*; see also R.9-R.10 (discussing the extensive training provided in Minnesota's 2008 election). Significantly, the *Lemons* court never held that the standards across the counties were perfectly uniform. Rather, it held, they were "uniform and specific enough to ensure equal treatment of voters." *Lemons*, 538 F.3d at 1102 (emphasis added). See also *id.* at 1106 (upholding dispositive finding that "overall we have a fairly coherent set of results"). *Lemons*, in short, confirms what *Bush* itself made clear: the Equal Protection Clause does not invalidate an election based on reasonable variations in the systems local entities develop to implement state election laws. See *Bush*, 531 U.S. at 109. See also, e.g., *State ex rel. League of Women Voters v. Herrera*, 203 P.3d 94, 99 (N.M. 2009) (no equal protection violation where the relevant state statute, coupled with guidance by the Secretary of State, "allow[ed] for some discretion by local election judges, but limit[ed] that discretion with clear and uniform guidelines"); *Wexler v. Anderson*, 452 F.3d 1226, 1233 (11th Cir. 2006) (same, where the state employed "different manual recount procedures" between counties depending on each county's voting system).

Third, Appellants' claim is deficient because it fails to recognize that local variations in election administration are often the result of variations in resources. The trial court confirmed this in fact occurred in Minnesota's election. R.42. In these circumstances, a constitutional challenge finds even less traction. See, e.g., *Wexler*, 452 F.3d at 1233 (rejecting equal protection claim and noting that "'local variety [in voting systems] can be justified by concerns about cost, the potential value of innovation, and so on'" (quoting *Bush*, 531 U.S. at 134 (Souter, J., dissenting))); *Fl. State Conference of N.A.A.C.P. v. Browning*, 569 F. Supp. 2d 1237, 1258 (N.D. Fla. 2008) (same, and noting that while "resource disparities are to some degree inevitable," they are "not, however, unconstitutional").

Fourth, Appellants' claim fails because the Equal Protection Clause does not invalidate elections based on minor variations. This principle is both commonsensical and well-established. See, e.g., *Duncan v. Poythress*, 657 F.2d 691, 701-704 (5th Cir. 1981) ("[T]o

interpret [federal law] as providing a remedy for all election irregularities would cause the federal courts to be 'thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law', " and "federal courts are neither equipped, nor empowered, to rectify every alleged election irregularity." (quoting *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970)); see also *Graham v. Reid*, 779 N.E.2d 391, 396-397 (Ill. App. Ct. 2002) (rejecting *Bush*-based claim for alleging "mere 'garden variety' election irregularities"); *Welker v. Clarke*, 239 F.3d 596, 597 n.3 (3d Cir. 2001) (compiling relevant cases); R.38-R.39 (same).

Fifth, Appellants' claim fails because a successful equal protection challenge requires a showing not only of discrimination, but of intentional or arbitrary discrimination. *Snowden v. Hughes*, 321 U.S. 1, 8 (1944) ("The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."); *Programmed Land, Inc. v. O'Connor*, 633 N.W.2d 517, 530 (Minn. 2001). Appellants never have sought to prove that local officials acted arbitrarily or with the intention to discriminate. At most, they have alleged that "counties and municipalities made their own deliberate decisions on the meaning of the statute." App.Br.6.

Finally, Appellants effectively waived the claim by failing to bring all 300,000 absentee ballots (or even all 11,000 rejected absentee ballots) before the trial court. Instead, Appellants brought before the trial court a mere 4,800 rejected absentee ballots. R.122-R.126. If Appellants' theory of equal protection were correct, then the constitutional error would be worsened, not remedied, by a court's imposition of a uniform standard to only a small fraction of the absentee ballots cast in an election. Though Appellants question the trial court's 4,800-ballot ruling in a footnote (one without citation or even an affirmative argument), the challenge is facially inadequate. Compare *In re Application of Olson*, 648 N.W.2d

226, 228 (Minn. 2002) (an issue is "not 'argued'" for purposes of appeal when it is raised "tangentially in one argument heading and in one footnote") *with* App.Br.24 n.8. The court's well-reasoned ruling is in any event correct, *see* R.122-R.126, and it is entitled to deference, *see* *Minn. Twins*, 592 N.W.2d at 850; *Amos*, 658 N.W.2d at 203.

In short, Appellants' novel equal protection claim (which has been waived) finds no support in the law. This comes as little surprise. If either of the factual circumstances alleged by Appellants—minor variations in election procedures or minor errors—were held to be a constitutional wrong, it would be virtually impossible for a state to conduct an election administered at the precinct and county level. Appellants' equal protection claim necessarily fails.

B. Appellants' Due Process Claim Was Never Raised, and It Is Without Merit.

Appellants' due process claim fails for similar reasons. At the outset, Appellants waived any due process "claim" by failing to raise it adequately before the trial court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (appellate review limited "'only [to] those issues that the record shows were presented and considered by the trial court'").

It is no accident that the phrase "due process" cannot be found in the trial court's exhaustive order. A due process claim appears neither in the Notice of Contest nor in Appellants' discovery responses. A.31-A.40; R.75-R.98. A search of the transcript reveals that, in 26 days of presenting their case, Appellants used the expression "due process" exactly four times. Not one of these references included any legal citation, and not one identifies the due process claim Appellants now advance. *See* R.207-R.208; R.235-R.236; R.238; R.240-R.241. After resting their case, Appellants made several passing references to "due process." *See* R.270; R.272; R.278-R.279. They waited until closing argument, however, even to use the phrase "substantive due process," which appears for the first (and only) time in the transcript on March 13. R.281-R.282. This was also the first time in the transcript that Appellants cited any legal authority in support of a due process claim. *Id.*

(discussing *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995)). Even that single citation failed to indicate whether Appellants meant to raise a new claim or merely to threaten the trial court with parallel proceedings in federal court. R.279 (discussing the doctrine of abstention and how the *Roe* court decided to halt state court proceedings).

