

NO. A10-395

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State of Minnesota  
**In Supreme Court**

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

*Appellants,*

vs.

RAMSEY COUNTY,

*Respondent.*

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**APPELLANTS' REPLY BRIEF**

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## INTRODUCTION

Appellants acknowledge the limitations that are imposed on the Court by the canons of statutory construction, as they have done from the inception of this litigation. The fact remains, however, that if the language and operation of Minn. Stat. §13.37 are understood in terms of the context in which the statute functions, reasonable minds can differ about what it means, and Appellants' initial brief describes in some detail why this is so. Yet Ramsey County's response entirely fails to refute (or even address) most of Appellants' specific arguments, and instead mainly cites, in mantra-like fashion, the familiar precedents stating that the courts may not go beyond the language of a statute if it is clear and free from ambiguity.

Ramsey County's brief also advances two arguments in favor of affirmance that were not considered by the Court of Appeals, one of which depends on a factual premise that is both implausible and erroneous, the other on a factual premise that is simply wrong. The first holds that granting Appellants the relief they request would "usurp" the authority of the United States Senate as the final arbiter of contested senatorial elections. The second is that voter privacy will inevitably be compromised by permitting public access to the absentee ballots.

However, even if—more than two years after the 2008 general election—the fantastical occurred and a challenge to Sen. Franken's victory was lodged with the

Senate, allowing public access to the rejected absentee ballots would in no credible way interfere with the deliberations of that body. And, as the district court expressly found, there is simply no factual merit whatsoever to the claim that public access to the ballots could place voter privacy at risk.

In addition, Ramsey County seeks to defend the decision of the Court of Appeals by contending that “the public has all the information it needs,” and that nothing would be gained by access to the rejected ballots themselves. Yet aside from the dubiousness of a government agency responding to a public access request by unilaterally deciding that there is no public benefit in disclosure, the County’s argument ignores the broader point that the transparency of the electoral process is directly linked to public confidence in that process, separate from the content of any particular records that may be sought. This benefit reaches its maximum where elections are very closely contested, require extended recounts, and generate widespread public concern. The fact that in the last two Minnesota general elections this exact scenario has occurred with respect to the two most important political offices in the state demonstrates the importance of insuring that the transparency of the electoral process is given the greatest possible scope.

### ARGUMENT

**A. The Issue of Whether Minn. Stat., Section 13.37 is Clear and Unambiguous.**

Ramsey County’s responsive brief offers almost nothing that actually engages Appellants’ specific analysis of the statute as to why it may reasonably be subject to

more than one interpretation, but instead does little more than repeat the familiar “rule of law that judges don’t write the law but rather interpret the law.” Respondent’s Brief, 8. Thus the County entirely fails to dispute *any* of the factual, legal, and analytical predicates on which Appellants’ argument is based.

In particular, the County does not contest Appellants’ point that election judges typically serve only on election day, and that as a result (especially where recounts and election contests occur), absentee ballots are often opened by persons who are not election judges. Consequently, the County does not (and could not) refute Appellants’ claim that to read the statute literally produces nonsensical results, since such an interpretation would mean that all of the absentee ballots opened by persons who were not election judges would remain forever classified, while those opened on election day by election judges would be public. Nor does the County dispute the conclusion which this produces, namely, that if election officials seek to allow public inspection of the ballots that were *not* opened by election judges—or even inspection of those ballots by more narrowly limited categories of individuals (such as representatives of the candidates)—the officials could be placed in the position of violating the Data Practices Act by improperly disclosing private data.

The County’s failure to acknowledge this concern, as if it were not especially important, warrants some further discussion showing just how restrictively the Data Practices Act treats private data. Government officials may not, on an *ad hoc* basis,

decide to disclose private data, even if doing so might be useful or important, as §13.05 (which contains detailed provisions limiting the dissemination of private data), makes clear. Minn. Rule 1205.0400 (“Access to Private Data”) amplifies these provisions, especially subpart 2, which states as follows:

**Who may see private data.** Access to private data shall be available only to the following: the subject of such data, as limited by any applicable statute or federal law; individuals within the entity [the government agency] whose work assignments reasonably require access; entities and agencies as determined by the responsible authority who are authorized by statute, including Minnesota Statutes, section 13.05, subdivision 4, or federal law to gain access to that specific data; and entities or individuals given access by the express written direction of the data subject.

