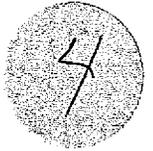


A10-395



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STATE OF MINNESOTA  
IN COURT OF APPEALS

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RAMSEY COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF  
MINNESOTA,

*Appellant,*

vs.

KSTP-TV, KSTC-TV, WDIO-TV, KAAL-TV, AND KSAX-TV,

*Respondents,*

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**APPELLANT'S BRIEF**

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## ISSUES PRESENTED

1. Do federal and state election laws have no further applicability in the election of a Senator to the United States Senate once an election certificate has been issued by the State of Minnesota?

*The trial court held that federal and state election laws did not govern the disposition of rejected absentee ballots as federal and state election laws were not applicable once an election certificate had been issued.*

**Contrary Authority:** The United States Constitution, Article I, Section 5, Clause 1; 42 U.S.C. §1974; Minn. Stat. §204C.24; Minn. Stat. §204B.40; Minn. Stat 209.12.

An election to the United States Senate is not over until an appeal to the Senate has occurred. Because no appeal to the United States Senate has occurred, Federal and State election laws are applicable and compel Ramsey County to keep all rejected absentee ballots sealed.

2. Does the injunction issued by the Minnesota Supreme Court in *Ritchie v. Coleman* have no continuing useful purpose once the election certificate was issued to Senator Al Franken by the State of Minnesota?

*The trial court held that the injunction issued by the Minnesota Supreme Court had no continuing useful purpose and therefore was not applicable in the present matter once an election certificate had been issued.*

**Contrary Authority:** The United States Constitution, Article I, Section 5, Clause 1; 42 U.S.C. §1974; Minn. Stat. §204C.24; Minn. Stat. §204B.40; Minn. Stat. 209.12.

An election to the United States Senate is not over until an appeal to the Senate has occurred. Because no appeal to the United States Senate has occurred, the injunction issued by the Minnesota Supreme Court compels Ramsey County to keep all rejected absentee ballots sealed.

3. Is the voter preference of a citizen inside a rejected absentee ballot in a federal election contest public data under the Minnesota Government Data Practices Act?

*The trial court held that the voter preference of a citizen identified within a rejected absentee ballot is public data under the Minnesota Government Data Practices Act.*

**Contrary Authority:** Minn. Stat. §204C; Minn. Stat. 13.02; Minn. Stat. §13.

The Minnesota Government Data Practices Act defines the attempted vote of a citizen within a rejected absentee ballot as nonpublic data or private data.

## STATEMENT OF THE CASE

The present case concerns the ability of a private citizen or entity to be able to review rejected absentee ballots after an election certificate has been issued in a race for the United States Senate.

On August 5, 2009, Plaintiffs KSTP-TV, KSTC-TV, WDIO-TV, KAAL-TV, and KSAX-TV (hereinafter "KSTP") served a complaint upon Ramsey County seeking declaratory relief to establish that rejected absentee ballots cast in the 2008 United States Senate race between former Senator Norm Coleman ("Coleman") and current Senator Al Franken ("Franken") are accessible to the public pursuant to the Minnesota Government Data Practices Act ("MGDPA").

On September 2, 2009, Ramsey County filed a motion to dismiss KSTP's Complaint for failure to state a claim. KSTP filed responsive papers in opposition to the motion brought by Ramsey County but did not bring a motion for affirmative relief.

On December 31, 2009, the District Court for Ramsey County issued the following order:

1. Defendant's motion for dismissal pursuant to MRCP, Rule 12.02(e) is DENIED.
2. All rejected and unopened absentee ballots from Minnesota's 2009 general election in the possession of Ramsey County are hereby declared public data that may be viewed and copied by the Plaintiffs subject to the voter's right of privacy.
3. Ramsey County is ordered to take all steps necessary, including redaction, to assure that the privacy of the voter and the sanctity of the ballot is maintained.

The decision of the District Court was based on the premise that all appeals and judicial review of the election between Coleman and Franken had been completely exhausted.

Ramsey County has filed the present appeal because the finding of fact by the District Court that all appeals have been exhausted is erroneous as a matter of constitutional law. As a result, the decision by the trial court that federal and state election laws and the injunction issued by the Minnesota Supreme Court were no longer applicable should be reversed. Further, Ramsey County appeals the interpretation of the MGDPA by the District Court Ramsey County contends that the MGDPA prohibits the opening of rejected absentee ballots on the basis that one's vote remains private data even after an election certificate has been issued.