Appellants were required to identify their due process claim in the normal course, prior to trial.³ They were required to present argument and evidence on the claim, in order to provide the trial court with a fair opportunity to address it (and to provide Respondent with fair notice and an opportunity to defend). They were required at least to *mention* due process in response to Respondent's motion for involuntary dismissal, which sought dismissal of Appellants' case-in-chief after Appellants had rested. Yet in their briefing and at the hearing, Appellants failed even to use the expression "due process." R.250-R.266; R.266 ("[W]ith respect to the various claims set forth in our brief that we have agreed that we have chosen not to present any evidence on in an effort to tailor our case, we agree that those certainly could be dismissed at this point.").

Even if properly raised, Appellants' due process claim fails on the merits. First, a contestant challenging an election under the Due Process Clause must demonstrate that "the election process itself [has reached] the point of patent and fundamental unfairness." *Roe*, 43 F.3d at 580 (internal quotation marks omitted). "Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots," *id.*, and relief is not available except upon a showing that an election has been permeated with "broad-gauged unfairness," *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978). A due process claim therefore fails when it is based on minor errors and inconsistencies. *See, e.g., Roe*, 43 F.3d at 580 ("Not every state election dispute . . . implicates the Due Process Clause of the Fourteenth Amendment and

³ Appellants' due process claim—like any other constitutional challenge to Minnesota's statutory scheme—was as viable on January 6, 2009, the day Appellants filed their Notice of Contest, as it was on any later date, including once the trial court had issued its various rulings. All the information necessary to make the claim (the statutes, case law, and alleged Election Day conduct) was available to Appellants prior to trial, and Appellants were obliged to raise the claim at that time.

thus leads to possible federal court intervention."). Yet that is precisely Appellants' challenge on appeal. The claim before this Court—involving, at most, minor variations between local jurisdictions applying the governing statutes—is no different from those that would be available after any county- or precinct-based election. Were the Court to accept Appellants' extraordinary invitation to interfere with the everyday administration of elections, it would be both unwise as a public policy matter and unprecedented as a legal matter.

Second, for due process claims based on allegedly altered election practices, "patent and fundamental unfairness" generally requires a strong showing that voters had relied on the prior practice. *See, e.g., Roe*, 43 F.3d at 581 (fundamental fairness implicated where certain individuals would have voted but for their reasonable expectation that the state would enforce the election laws as written); *Griffin*, 570 F.2d at 1074 (unconstitutional to "invalidate [state-created ballots,] where the effect of [the action is] to induce the voters to vote by this means"); *Henry v. Connolly*, 910 F.2d 1000, 1003 (1st Cir. 1990) (cases in question "without exception involved instances where the government, by an established policy or course of conduct, actively misled interested parties"); *Partido Nuevo Progresista v. Perez*, 639 F.2d 825, 828 (1st Cir. 1980) (rejecting claim; "no party or person is likely to have acted to their detriment by relying upon the [relevant rule]"); *Brown v. O'Brien*, 469 F.2d 563, 569 (D.C. Cir.) (had rule been changed prior to the election, "the candidates might have campaigned in a different manner" and "[v]oters might have cast their ballots for a different candidate"), *vacated as moot*, 409 U.S. 816 (1972) ; *Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970) (state could not apply a "new . . . rule to nullify previously acceptable signatures without prior notice" where "[n]othing in the statutory language suggests that such a restrictive interpretation was necessary or would be readily understood by the general public").

Here, Appellants have neither alleged reliance nor presented any evidence of it. They fail even to allege differences in stated or publicized policies. *See Rossello-Gonzalez v. Calderon-Serra*, 398 F.3d 1, 18 (1st Cir. 2004) (rejecting claim where "there [was] no clearly articulated

Commonwealth policy, much less a statute," supporting the plaintiffs' proposed interpretation of the rules). Rather, Appellants complain of minor differences in the methods officials employed to determine whether individual ballots comply with certain statutory requirements—alleged differences in the manner of checking registration, in the standards for comparing voter signatures, and the like. It is impossible to imagine how voters might have known of, much less have relied on, such standards in casting their absentee ballots.

If anything, reliance existed in the opposite direction, and a viable due process claim would arise if this Court were to *accept* Appellants substantial compliance argument. If, for example, this Court were to disregard Minnesota's notarization/witness requirements and accept ballots in violation of those requirements, then *Roe* indeed would be on all fours:

First, counting ballots that were not previously counted would dilute the votes of those voters who met the requirements of [the statute] as well as those voters who actually went to the polls on election day. Second, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the notarization/witness requirement.

Roe, 43 F.3d at 581. It is *these* effects that would "implicate fundamental fairness." *Id.*; *see also id.* (rejecting argument that the more lenient standard was "what the law has always been in Alabama," where both the statutory language and the district court's findings were to the contrary).

Third, Appellants' proposed remedy is in no one's legal interest. Under Appellants' theory, two classes of voters are affected by the trial court's decision to apply the law: those whose ballots remain rejected pursuant to statute, and those whose ballots were accepted either on Election Day or by the court. The first class of voters has no standing to challenge the rejection of their ballots. The Constitution does not protect the voting rights of voters who do not follow the law. *See Johnson v. Trnka*, 154 N.W.2d 185, 187 (Minn. 1967) ("The outcome of an election should rest upon ballots received according to law and should not be determined by illegal votes."). The interest of the second class of voters is to prevent

dilution of their votes—here, to keep the remaining illegal ballots rejected, not opened and counted. Appellants' novel remedy actually harms the interests of these voters.

In sum, on multiple, independent grounds, Appellants' due process claim fails as a matter of law.⁴

C. Appellants' "Substantial Compliance" Argument Is Without Merit.

Despite limiting their Issues Presented on Appeal to evidentiary and constitutional concerns, App.Br.1-2, Appellants appear to have expanded their absentee-ballot claims through an oblique attack on the trial court's interpretation of state law. *See* App.Br.37 (criticizing the trial court's "adherence to the statute"). Again, however, the argument fails.