### **SUMMARY OF ARGUMENT**

The District Court's factual determination that the election of Franken to the United States Senate is not subject to further judicial review upon Coleman exhausting appeals before the Minnesota Supreme Court is erroneous as a matter of constitutional law. Article I, Clause 5, Section 1 of the United States Constitution provides that the United States Senate is the final tribunal concerning the election of its members. The United States Supreme Court and Minnesota Supreme Court have long recognized that the United States Senate is the court of last resort concerning the election of a Senator to the United States Senate. On several occasions in our nation's history, the United States Senate has deliberated over the election of an individual to the United States Senate after an individual has received a certificate of election. Coleman therefore still has the constitutional right to challenge the election of Franken within the United States Senate.

Federal and State election laws direct election officials to retain and preserve all rejected ballots for a period of twenty-two months. The Minnesota Supreme Court also

issued an injunction prohibiting election officials in the State of Minnesota from opening rejected absentee ballots.

Federal law, state law and the injunction issued by the Minnesota Supreme Court all direct Ramsey County election officials not to open rejected absentee ballots. The district court's analysis that it would be permissible to open the rejected absentee ballots is based upon the erroneous factual basis that the election was over. The election is not over as a matter of law because Coleman has not exhausted his right to file an appeal with the United States Senate. The trial court's order for summary judgment should therefore be reversed.

Alternatively, even if this Court were to conclude that the election was not over and that election law and the injunction issued by the Minnesota Supreme Court was not applicable, the decision of the trial court should still be overturned as the data being sought constitutes nonpublic data or private data under the MGDPA.

The ability of a citizen to express in private who they wish to represent them is one of the most fundamental rights in our democracy. The trial court's opinion threatens to undermine this cornerstone of our democracy by allowing the MGDPA to be used a sword to pierce the veil of privacy surrounding votes cast by absentee ballots.

Further, the opinion of the trial court in ordering the inspection and copying of all rejected absentee ballots currently in the possession of Ramsey County leads to the inescapable conclusion that any one individual absentee ballot could be inspected and copied. If any one individual absentee ballot can be inspected and copied, voter privacy would cease to exist for any citizen who wished to vote by absentee ballot.

This Court therefore must reject the reasoning of the trial court to ensure that the MGDPA is not used to undermine the sanctity of ballot privacy among absentee ballot voters.

### STATEMENT OF FACTS

KSTP seeks to open the rejected absentee ballots in the possession of Ramsey County officials for the purpose of discovering which Senatorial candidate individuals attempted to vote for in the 2008 Senate race in Minnesota. While the present matter only concerns the absentee ballots held by Ramsey County election officials, KSTP has forwarded correspondence to election officials in every county in the State of Minnesota in an effort to copy and inspect every rejected absentee ballot held by election officials. (APP 2-9, APP 27-29).

#### Franken/Coleman Litigation Background

Because the margin separating the candidates, Al Franken (“Franken”) and Norm Coleman (“Coleman”), was less than one-half of one percent of the total votes, a manual recount was required pursuant to Minn. Stat. 204C.35, subd. 1(b) (1) (2008). *Coleman v. Franken*, 767 N.W.2d 453, 457 (Minn. 2009). Prior to the recount, Coleman petitioned the Minnesota Supreme Court for an order prohibiting county canvassing boards from counting rejected absentee ballots. Granting the petition in part and denying in part, the Court held:

**All local election officials**, county canvassing boards, the Secretary of State, and the Minnesota State Canvassing Board **are enjoined from opening any previously rejected absentee ballot envelopes** and from including any previously rejected absentee ballots in the administrative recount now underway, except as provided herein . . .

*Coleman v. Ritchie*, 758 N.W.2d 306, 308 (Minn. 2008)(Emphasis added). The Court then went on to set forth a process by which absentee ballots could be properly counted. Id.

The Office of the Secretary of State counted an additional 933 absentee ballots. *Coleman*, 767 N.W.2d at 457. The State Canvassing Board certified the election results finding that Franken received 225 more votes than Coleman. Coleman then contested the election results under Minn. Stat. 209.021 (2008) and sought a declaration that he was entitled to the certificate of election as United States Senator. Id.

The Minnesota Supreme Court appointed three judges to resolve the contest. The heart of the dispute was the issue of rejected absentee ballots. The trial court found that certain categories of rejected absentee ballots should not be opened as a matter of law; the categories were:

1. Absentee ballot submitted by a voter in an absentee ballot return envelope on which the voter's address is not the same as on the absentee ballot application.
2. Absentee ballot submitted by a voter in an absentee ballot return envelope in which the witness certification on the absentee ballot return envelope is signed by a person identified as a notary public but no notary seal or stamp is affixed to the absentee ballot return envelope.
3. Absentee ballot submitted by a non-registered voter.
4. Absentee ballot submitted by a voter in an absentee ballot return envelope in which the voter failed to sign the absentee ballot return envelope.
5. Absentee ballot submitted by a voter whose absentee ballot application does not contain the voter's signature.

6. Absentee ballot submitted by a voter whose absentee ballot application was signed by another unless the absentee ballot application was signed by another individual in accordance with Minn. Stat. 645.44, subd. 14.
7. A UOCAVA<sup>1</sup> ballot received by election officials after the deadline for receipt of absentee ballots.
8. Absentee ballot dropped off in-person by the voter on Election Day.
9. Absentee ballot dropped off by a proper agent on Election Day but after the statutory deadline for delivery.
10. A ballot submitted by a voter who was not registered to vote within the precinct in which he or she resides.

(APP 10-26.)

Following a seven week trial, “the court determined 351 additional absentee ballot return envelopes satisfied the statutory requirements and ordered that these envelopes be opened and the ballots inside counted.” *Coleman*, 767 N.W.2d at 457. On April 13, 2009, the trial court issued findings of fact and conclusions of law finding that Franken won the Senate race by a margin of 312 votes.

Coleman then filed an appeal with the Minnesota Supreme Court raising various constitutional law violations and violations of Minnesota election law. The ruling of the trial court however was upheld by the Minnesota Supreme Court. *Id.* at 453. The Minnesota Supreme Court noted that their scope of review was limited to determining who was entitled to receive an election certificate and that the United States Senate had final authority over who was seated.

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<sup>1</sup> UOCAVA stands for the Federal Uninformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973 ff-6 (2000 Supp. III 2003 & Supp. IV 2004)

An election contest involving an office of the United States Congress is governed by the special provisions of Minn. Stat. 209.12 (2008). Minn. Stat. 209.12 limits the question to be decided by the trial court to which candidate received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of election . . . After a final determination of the contest, on the request of either party, the record must be transmitted to the house of Congress for which the election was held, in this case, the Senate. The Senate has the final authority as to who is seated. U.S. Const., Art. I, Sec 5; see *Franken v. Pawlenty*, 762 N.W.2d 558, 567 (Minn. 2009).

*Id.* at 458, footnote 5. Governor Tim Pawlenty subsequently signed an election certificate establishing that Franken received the most votes in the election.

#### Absentee Ballot Voting Process

Minnesota Statute 203 governs the process for voting by absentee ballot.

Following an application,

[a]n absentee ballot is provided along with a ballot envelope and a return envelope<sup>2</sup>. Minn. Stat. 203B.06-07 (2008). The voter marks the ballot with his votes, places the ballot in the ballot envelope, and places the sealed ballot envelope (and a voter registration application, where needed) in the return envelope. See Minn. Stat. 203B.08 (2008). The voter fills in his name and address on the return envelope, completes a certificate of eligibility to vote by absentee ballot printed on the return envelope, and signs the certificate before a witness who also signs the return envelope. See Minn. State. 203B.07, subd. 3. The return envelope (containing the ballot envelope in which the completed ballot has been placed) is then returned to the county auditor or municipal clerk. Minn. Stat. 203B.08, subd. 1.

*Coleman v. Ritchie*, 762 N.W. at 218, 220 (Minn. 2009). Ultimately the return envelopes are examined by two or more election judges and marked “accepted” if they meet the necessary statutory criteria or “rejected” if they do not. *Id.* at 221. (citing Minn. Stat. 203B.12). “Rejected absentee ballot return envelopes are returned unopened to the county auditor, and the ballots they contain are not counted on election night.” *Id.*

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<sup>2</sup> All Ramsey County ballots display voter ward and precinct numbers at the bottom of the ballot. (APP 35-39)

Ramsey County absentee ballot return envelopes require witnesses to document the proof of residence shown by the voter, as well as details pertaining to the proof (e.g., driver's license number, passport number, etc.).<sup>3</sup> Details on the individual are confidential information and are not to be disclosed. 5 U.S.C. 552a; Minn. Stat. 13.02, subd. 12.

Rejected absentee ballots are not counted and ultimately returned to the county elections office for safekeeping. These ballots are kept within their respective A and B envelopes and stored pursuant to Minn. Stat. 204B.40.

#### Informal Opinion of Attorney General

Prior to instituting the present action, counsel for KSTP sent correspondence to the Secretary of State indicating that his client sought to inspect and copy all rejected and uncounted absentee ballots. (APP 27-29). Upon receipt of the Anfinson letter, Deputy Secretary of State Jim Gelbmann sought an informal opinion from the Office of the Attorney General. Assistant Attorney General Kenneth Raschke, Jr. provided the requested opinion and concluded that the rejected absentee ballots are nonpublic data.