It is worth noting that, although Minnesota currently provides for absentee voting, it is under no obligation to do so. *See, e.g., McDonald*, 394 U.S. at 806-809. Whether and how a state permits its citizens to vote by absentee ballot is part of its "'broad powers to determine the conditions under which the right of suffrage may be exercised.'" *Id.* at 807; U.S. Const., Art. I, Sec. 4. A voter's ability to vote absentee, in other words, is derived entirely from state statute, and any restrictions a state imposes on the mechanics of and qualifications for absentee-ballot voting are subject only to rational basis review. *See Erlandson*, 659 N.W.2d at 733; *see also McDonald*, 394 U.S. at 808-809.

In Minnesota, absentee-ballot voting has "'the characteristics of a privilege rather than of a right.'" *Erlandson*, 659 N.W.2d at 733, n.8. In granting this privilege, Minnesota's Legislature has made a considered judgment to impose certain clear restrictions, largely in

⁴ Appellants also raise an ill-defined "due process" objection to the notice provided to certain voters. App.Br.31 n.11, 32. At the outset, there was in fact a "rational basis" for providing notice to the 413 voters whose ballots were rejected by one of the candidates rather than by election officials. States have a valid and significant interest in "protecting public confidence 'in the integrity and legitimacy of representative government,'" and special legitimacy concerns are raised when the State has concluded that a ballot should be counted but it is not, due to a candidate's objection. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1620 (2008). In any event, the letter at issue provided neither pre-deprivation notice nor any special right of appeal. It merely cited two statutory provisions available to all voters and confirmed that the Secretary of State's office "cannot provide legal advice on this matter." R.287.

the interest of fraud prevention. *See Bell*, 227 N.W.2d at 802 (the "prevention of fraud" is a central purpose of absentee-ballot legislation); *Wichelmann*, 273 N.W. at 639 ("The lawmaking power, being fully cognizant of the possibilities of illegal voting, frauds and dishonesty in elections, prescribed many safeguards in the Absent Voters Law to prevent such abuses."). As the United States Supreme Court has held, fraud is an "unquestionably relevant" concern in the voting context and "[t]here is no question about the legitimacy or importance of the state's interest in counting only the votes of eligible voters." *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1617, 1619 (2008). Indeed, "flagrant examples [of fraud] have been documented throughout this Nation's history," and, in particular, fraud perpetuated through the use of absentee ballots has "demonstrate[d] that not only is the risk of voter fraud real but that it could affect the outcome of a close election." *Id.* The analysis in no way changes even if there is "no evidence of any such fraud actually occurring in [a given state] at any time in its history." *Id.* The state nevertheless may act to prevent voter fraud. *Id.*

A second central purpose of Minnesota's absentee ballot rules is to facilitate efficient processing and the "reasonably prompt determination of the result of the election." *Bell*, 227 N.W.2d at 802. This, too, without more, provides a "sufficient justification" for Minnesota to impose restrictions in the process. *Crawford*, 128 S. Ct. at 1619.

Having considered these concerns, the Legislature has made Minnesota's absentee-ballot rules deliberately strict. Minnesota is one of a minority of states, for example, that requires an excuse for early or absentee voting. *See* Reed College, Early Voting Information Center, State Summary Table, *available at* <http://www.earlyvoting.net/states/abslaws.php>. Even by comparison to the minority of states that still require an excuse, Minnesota's Legislature has imposed stricter prophylactic standards. *See, e.g.*, Minn. Stat. § 203B.07, subd. 3 (requiring that each absentee ballot be witnessed by a qualified individual). In part, this provides a balance to Minnesota's more liberal regime for in-person voting. *See* R.135 (recognizing Minnesota as one of eight states allowing same-day registration); *see also id.* at R.135-R.136 ("The legislature has made a policy decision whereby voters are encouraged to

vote in person on Election Day."). While many of Minnesota's neighbors have elected to make absentee ballot voting easier, Minnesota's Legislature, at least to this point, has chosen not to follow suit—and that legislative determination is not subject to challenge. *Crawford*, 128 S. Ct. at 1619.

As a result, the trial court was both obliged and correct to enforce certain requirements governing the acceptance of absentee ballots. Each is statutorily imposed, substantial, and mandatory. As this Court explained in *Bell*,

In order to preserve the purity and integrity of elections, . . . the absentee voter statutes, so far as the acts and duties of the voter are concerned, must be held to be mandatory in all their substantial requirements. These laws are not designed to insure a vote, but rather to permit a vote in a manner not provided by common law. As a result, voters who seek to vote under these provisions must be held to a strict compliance therewith.

227 N.W.2d at 803; *see also Wichelmann*, 273 N.W. 638 at 66 ("The provisions of election laws requiring acts to be done and imposing obligations upon the elector which are personal to him, are mandatory.").

Appellants resist this direct authority by citing *Application of Andersen*, 119 N.W.2d 1 (Minn. 1962), and a lower court decision, *In re Contest of Sch. Dist. Election*, 431 N.W.2d 911 (Minn. Ct. App. 1988). Yet neither is contrary. *Andersen*, which preceded *Bell*, is not an absentee voting case. It addressed the correction of obvious error by county canvassing boards, not the requirement that absentee voters comply with clear and substantial statutory requirements. 119 N.W.2d at 8-9. In *School District Election*, the Court of Appeals specifically limited its holding to directory voting instructions such as where to place a properly completed voter registration card. It cited *Bell* and *Wichelmann* for the proposition that "mandatory requirements" for absentee ballot voters include "fil[ing] a verified application for a ballot with the city clerk prior to the election," and "sign[ing] the voter's certificate." *School District Election*, 431 N.W.2d at 915. Even in *School District Election*, officials rejected ballots if they did not comply with the mandatory provisions. *See id.* at 915-916.