Assistant Attorney General Raschke, Jr.'s Opinion notes,

The data practices classification of sealed absentee ballots is expressly prescribed by Minn. Stat. 13.37, subd. 2 (2008) as follows:

The following government data is classified as nonpublic data with regard to data not on individuals, pursuant to section 13.02, subdivision 9, and as private data with regards to data on individuals, pursuant to section 13.02, subdivision 12: Security information; trade secret information; sealed absentee ballots prior to opening by an election judge; . . .

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<sup>3</sup> APP 35-39.

(APP 30-34). In addition to finding that the rejected absentee ballots would constitute nonpublic data under the plain wording of sections 13.37 and 13.02, the opinion noted that the ballots would also constitute nonpublic data because of the injunction issued by the Minnesota Supreme Court and because of the need to protect the sanctity of the ballot. (APP 30-34) The threat to the sanctity of the ballot was significant given that the names of the voters for the rejected absentee ballots had previously been made public and in several precincts there is only one or a few absentee ballots.<sup>4</sup>

#### Ramsey County District Court Opinion

On August 5, 2009, KSTP served a complaint upon Ramsey County. The Complaint sought declaratory relief to establish that the rejected absentee ballots are accessible to the public pursuant to the MGDPA. The stated purpose in the Complaint for the action was to educate the public as to why absentee ballots were rejected.

The Ramsey County Attorney's Office informed KSTP that the rationale for why the absentee ballots were rejected was contained on the outside of the envelopes. KSTP informed Ramsey County that they were interested in inspecting and copying all information inside of the rejected absentee ballot envelopes – the candidate preference of the voter.

On September 2, 2009, Ramsey County filed a motion to dismiss Plaintiff's Complaint for failure to state a claim. Plaintiff's filed responsive papers but did not bring a cross motion for summary judgment.

Ramsey County argued that Plaintiff's Complaint should be dismissed because:

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<sup>4</sup> APP 40-42.

1. Federal and Minnesota law related to election practices prohibit Ramsey County from disclosing the contents of rejected absentee ballots;
2. The Minnesota Supreme Court had issued an injunction that prohibits Ramsey County from disclosing the contents of the absentee ballots in its possession, and
3. The rejected absentee ballots constitute private data under MGDPA and granting KSTP's request will infringe upon the sanctity of ballot privacy of the citizens who attempt to vote by absentee ballot.

The District Court opinion began by acknowledging that no additional information could be learned as to why the absentee ballots were rejected as "opening the envelope will provide no additional information regarding why the ballot was rejected." APP 46. After stating that the MGDPA establishes a presumption that government data is public, the District Court noted that it was significant that the present action was brought before it after "the recount and legal challenges have been concluded." APP 46-47.

The District Court then examined applicable election laws and noted that "these statutes only provide for the handling of absentee ballots while the election process, including any recount or legal challenge is under way. These statutes do not address the status of the rejected absentee ballots after the election process has ended." APP 49. After finding that the election process was over, the Court found that the election laws provided no prohibition to opening the rejected absentee ballots.

The District Court dismissed Ramsey County's argument that they were enjoined by the Minnesota Supreme Court from opening the rejected absentee ballots using the same logic it applied to the election law arguments raised by Ramsey County. APP 48-49. Specifically, the District Court noted that

[T]here is no indication by the Supreme Court that the injunction was intended to be permanent. The injunction was issued during the recount as a determination of which absentee ballots could be opened and counted and which could not. The election is now at an end and there is no reason to believe the injunction was intended to outlive its intended purpose. (APP 48-49)

The District Court also addressed the issue of protecting voter privacy. The District Court noted that, “the identity of the voter and the content of his ballot are at no greater risk whether opened by an election judge or by an authorized individual after the election has ended.” APP 48. The District Court noted that election officials could simply redact any public information from the outside of the envelope that could be used to identify the individual who submitted the absentee ballot. APP 48.

#### Absentee Ballots in the Possession of Ramsey County

Ramsey County has more than one thousand rejected absentee ballots in its possession. The rejected absentee ballots in the possession of Ramsey County fall into one of the five following categories. The five categories of rejected absentee ballots are:

1. The rejected absentee ballot was not counted because there was no agreement between the campaigns that would allow the ballot to be counted pursuant to the Supreme Court’s decision in Ritchie.
2. The rejected ballot was not counted because it was received after Election Day.
3. The rejected ballot was not counted because it falls into one of the ten categories identified by the three judge panel in the matter entitled, “In the Matter of the Contest of General Election held on November 4, 2008.”
4. The rejected absentee ballot was not counted because the person submitted a proper timely ballot in person.
5. The rejected absentee ballot was not counted because the person received a subsequent absentee ballot and submitted a proper timely ballot.

Ramsey County officials have not identified how many ballots fall into each of the above five categories. Prior to the filing of this brief, Counsel for Ramsey County sought to confirm with Counsel for KSTP that it only sought to inspect and copy the absentee ballots for which the campaigns couldn't agree, were received after Election day, or were not counted pursuant to the Order issued by the three judge panel; no response has been received in response to the correspondence.

#### Application to the United States Senate

Coleman has not sought relief before the United States Senate to review the election results between himself and Franken. There has been no judicial determination that Coleman is prohibited from seeking relief before the United States Senate to review the election results between himself and Franken.

### **STANDARDS OF REVIEW**

“We employ a de novo standard of review when interpreting the federal and state constitutions.” *In re Grand Rapids Public Utilities Comm.*, 731 N.W. 2d 866, 874 (Minn. App. 2007); *State v. Shattuck*, 704 N.W. 2d 131, 135 (Minn. 2005). Statutory interpretation of the data practices act is a legal issue reviewed de novo. *Star Tribune Co. v. University of Minnesota*, 683 N.W.2d 274, 270 (Minn. 2004). Summary judgment may be granted when there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ...P. 56.03. “A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. *Fabio v.*

*Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). “On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This Court should “view the evidence in the light most favorable to the part against whom judgment was granted.” *Fabio*, 504 N.W. 2d at 761. When there are no genuine issues of material fact, this court should review the district court’s decision de novo to determine whether it erred in applying the law. *Art Goebel, Inc. v. N. Suburban Agencies*, 567 N.W. 2d 511, 515 (Minn. 1997).

## ARGUMENT

### I. THE TRIAL COURT’S FACTUAL FINDING THAT THE ELECTION IS OVER UPON THE ISSUANCE OF AN ELECTION CERTIFICATE IS AN ERROR OF LAW.

The United States Constitution clearly states that the final decision maker concerning a dispute involving the election of a United States Senator is the United States Senate.

Article I, Section 5, Clause 1 of the United States Constitution states,

*Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members*, and a Majority of each shall constitute a Quorum to do Business, but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

(Emphasis added). Accordingly, a candidate who does not receive an election certification may take their appeal directly to the United States Senate. The candidate who does not receive an election certificate may even wait until his opponent in the election has been sworn in as a senator. The election of a member to the United States

Senate therefore does not end upon the issuance of an election certificate. The final judge of the election of a United States Senator is the United States Senate.

The Supreme Court of the United States has long recognized that the United States Senate and not the Judicial branch is the tribunal of last resort in determining the qualifications of the members of the Senate. Specifically, the Supreme Court in *Barry v. Cunningham*, 279 U.S. 597, 613 (U.S. 1929) noted that while,

Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers, which are not legislative, but judicial, in character. Among these is the power to judge of the elections, returns, and qualifications of its own members.

The *Barry* Court further added that the power of the Senate “carries with it authority . . . to render a judgment which is beyond the authority of any tribunal to review.” *Id.*

The Minnesota Supreme Court in *Coleman* clearly stated that the election contest by courts in Minnesota would only decide “which candidate received the highest number of votes legally cast at the election and is therefore entitled to receive the certificate of election.” 767 N.W. 2d at 458. The *Coleman* court noted that after a final determination of the election contest, on the request of either party, that the entire record must be forwarded to the senate as the “Senate has the final authority as to who is seated.” *Id.*

The power conferred to the United States Senate in Article I, Section 5, Clause 1 has been applied twice in the rich historical past of the State of Minnesota and both instances involved Senator Thomas D. Schall. See, *Anne Butler and Wendy Wolff, United States Senate Election, Expulsion and Censure Cases, 1793-1990, S. Doc. 103-33, Washington, GPO 1995*. On February 2, 1926, Minnesota’s then current Senator Magnus

Johnson filed a petition to challenge Schall's election. *Id.* The Senate's Committee on Privileges and Elections recommended that Johnson's request for a recount be denied after holding twelve days of hearings. *Id.* On June 16, 1926, the Senate accepted the unanimous opinion of the committee that Schall retain his seat. *Id.* On July 2, 1926, the Senate authorized a payment of \$15,500 to Schall for his expenses in defending his seat. *Id.*

On December 7, 1931, Schall appeared in the Senate and took his seat for a second term without protest. *Id.* On April 14, 1932, his opponent Einar Hoidale filed a petition to challenge Schall. *Id.* The Senate's Committee on Privileges and Elections reviewed information for several months before issuing a report to the full Senate that the petition be dismissed. *Id.* The Senate on February 7, 1933, agreed by voice vote that Schall had been duly elected. *Id.*

The trial Court's factual finding that the election is over upon the issuance of an election certificate is an error of law. The United States Constitution is clear that Coleman may still file an election challenge with the United States Senate. The United States Supreme Court and the Minnesota Supreme Court have consistently and recently reaffirmed that the United States Senate is the judicial tribunal of last resort in an election contest. In Minnesota's history, a sitting United States Senator has twice been challenged in the United States Senate. Coleman clearly can challenge Franken's election in the United States Senate.