Not one of the cases cited by Appellants calls Minnesota's clear law into question, and each provides support for the trial court's orders. See *Fitzgerald v. Morlock*, 120 N.W.2d 339, 345 (Minn. 1963) (acknowledging the well-settled rule that "any reasonable regulations of the statute as to the conduct of the voter himself were mandatory and that his vote may be refused if he fails to comply with them"); *Allen v. Holm*, 66 N.W.2d 610, 613 (Minn. 1954) (addressing a statutory ambiguity in the deadlines for nomination certificates and noting that "[i]n the absence of such ambiguity, the language requiring the filing within a stipulated period of time would, of course, have to be given literal effect since it is mandatory in nature"); see also *Clayton v. Prince*, 151 N.W. 911, 912 (Minn. 1915) (refusing to reverse district court, which had held that voters' registrations were proper, where voters had registered in person, they had acted entirely in "accordance with instructions of the judges of election," and there was no mandatory requirement that the voters use a certain unavailable affidavit form rather than an oath); *McEwen v. Prince*, 147 N.W. 275, 276-277 (Minn. 1914) (refusing to reverse district court, which had made case-by-case determinations concerning whether certain in-person registration requirements were mandatory); *Bloedel v. Cromwell*, 116 N.W. 947, 949 (Minn. 1908) (refusing to reverse district court, which had held that the ballot in question "was properly excluded by the trial court, although it was 'cast in good faith, without fraud or corruption, and without any intention of identifying it'").⁵

The trial court carefully followed this precedent, considering each relevant requirement in light of the applicable statutes, rules, and case law. See, e.g., R.153-R.154 (refusing to accept the argument, advanced by *Appellants* throughout the recount and at trial, that all absentee ballots containing "mismatched dates" should be rejected on that ground alone, where no such requirement can be found in the relevant authority); R.4-R.5 (refusing to reject ballots on the basis that the voter-registration materials had been placed, contrary to the printed instructions, in the secrecy envelopes, where statute and case law treat that

⁵ As these cases make clear, Appellants are simply incorrect to claim that "absent evidence of fraud or bad faith, this Court has never favored a strict compliance standard." App.Br.25.

instruction as directory); A.263 (citing Minn. R. 8210.2200, subp. 2, and refusing to reject ballots on the ground of incomplete voter certifications where the envelope had been hand-delivered and, but for official error, the voter would have been permitted the opportunity to correct the error).

Of course, Appellants' error rests not only in their misreading of the law, but in their very approach. It makes little sense to talk about the requirements of absentee voting as though hundreds of thousands of ballot-related decisions might be made under a blanket "substantial compliance" or "strict compliance" standard. App.Br.7. Defined rules of decision must govern the acceptability of ballots. It is particularly ironic that Appellants are advocating such an ill-defined approach, given their insistence that every ballot be subject to exactly uniform criteria. *See, e.g., Gross v. Albany County Bd. of Elections*, 819 N.E.2d 197, 201 (N.Y. 2004) ("Strict compliance . . . 'reduces the likelihood of unequal enforcement'" and "'a too-liberal construction . . . has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process'"). Appellants nevertheless ask this Court to order the application of an undefined standard, "built by an amalgam of the practices on election night," App.Br.33, as though such an order could provide the fact-finder with anything close to a meaningful, workable directive.

The proper standard—defined by the Legislature, specifically set forth in statute, and characterized by careful, clear rules of decision—was identified in the detailed set of orders the trial court issued on February 13 and March 31. R.127-R.143; R.174-R.205. The court's rulings are both well-supported and correct on the merits.

In the end, Appellants' many objections to Minnesota's absentee voting laws do have a proper forum: the Legislature. Appellants cannot demand that this Court simply ignore the law. Indeed, such a remedy would be more than lawless; it would nullify statutory restrictions that were known, relied upon, and in effect on Election Day, and it therefore would violate the Constitution. *See Roe*, 43 F.3d at 582.

III. Each of Appellants' Five Points Fails on Multiple, Independent Grounds.

As explained above, Appellants' three principal legal theories lack legal merit. This helps to explain why each of their claims is deficient for multiple, independent reasons.

Respondent now turns to each of the five points on appeal.

A. The Trial Court Did Not Abuse Its Discretion in Excluding Cumulative and Irrelevant Evidence.

This Court reviews evidentiary rulings for clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). If exclusion of evidence is proper, then a trial court's decision to exclude the evidence will not be overturned regardless of the theory upon which it was based. *Brecht v. Schramm*, 266 N.W.2d 514, 520 (Minn. 1978).

Appellants contend, first, that the trial court erred in excluding the evidence contained in their offers of proof. These offers of proof consist of the following: (i) testimony regarding minor variations in election procedure that is in no way quantified or otherwise placed into perspective; (ii) expert testimony that, at best, would have acknowledged differences in absentee-ballot rejection rates without any effort to opine on causation for the observed differences; and (iii) a small number of purportedly accepted ballot envelopes and applications offered without accompanying explanations by voters or election officials. *See* A.570-A.591; A.704-A.708; *see also* A.166-A.174 (excerpting relevant portions of expert witness's deposition testimony). Without question, the trial court acted within its discretion in excluding this evidence.

1. The Evidence Was Cumulative.

First, Appellants' evidence was properly excluded because it was cumulative. For weeks, the court heard evidence that Appellants felt supported their theory of Election Day disparities. This enormous quantity of evidence allowed the court to find, as a matter of fact, that:

Counties and cities adopted different procedures and methods, consistent with their resources and personnel, in determining whether an absentee voter complied with the statutory requirements of Minnesota law. Election officials were governed by uniform laws and did not arbitrarily disregard the statutory elements of absentee voting in adopting these procedures. . . . By all accounts,

election officials performed their duties on Election Day to the best of their abilities, given the resources available to them.

R.42-R.43; R.46 ("Based upon the weight of the testimony and evidence presented, the Court finds local officials and election judges operated under uniform standards on Election Day."). A trial court's findings of fact, which necessarily incorporate the court's judgment concerning the evidence required to reach them, are entitled to "great deference." *Fletcher*, 589 N.W.2d at 101; *see also* R.243-R.244 (determining that proffered absentee-ballot evidence was cumulative); R.233 (same). Yet Appellants do not even attempt to explain how the evidence contained in their offers of proof—which constitutes only a fraction of the evidence they presented on allegedly disparate standards—could or should have altered the court's factual findings. The claim fails on this ground alone. *See Amos*, 658 N.W.2d at 203 (confirming that, when appealing an evidentiary ruling, the appellant bears the burden of establishing prejudice). In short, the evidence was cumulative, and the trial court acted within its discretion to exclude it.

2. The Evidence Was Irrelevant.

Second, the evidence challenged by Appellants was irrelevant and therefore properly excluded. Appellants argue before this Court that the evidence is relevant to either their equal protection claim or their due process claim. Neither argument is sufficient.

At the outset, Appellants are constrained on appeal in making these arguments, given that they failed to preserve multiple claims. As discussed above, Appellants failed to raise their due process claim before the trial court. Section II (B), *supra*. As this Court has long held, when evidence is offered for a purpose other than one that might have rendered it admissible, exclusion of the evidence is not reversible error. *Mareck v. Minneapolis Trust Co.*, 77 N.W. 428, 430 (Minn. 1898). Appellants also failed properly to preserve claims based on accepted absentee ballots by declining to disclose evidence in response to Respondent's interrogatories. R.14, R.24. The trial court unquestionably had discretion to exclude evidence withheld in discovery. *Minn. Twins*, 592 N.W.2d at 850; *see also State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998) ("Trial courts have broad discretion in imposing sanctions for

violations of the discovery rules.").

On the most fundamental level, Appellants' equal protection and due process claims fail as a matter of law. *See* Sections II (A)-(B), *supra*. Accordingly, the trial court acted well within its discretion in excluding evidence offered to support them.

3. Exclusion of the Evidence Was Harmless.

Third, even if the court did err in excluding Appellants' evidence, the error was harmless and Appellants are entitled to no relief. *See* Minn. R. Civ. P. 61. The voluminous record before the trial court was more than sufficient to provide a foundation to address, and resolve, Appellants' claims. The offers of proof do nothing to call into question the court's determinative findings regarding the uniformity of standards on Election Day. Nor do they even come close to establishing that any alleged irregularity—whether relating to equal protection, due process, or some other claim—affected the outcome of election. R.26. Without either showing, the challenge necessarily fails. *See Hahn*, 225 N.W.2d at 386; *Green*, 89 N.W.2d at 16-17.

Appellants' evidentiary challenge therefore fails on multiple, independent grounds.

B. Appellants' Constitutional Challenges Relating to Accepted Absentee Ballots Have Been Waived and Are Without Merit.

Appellants also challenge the trial court's treatment of accepted absentee ballots, at times referring to allegedly "illegal" votes. The trial court expressly found this claim to be waived. It is, in any event, without merit.

1. Appellants Waived Their Accepted-Ballot Claim.

First, as the trial court expressly held, Appellants waived all claims based on accepted absentee ballots. R.24 ("[Appellants] failed to meet their burden of proving that wrongfully accepted absentee ballots affected the result of the election. In addition, [Appellants] waived these claims by failing to identify specific ballots in response to [Respondent's] interrogatories."). The trial court was correct (and certainly did not abuse its discretion) in so holding.

Appellants' half-hearted attempt to challenge this ruling is inadequate even on its face. Compare *In re Application of Olson*, 648 N.W.2d at 228 with App.Br.28 n.9. On the merits, the argument is similarly inadequate. Even if Appellants' late identification of ballots had been a sufficient response to Respondent's extensive pretrial interrogatories (which it was not), that identification was provided more than five weeks into trial—at the close of Appellants' case, A.570-A.591, and the day before closing arguments, R.272-R.274; see also R.274-R.276 (Respondent objecting on timeliness grounds, as "an offer of proof must be made during the case in which it's relevant"). Such a late disclosure, which obviously could not cure Appellants' pretrial discovery failures, very much "prejudice[d]" Respondent's ability to prepare for trial, which had all but concluded by that point. *Cornfeldt v. Tongen*, 262 N.W.2d 684, 697 (Minn. 1977). Moreover, courts have "broad discretion" to issue discovery orders, and their rulings—including those imposing sanctions—must be upheld absent an abuse of that discretion. *Minn. Twins*, 592 N.W.2d at 850; see also *Patterson*, 587 N.W.2d at 50.⁶

Appellants independently waived their accepted-ballot claims by failing to bring all 300,000 absentee ballots before the court. See Section II (A), *supra*.

Finally, Appellants waived their accepted-ballot claims by failing to object to the ballots prior to their opening and counting. See *Bell*, 227 N.W.2d at 805 (considering precursor to Minn. Stat. § 204C.13 and concluding that "an absentee ballot may not be challenged at any time after the ballot has been deposited in the ballot box," and "only facially invalid ballots may be subject to postelection challenges"); see also *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 332 (1946) ("Long experience has demonstrated the fairness and efficaciousness of the general rule that once a ballot has been cast without challenge and its identity has been lost, its validity cannot later be challenged."); R.24. Appellants attempt to

⁶ Appellants make a cryptic reference to the court's mid-trial order addressing "the standard for 'legally cast' ballots." App.Br.28 n.9. To the extent Appellants are suggesting that parties can somehow escape discovery obligations by changing their theory of the case in the middle of trial, they cite no authority, presumably because none exists. That argument is waived, in any event, because Appellants' brief contains no argument or citation to legal authority in support." *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002).

evade this requirement by arguing that, as a practical matter, they did not have the ability to raise such challenges. App.Br.28. *Bell* rejected an analogous argument, however, making clear that the critical issue was not prevailing practice or administrative burden but the language of the statute. *Bell*, 227 N.W.2d at 806 n.12 (acknowledging that the "burden of appointing challengers in a statewide election is undoubtedly great"). In any event, the time for Appellants to have questioned the ability to raise challenges was prior to Election Day, not after the opening and counting of hundreds of thousands of absentee ballots. *Peterson v. Stafford*, 490 N.W.2d 418, 419 (Minn. 1992) (courts will examine election-related challenges "not only on their merits, but also from the perspective of whether the applicant acted promptly in initiating proceedings").

2. Appellants' Accepted-Ballot Claim Is Without Merit.

Had Appellants not waived their challenge to accepted absentee ballots, it still would fail on the merits. As previously discussed, Appellants' attack on accepted absentee ballots constitutes neither an equal protection violation nor a viable claim under the Due Process Clause. See Sections II (A)-(B), *supra*.