The trial court's factual finding that the election is over is therefore a clear error of law that calls for this court to overturn the District Court's Order.

**II. BECAUSE COLEMAN HAS A CONSTITUTIONAL RIGHT TO APPEAL TO THE UNITED STATES SENATE, ALL REJECTED UNOPENED ABSENTEE BALLOTS MUST REMAIN SEALED PURSUANT TO ELECTION LAW AND THE INJUNCTION ISSUED BY THE MINNESOTA SUPREME COURT.**

Minnesota election law requires election officials to keep unopened rejected absentee ballots sealed. The Minnesota Supreme Court has ordered Ramsey County election officials to keep unopened rejected absentee ballots sealed. As discussed above, the decision of the trial court was based on the erroneous assumption that Coleman did not have a right to appeal the election of Franken. This Court should therefore overturn the District Court decision because Minnesota election law and the injunction issued by the Minnesota Supreme Court direct Ramsey County election officials not to open rejected absentee ballots and the rationale of the trial court was based on an erroneous fact as a matter of constitutional law.

Minnesota election law clearly sets forth the duties that election officials have concerning unopened rejected absentee ballots concerning an election to the United States Senate. Minnesota law requires election officials to: (1) ensure that ballots are maintained for at least 22 months or until the contest has been finally determined, (2) ensure that all rejected ballots remain unopened, and (3) that upon request in an election contest that the ballots be forwarded to the presiding officer of the Senate.

Specifically, Minnesota law 204B.40 entitled *Ballots; election records and other materials; disposition; inspection of ballots*, provides:

The county auditors, municipal clerks, and school district clerks shall retain all election materials returned to them after any election for at least 22 months from the date of that election. All election materials involved in a contested election

must be retained for 22 months or until the contest has been finally determined, whichever is later.

Minnesota statute 204B.40 further provides that ballots that weren't opened "must be retained unopened . . . in a secure location." Specifically, the statute states:

Sealed envelopes containing voted ballots must be retained unopened, except as provided in this section, in a secure location. The county auditor, municipal clerk, or school district clerk shall not permit any voted ballots to be tampered with or defaced.

The only individual the statute provides may open the ballots is "the secretary of state" who may do so only for the limited "purpose of monitoring and evaluating election procedures." *Id.* After the "Election materials [are] no longer required to be retained pursuant to this section shall be disposed of in accordance with sections 138.163 to 138.21." *Id.*

After judicial appeals in Minnesota have been exhausted on the question of who should have been issued a certificate of election, election officials need to be prepared to send all election materials to the Senate in the event of an election contest. Minnesota Statute 209.12 provides,

. . . upon application of either party to the contest, the court administrator of the district court shall promptly certify and forward the files and records of the proceedings, with all the evidence taken, to the presiding officer of the Senate or the House of Representatives of the United States.

Minnesota Statute 209.12 provides no limitation as to the time frame for which a party to the election contest may request files to be forwarded to the presiding officer of the United States Senate.

The injunction issued by the Minnesota Supreme Court also clearly prohibits Ramsey County from opening the rejected absentee ballots. The Order by the Minnesota Supreme Court was not limited in duration and provided explicitly:

All local election officials, county canvassing boards, the Secretary of State, and the Minnesota State Canvassing Board are enjoined from opening any previously rejected absentee ballot envelopes and from including any previously rejected absentee ballots in the administrative recount now underway . . .

*Coleman v. Ritchie*, 758 N.W.2d 306, 307 (Minn. 2008). Nothing in the Supreme Court's decision provides any indication that the Order was intended to be temporary. Indeed, the full opinion of the Court, after noting that the United States Senate is the final tribunal of review, makes it clear that local canvassing boards do not have the authority to open rejected absentee ballots. *Coleman v. Ritchie*, 762 N.W.2d 218, 229 (Minn. 2009).

The purpose of an injunction is to maintain the status quo until the final tribunal has had an opportunity to pass upon the merits of the dispute between the parties. The injunction issued by the Minnesota Supreme Court was designed to maintain the status quo concerning all of the ballots from the election in the event that former Senator Coleman sought to challenge the election of Senator Franken in the United States Senate.

As discussed above, the United States Senate is undeniably the final tribunal concerning any election contest involving one of its members. Coleman has not exhausted his right to petition the United States Senate for relief. As a result Coleman has the ability and the right to request that the United States Senate undertake efforts to conduct an election re-count.

Any argument by KSTP that simply counting the ballots wouldn't interfere with the ability of the United States Senate to resolve an election contest between Franken and Coleman because such a count of ballots by KSTP would be unofficial should be rejected by this Court. As discussed above, the rejected absentee ballots fall into one of ten categories as identified by the three judge panel. If the rejected absentee ballots are opened and counted before an election recount is requested by former Senator Coleman, the number of votes each candidate could theoretically have added to his vote total in each of the ten categories would be known before the United States Senate election committee is convened. For example, once all of the rejected absentee ballots are opened we may learn that of the 100 ballots where an absentee ballot submitted by a voter in an absentee ballot return envelope was different than the voter's address that 75 people voted for Coleman and 25 voted for Franken.

In such a situation, the Senate would be unable to faithfully discharge its duties in judging the election contest. Would Senators who are of the same political party as Franken find that the absentee ballots were properly rejected because of how they interpreted Minnesota law or because it would reduce the margin of Franken's victory? Similarly, would Senators who were of the same political party as Coleman find that the absentee ballots were improperly rejected because of how they interpreted Minnesota law or because it reduced the number of votes that Coleman trailed Franken. Moreover, how could any citizen view the proceedings in the Senate as being legitimate when each Senator knows the impact of his or her vote on the election results before having heard the evidence on the merits of accepting a category of rejected absentee ballots?

Minnesota election law requires election officials to keep unopened rejected absentee ballots sealed. The Minnesota Supreme Court injunction directs all election officials in the State of Minnesota to keep unopened rejected absentee ballots sealed. The decision of the trial court that Coleman had exhausted all appeals is clearly erroneous as discussed above. If the ballots were opened prior to Coleman filing an appeal with the United States Senate, the Senate would not be able to faithfully discharge its duties as the final tribunal in the election contest.

This Court must overturn the decision of the trial court and find that Ramsey County must continue to keep unopened rejected absentee ballots sealed.

**III. THE ATTEMPTED VOTE OF A CITIZEN CONTAINED WITHIN A REJECTED ABSENTEE BALLOT IS PRIVATE DATA UNDER THE MGDPA.**

Assuming that this Court concludes that the election between Franken and Coleman is over, Ramsey County officials would still be precluded from disclosing the contents of rejected absentee ballots under the MGDPA.

The purpose of the MGDPA is to regulate government data. Generally, it operates on the “presumption that government data are public and are accessible by the public . . .” Minn. Stat. §§ 13.01, subd. 3 and 13.03, subd. 1. Not all data, however, fall within the presumption. Limitations regarding accessibility are placed on data which are subject to “federal law, a state statute, or a temporary classification of data . . . .” *Id.* Thus, the MGDPA functions by a system of classification. “[H]ow the data are classified ultimately determines who has access to the data.” *Wiegel v. City of St. Paul*, 639 N.W. 2d 378, 380 (Minn. 2002).

Essentially, data is classified as data on individuals or data not on individuals. Minn. Stat. §13.02, subds. 4, 5. Data on individuals may be classified as “public,” “private,” or “confidential.” Minn. Stat. § 13.02, subds. 3, 12, 15. Data not on individuals may be classified as “public,” “nonpublic,” or “protected nonpublic.” Minn. Stat. § 13.02, subds. 9, 13, 14. “Public” data are accessible to anyone requesting access to the data. “Private” and “nonpublic” data are accessible to the subject of the data, but not generally accessible to the public. Minn. Stat. §13.02, subds. 9, 12; *see also* Minn. Stat. §13.04, subd. 3. “Lastly, ‘confidential’ and ‘protected nonpublic data’ are generally not accessible to either the public or the subject of the data.” *Wiegel* at 380 (citing Minn. Stat. § 13.02, subds. 3, 13).

Through its various subdivisions, the MGDPA endeavors to sort all government data into the specific definitional categories of data described above. *See* Minn. Stat. §§13.32-.99. Section 13.37 specifically addresses the data at issue in this case, i.e., absentee ballots. As discussed above, sealed absentee ballots prior to opening by an election judge are classified by the MGDPA as “*nonpublic data*” with regard to data not on individuals, pursuant to section 13.02, subdivision 9, and as “*private data*” with regard to data on individuals, pursuant to section 13.02, subdivision 12.” (App 30-34) (citing Minn. Stat. § 13.37, subd. 2 (2008))(emphasis added). Accordingly, the contents of the absentee ballots do not become public until opened pursuant to a lawful recount process.

KSTP concedes that the contents of absentee ballots are nonpublic or private data prior to the conclusion of the election. Any argument to the contrary would be absurd. If the contents were public prior to the election, the entire election process would be

compromised. KSTP argues that contents of unopened absentee ballots become public at the conclusion of the election. However, nothing in the MGDPA supports this conclusion.