The flaws in this particular manifestation of Appellants' claim run particularly deep, as Appellants maintain that "[i]t cannot be determined . . . for which candidate [the] illegal votes were cast." App.Br.32.⁷ If true, this simply means that Appellants' contest should be dismissed, as they have failed to meet their burden of showing that the alleged irregularities "affected the result." *Taylor*, 10 Minn. 107. Either way, there is no question that, as an

⁷ Respondent agrees that neither of the alternative remedies identified by Appellants is available under Minnesota law. So-called "proportional reduction," which "necessarily disenfranchises voters," App.Br.33, is a heavily criticized method, employed by only a handful of states, and it is used most often as a screening device to validate elections, not to carry the contestant's burden of proof or to overturn an election. See, e.g., *Fischer v. Stout*, 741 P.2d 217, 226 (Alaska 1987); *Wilkinson v. McGill*, 64 A.2d 266, 274 (Md. 1949) (rejecting proportional reduction in light of "the weight of authority and the better reasoning"). As for ordering a new election, this extreme remedy finds no support in Minnesota law; it runs directly contrary to the limits set by Minn. Stat. § 209.12; and it is hardly rehabilitated by a line of cases involving non-federal elections where state statutes expressly permitted a new election. See App.Br.33.

evidentiary matter, Appellants have failed to meet this burden.⁸ The claim therefore fails as a matter of law. *Hahn*, 225 N.W.2d at 386-387.

In short, Appellants' attack on accepted absentee ballots is not only waived; it is without merit and would not affect the outcome of the election.

C. Appellants' Constitutional Attack on an Undefined Number of Rejected Absentee Ballots Is Waived, It Is Without Merit, and It Fails on the Facts.

Appellants' third objection involves a constitutional challenge to the court's treatment of rejected absentee ballots. As with Appellants' other constitutional challenges, Appellants waived the claim by failing to bring all 300,000 absentee ballots before the court. *See* Section II (A), *supra*.

Even if Appellants had preserved the claim, it fails on the merits. For the reasons set forth above, Appellants have not alleged a violation under either the Equal Protection Clause or the Due Process Clause. *See* Section II (A)-(B), *supra*. To the extent that Appellants are arguing that it is not the Constitution, but rather Minnesota law, that requires subjecting absentee ballots to a "substantial compliance standard," App.Br.34, it is difficult to understand the argument given Appellants' failure to cite (much less to analyze) the relevant state statutes. *See, e.g.*, R.135-R.140 (citing, for example, Minn. Stat. §§ 203B.02, 203B.04, 203B.07, and 203B.08, all of which have requirements that are either incorporated into or taken as a prerequisite by the single relevant statute addressed by Appellants, Minn. Stat. § 203B.12, subd. 2); *see generally* R.127-R.143. Whatever the case, Appellants' substantial compliance argument is incorrect, for the reasons previously discussed. *See* Section II (C), *supra*.

As a third independent ground for rejection, the factual predicates for Appellants' claims simply cannot be squared with the trial court's order. Appellants, for example, argue

⁸ While Appellants assert that the number of allegedly illegal ballots included in the count exceeds the margin between the candidates, that is irrelevant. Appellants must show that the *result* was affected.

that the trial court somehow "disenfranchised thousands of Minnesota voters." App.Br.40. Yet Appellants neither dispute that voters must be properly registered nor deny that the trial court had before it evidence of proper registration for fewer than 700 voters. R.48. Appellants likewise argue that "the evidence showed . . . thousands of absentee votes" that should not have been counted on Election Day. App.Br.6; *see also id.* at 5 (describing evidence as containing "more than 425"). Yet Appellants provide the Court with no means to investigate this claim, and even a cursory review of Appellants' evidence reveals any number of accepted ballots with no apparent deficiencies. *See, e.g.*, R.290-R.295 (ballots, accepted on Election Day, that Appellants allege are illegal). Moreover, at least one of the ballots Appellants offered in support of its accepted-ballot claim was, in fact, rejected and never counted. *See* R.289, R.296 (materials related to Dorothy A. Cole).

The factual deficiencies run even deeper. In support of their equal protection claim, Appellants would have this Court believe that "[t]he record conclusively establishes that local officials applied the statutory requirements differently and inconsistently . . . by extensive, wholesale and intentional decisions." App.Br.6. Yet after considering Appellants' evidence of disparate standards, the trial court concluded precisely the opposite. It held that the standards on Election Day were uniform and consistent with Minnesota state law, but for inadvertent, garden-variety errors and minor variations that were necessarily a result of differences between certain counties' resources and that commonly occur in every election. R.10-R.12; R.42-R.46; R.50-R.52. The trial court concluded, moreover, that "[t]he state-wide standards governing absentee voting in Minnesota are uniform and explicit and apply in every county and city in the state," R.46, and that Minnesota's thorough system of training "ensures that election judges in all 4,128 polling stations throughout Minnesota apply the election laws in a consistent and uniform manner," R.10.

An appellate court will not disturb a trial court's factual findings so long any evidence on the record provides reasonable support. *Fletcher*, 589 N.W.2d at 101. As the trial court's extensive citation to the record confirms, its findings have more than reasonable support;

indeed, the record compels them. Appellants' attempted rebuttal—which relies on the record and their offers of proof as though they are interchangeable, takes evidence entirely out-of-context, and does not so much as attempt a balanced portrayal—is hardly sufficient to overcome the heavy burden of appealing factual findings.

If anything, Appellants' factual argument only illustrates the depth of the deficiency. Appellants claim, for example, that "Ramsey County did not reject absentee ballots if the application could not be found." App.Br.14. They cite a single authority in support: the testimony of Ramsey County elections manager Joe Mansky. *Id.* Yet Mr. Mansky testified, first, that Ramsey County had rejected the ballot in question precisely *because* the application could not be found, A.372; second, that the ballot should now be accepted (the application had been located and entered into evidence), *id.*; *see also* Exhibit F1660; and third, that officials are indeed required to consult a voter's application in order to comply with non-discretionary statutory requirements, *see* R.228-R.230.