The section of the MGDPA at issue clearly provides that the contents of absentee ballots remain nonpublic or private until accepted and opened by an election judge. Minn. Stat. 13.37, subd. 2. There is no other provision in the law that removes the privacy protection afforded the ballot. KSTP's argument that the ballots should become public at the conclusion of the election is inconsistent with the structure of the MGDPA.

Under the MGDPA, if protected data becomes public at a subsequent time, the Minnesota Legislature clearly sets out when the data becomes public. *See e.g. Minn. Stat. 13.39 (Civil Investigative Data); Minn. Stat. 13.82 (Criminal Investigative Data)*. As a result, when the legislature intends for the status of protected data to change upon the occurrence of some event, the legislature can clearly set forth its wishes in the statute. The absence of any such provision within the MDGPA with respect to absentee ballots means that their contents remain protected unless accepted by the election judges and counted as part of the election process.

The right to secrecy regarding the manner in which a voter casts a ballot in a general election is sacrosanct. This right is not undermined by the fact that an absentee ballot is cast, as opposed to a ballot cast at a public polling place. As noted by the court in *In Matter of Contest of School Dist. Election Held on May 17, 1988*,

The purpose and intent behind absentee voting legislation is the preservation of the enfranchisement of qualified voters, ***the preservation of the secrecy of the ballot***, the prevention of fraud, and the achievement

of a reasonably prompt determination of the election result.  
431 N.W.2d 911, 913 (Minn. Ct. App. 1988) (*citing Bell v. Gannaway*, 227 N.W.2d 797,802 (1975) (emphasis added). *See also, Kearin v. Roach*, 381 N.W.2d 531, 533 (Minn. Ct. App. 1986) (describing the “inviolable secrecy of the ballot”); Minn. Stat. 204C.17 (secrecy of ballots). While KSTP has said they recognize this right and do not intend to invade it, there is no process or authority by which this can be done.

There is no protocol that can be established to completely avoid infringing upon the privacy of certain voters because their ballots have been segregated in such a fashion that their candidate preference will be ascertained. Each ballot identifies the ward and precinct of the voter. During the recount process, the names of the absentee voters whose ballots were rejected became public. In some instances, only one absentee ballot per precinct was rejected.

If KSTP can obtain a copy of all the rejected absentee ballots what is to prevent KSTP from requesting a copy of the rejected absentee ballot in the precincts in which there is only one absentee ballot? If the Court adopts the reasoning of the Trial Court to allow KSTP to receive a copy of all of the ballots, clearly they could ask to receive a copy of only one rejected absentee ballot. Assuming KSTP doesn't wish to engage in such behavior what is to prevent the next litigant from requesting a copy of the rejected absentee ballot from a precinct in which there is only one rejected ballot?

KSTP may argue that this problem could be solved by not allowing a request for one rejected absentee ballot. However, such an approach begs the question as to how many votes to produce. Is five votes enough? What if all five votes are for the same

candidate? In such scenario wouldn't election officials have to ascertain the vote on the rejected absentee ballot to know when enough absentee ballots should be provided to the party requesting a copy of the ballot. Invariably this will lead to the sanctity of the secrecy surrounding ballots being breached.

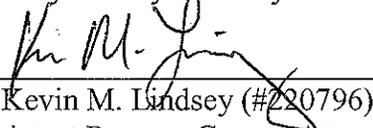
The MDGPA defines a person's vote as nonpublic and private data that is not subject to disclosure. This interpretation of the MDGPA is consistent with the legislative framework of MDGPA. Further, this interpretation avoids the absurd result of any individual using the MDGPA to invade the sanctity of the secret ballot in an election. The District Court's Order should be reversed as a matter of law as it is an erroneous interpretation of the MDGPA.

### CONCLUSION

On the basis of the foregoing argument, Ramsey County respectfully submits that this Court should find that the ballots inside the rejected absentee ballots should remained contained within the secrecy envelope consistent with the United States Constitution, Minnesota election law, the injunction issued by the Minnesota Supreme Court and the MDGPA. Ramsey County also prays that this Court reverse the order of summary judgment entered in favor of KSTP by the Ramsey County District Court.

Dated: 2/25/10

SUSAN GAERTNER  
Ramsey County Attorney

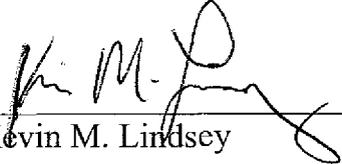
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**CERTIFICATE OF COMPLIANCE WITH RULE 132.01, SUBD. 3**

I hereby certify that Respondent's Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd 3(a). The brief contains 6,848 words, including footnotes, excluding the Table of Contents, Table of Authorities and Index to Appendix. This brief was prepared using Microsoft Word 2007 and text is 13-point Times New Roman.

  
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Kevin M. Lindsey