Appellants further claim that "Ramsey County would accept absentee ballots that did not have a signature on them if the mailing sticker obstructed information." App.Br.15. Again, they only cite Mr. Mansky, and again the citation is inappropriate. As Mr. Mansky expressly explained, the testimony in question concerned his personal opinion, not Ramsey County policy. *See* A.373 ("[I]n my opinion, and that's all it is, . . . if information of, of value to the voter . . . was obstructed by our placement of the mailing label, in, in my opinion that would be a sufficient defense [for the voter]."). Mr. Mansky was not describing county policy. He was not even discussing the treatment of individual ballots.

These are hardly isolated errors. Indeed, Appellants' evidence-based arguments are often contradictory. They suggest, for example, that Washington County took a "lenient" approach to evaluating signature mismatches while Dakota County "rejected substantial numbers of ballots on this basis." App.Br.16. Yet these assertions directly contradict their offers of proof, which indicate that Washington County had a higher-signature mismatch rejection rate (10.35%) than did Dakota County (8.5%). A.579-A.580. Moreover,

Appellants' characterization of particular counties shifts constantly throughout the brief. Compare, e.g., App.Br.9 (portraying Carver County as a strict compliance county) *with id.* at 14 (same, as a substantial compliance county). Appellants also fail to take into account the effect of the trial court's orders. The "starkest illustration" of Appellants' case, for example, concerns the methods that local entities used to check witness registration. App.Br.10. But the trial court already remedied any alleged problem. The court adopted what Appellants characterize as the more lenient standard, App.Br.11, requiring nothing more than a Minnesota address to prove witness registration, R.23.

In short, the court's factual findings preclude Appellants' equal protection claim. Nothing—not even Appellants' offers of proof—call the findings into question.⁹

As for Appellants' late-raised due process claim, it too is irreconcilable with the court's factual findings. As discussed above, the court found that the standards on Election Day were uniform and consistent with Minnesota law, but for minor errors and minor variations. In other words, the court unequivocally rejected Appellants' attempt to prove the central factual predicate upon which their claim relies: that a "substantial compliance standard [was] actually applied by election officials." App.Br.1. The court's extensive factual findings rejecting this factual predicate are well supported and certainly not "clearly erroneous on the record as a whole." *Bell*, 227 N.W.2d at 801.

The particular failure of proof is hardly surprising: even Appellants' own allegations fatally undermine their due process claim. They argue that the record compels the conclusion that a "substantial compliance standard" was in place on Election Day—even as

⁹ Appellants are similarly unsuccessful in attacking the trial court's application of the statutory standard to the ballots before it. See App.Br.19 n.4. After inexplicably criticizing the court's decision to issue interim orders clarifying their rulings—which was done at the request of both parties and prior to the opening and counting of any ballots—Appellants question whether the court properly resolved issues relating to two of the thousands of ballots at issue in the contest. *Id.* They are wrong as to both. The evidence concerning Janelle Schmit's ballot, including in-court testimony directly addressing each of Appellants' alleged deficiencies, demonstrated that her ballot in fact did meet the court's requirements, Trial Transcript, vol. 29, 143:3-152:1, and the court did not count Ray Hermanson's ballot because it had already been counted on January 3, R.283-R.285 (listed as "Ray Thermnson").

they argue that election officials failed to apply *any* standard uniformly. App.Br.6-7. They ask this Court to conclude, in direct contradiction of the trial court's findings, that officials only substantially followed the law on Election Day—even as they allege that those same officials rejected thousands of ballots under this same standard. *Id.* at 8. Appellants' claims are incoherent, and there is nothing in either the record or in Appellants' offers of proof that could rehabilitate the factual deficiencies.

In any event, Appellants failed to meet their burden with respect to both claims on a second, independent ground. They failed to prove that rejected absentee ballots in any way affected the outcome of the election. R.26. Every single manifestation of their rejected-ballot claims fails on this ground alone. *Hahn*, 225 N.W.2d 386-387.

In short, Appellants' rejected-ballot claims fail on multiple, independent grounds. For a litany of reasons, they are waived, without legal merit, and factually precluded.

D. The Trial Court Did Not Abuse Its Discretion in Declining To Order Precinct Inspections.

Appellants next challenge the trial court's decision to deny their request for inspections pursuant to Minn. Stat. § 209.06. Yet the trial court's denial was amply supported by the record, and it certainly did not abuse its discretion. *See Minn. Twins*, 592 N.W.2d at 850 (trial court exercises "broad discretion" in managing discovery); *see also O'Gorman v. Richter*, 16 N.W. 416, 417 (Minn. 1883) (comparing Minn. Stat. § 209.06 to a precursor to Rule 34 of the Rules of Civil Procedure).

Appellants rely on a statute that limits inspections to ballots and requires that a request for inspection be filed through a verified petition. Minn. Stat. § 209.06. The statute "allows inspection only . . . upon a showing that an inspection is needed to prepare for trial." *Christenson v. Allen*, 119 N.W.2d 35, 39 (Minn. 1963). On multiple grounds, Appellants fell far short of making this showing.

First, "[t]he parties [had] already viewed the ballots during the recount," so it is not at all clear what an inspection would have revealed. R.109. Appellants had the burden of

showing that an inspection was necessary, but their verified petition offered "no . . . information regarding the nature of the information [Appellants] believe the inspection will reveal, how this information will be crucial in preparing their case for trial, or their inability to obtain the information in a more efficient manner." *Id.* It made no showing of necessity.

Second, Appellants "conceded [at oral argument] that they would be able to prove their case without an inspection by calling election judges as witnesses, subpoenaing voter rolls, and subpoenaing ballots." R.109.

Third, the trial itself confirmed that an inspection was unnecessary. Appellants were not only able to obtain the election materials at issue but were able to enter them into evidence. *See, e.g.*, R.18-R.19 (discussing relevant exhibits and explaining that Appellants had failed to provide adequate testimony as to those exhibits). Appellants had—and frequently used—subpoena power and the ability to obtain precisely the evidence at issue.

Fourth, Appellants' verified petition far exceeded the scope of Minn. Stat. § 209.06, which only permits inspection of ballots—and not "without limitation, all Ballots and Election Materials," as Appellants had requested. R.99.

Finally, Appellants' request was untimely. Though Appellants' petition demanded that extensive inspections occur throughout Minnesota, they filed it less than two court days before the trial was statutorily required to begin. *See* Minn. Stat. § 209.065; *see also* R.110.

On multiple grounds, therefore, the trial court acted well within its discretion in denying Appellants' request. Even if it had not, the error would be harmless. The trial court made clear that Appellants had failed to prove their alleged "double-counting" claim because the materials in question did not support the necessary findings and because Appellants had failed to provide adequate testimony going to the issue. Inspections would have remedied neither of those errors. Appellants likewise failed to prove that any alleged double counting affected the outcome of the election. *Hahn*, 225 N.W.2d at 386.

E. The Trial Court Did Not Err in Refusing To Overturn the Certified Totals with Respect to Minneapolis Precinct 3-1.

Finally, Appellants challenge the trial court's refusal to overturn the certified vote totals with respect to a single Minneapolis precinct, where an envelope of ballots had gone missing during the recount and the State Canvassing Board unanimously voted to use Election Day returns. Appellants' cursory challenge to this decision fails at the threshold.

As long-standing precedent makes clear, when missing ballots cannot be found, Election Day returns must be used to establish the vote totals.

A ballot serves as the best evidence of a vote. *Moon v. Harris*, 142 N.W. 12, 14 (Minn. 1913). However, when ballots are missing, or their integrity is otherwise compromised, election officials must turn to the next best evidence: here, the vote totals provided by election officials on Election Day. *Id.*; *see also McDunn v. Williams*, 620 N.E.2d 385, 402 (Ill. 1993) ("Where the original ballots . . . are missing, the official results are the best evidence."). This principle is clearly established in both Minnesota and across the country—and has been for well over a century. *See, e.g., Newton v. Newell*, 6 N.W. 346, 347 (Minn. 1880) ("The ballots cast at an election may . . . be resorted to for the purpose of disputing the returns of the board of canvassers, and of investigating and ascertaining the actual state of the vote. But to entitle them to be used for these purposes it must affirmatively appear that they have . . . been 'carefully preserved.'"); *see also Sullivan v. Ebner*, 262 N.W. 574 (Minn. 1935); *Stemper v. Higgins*, 37 N.W. 95 (Minn. 1888). This rule makes perfect sense, given that missing votes cannot be recounted, and it is fair, given that a refusal to account for missing votes would disenfranchise voters.

There is no factual dispute concerning what happened in Minneapolis Precinct 3-1, as found unanimously by both the State Canvassing Board and the trial court. "Every indication is that the Election Day totals from Minneapolis Precinct 3-1 are an accurate count of the ballots cast." R.20. Yet after Election Day and before the recount, 132 ballots went missing and have not been found. *Id.* In this circumstance, the law requires resort to the Election Day totals. The Attorney General therefore was correct to recommend this

action, and the State Canvassing Board was correct to take it. The Board's administrative determination is entitled to deference. *See George A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988).

In short, the trial court was correct to refuse to overturn the certified totals with respect to this precinct. *See* R.19-R.20, R.25; *see also* R.165-R.166. Even if it were not, Appellants failed to prove that the treatment of the 132 missing ballots affected the outcome of the election. *Hahn*, 225 N.W.2d at 386. Given Appellants' stated interest in enfranchisement, it is ironic that they still seek to disenfranchise these 132 Minneapolis voters.

IV. Franken Is Entitled To Receive the Certificate of Election.

As this Court is well aware, the instant appeal is inexorably intertwined with the public interest. For over four months, the citizens of Minnesota have been represented by only one United States Senator, and the effects of this delay are increasingly significant. Accordingly, Respondent respectfully requests that this Court:

- 1) Affirm the trial court's decision, declaration, and judgment that Al Franken received the highest number of votes legally cast in the 2008 United States Senate general election and is therefore entitled to receive the certificate of election.
- 2) Order that judgment be entered on the Court's decision immediately without any 10-day delay for a motion for reconsideration or rehearing under Rule 140.01. *See* Minn. R. Civ. App. P. 102 and 126.02 (permitting the Court, for good cause shown, to limit time and to expedite). To facilitate immediate entry of judgment, Respondent waives any claim for costs and disbursements incurred on appeal.
- 3) Direct that the Governor and the Secretary of State perform their ministerial duties to prepare, countersign, and deliver the certificate of election promptly to the Secretary of the United States Senate, as required by Minn. Stat. § 240C.40.
- 4) Reiterate that the Court's decision is the final determination of the election contest under Minn. Stat. § 240C.40, subd. 2, and Minn. Stat. § 209.12, notwithstanding any

subsequent action at the federal level—whether that subsequent action be through direct review by the United States Supreme Court, a separate federal lawsuit, or a proceeding in the United States Senate. *See Franken v. Pawlenty*, 762 N.W.2d 558, 566 (Minn. 2009) ("The plain language of Minn. Stat. § 240C.40, subd. 2, provides that no election certificate can be issued in this Senate race until the *state* courts have finally decided the election contest pending under chapter 209.") (emphasis added)).

CONCLUSION

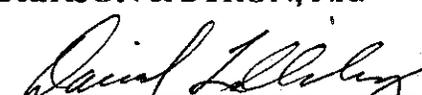
For the foregoing reasons, Respondent respectfully requests that the Court affirm the decision of the trial court and declare that Al Franken is entitled to receive the certificate of election without further delay.

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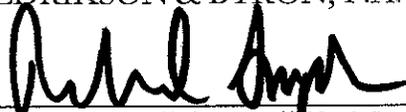
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**CERTIFICATE OF COMPLIANCE
WITH MINNESOTA RULE OF CIVIL APPELLATE
PROCEDURE 132.01, SUBD. 3**

The undersigned hereby certifies, pursuant to Minnesota Rule of Civil Appellate Procedure 132.01, Subd. 3(a)(1), that this brief (exclusive of the table of contents, the table of authorities, any addendum, and any certificates of counsel), contains 13,998 words, as ascertained by using the word count feature of the Microsoft® Word 2003 word-processing software used to prepare the brief, and conforms to the typeface and type style requirements of the Rules by being in 13-point Garamond format.

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