Thus disclosure of data classified as private is not permitted except where expressly authorized by law or the data subject, even where public agencies are involved and are engaged in the transaction of important, official business, as various appellate decisions have recognized. See e.g., *State by Johnson v. Colonna*, 371 N.W.2d 629 (Minn. App. 1985) (holding that an investigatory subpoena issued by the Commissioner of Human Rights pursuant to express statutory authority was not sufficient to allow the Commissioner access to private data); *Unke v. Independent School Dist. 147*, 510 N.W.2d 271 (Minn. App. 1994) (holding that during public session of a school board, board members could not divulge data classified as private). In addition, potential damage claims prompted by improper disclosure of private data can be substantial. For example, in *Navarre v. South Washington County Schools*, 652 N.W.2d 9 (Minn. 2002),

this Court considered a case in which the jury had awarded the plaintiff more than \$500,000 after private data about her was publicly released. Ignoring the data privacy issues that would be created by the interpretation of §13.37 embraced by the County and the Court of Appeals will not make them go away, and indeed makes the hazard posed to state and local election officials even greater.

In addition to its failure to address this consequence of reading the statute in the way the Court of Appeals does, the County similarly makes no attempt to dispute Appellants' observations about the classification language found in §13.37 or the import of the definitions of "private" and "nonpublic" data found in the Data Practices Act. Specifically, Ramsey County does not deny that under the Act, particular data cannot be both private and nonpublic at the same time, but rather will be one or the other; that §13.37 contains a grab-bag of unrelated categories of records, some of which are data on individuals and some of which are not; and that the statutory prescription that all of these records are "nonpublic data . . . and private data" necessarily produces uncertainty as to which of the diverse kinds of records in §13.37 are subject to which classification.

Rather than debating any of these points on which Appellants' argument about the need for judicial interpretation is based, the County simply insists without analysis that the statute is clear, and that this Court must therefore affirm the decision of the Court of Appeals. However, such a complete failure to engage or examine the key elements that comprise Appellants' case hardly makes for a persuasive defense of the decision below.

Thus while it is clear that the County wants this Court to find Appellants' argument to be wrong, it is not at all evident from the County's brief as to why it is wrong. And in fact, as described in Appellants' initial brief, the analysis relied on by the Court of Appeals is similarly superficial, completely ignoring Appellants' argument about the prospect of absurd and untenable results produced in the ballot counting process if §13.37 is construed literally, as well as the ambiguities inherent in the statute due to the way in which it applies a single classification rule to the varied categories of data encompassed by the statute.<sup>1</sup>

Ramsey County does contend (echoing the Court of Appeals) that §13.37 is simply silent on the status of rejected absentee ballots after an election, and that the courts cannot supply what the Legislature omits or overlooks, claiming that Appellants' argument "is nothing more than a poor and thinly disguised attempt to have this Court engage in judicial activism by writing an amendment to the Data Practices Act."

Respondent's Brief, 8.

This, however, completely mischaracterizes Appellants' argument about how

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<sup>1</sup>Respondent's insistence that there is no possible uncertainty about the meaning of section 13.37 contrasts with observations that this Court and expert commentators have made about the Data Practices Act generally. For example, in *Wiegel v. City of St. Paul*, 639 N.W.2d 378, 381 (Minn. 2002), the Court described the Act as "a complex and technical chapter of the Minnesota Statutes." A law review retrospective on the first two decades of the Act notes that "Many lawyers and judges throw up their hands in exasperation" when dealing with the statute because of its "length" and "its incomprehensibility," stating that "[g]overnmental officials are frequently confused by its requirements," and that the "law is indeed prolix." Donald A. Gemberling and Gary A. Weissman, *Data Practices at the Cusp of the Millenium*, 22 Wm. Mitchell L. Rev. 101, 103 (1996).

§13.37 should be interpreted—which is not at all predicated on the claim that the statute is merely silent as to the classification of ballots after an election, but rather on the conclusion that by seemingly linking the data classification to the physical act of election judges (who serve only on election day) opening the ballot envelopes, the Legislature’s intention may be readily inferred—which was to prevent interference with the absentee ballots until the normal election day counting process occurred, just as with other ballots. Thereafter (or until the conclusion of any recount or election contest), the default rule of the Data Practices Act would apply (the presumption of public access to all government records except where a specific classification provides otherwise). Thus the unopened absentee ballots themselves would become publically accessible—just as with all other kinds of ballots. Contrary to the suggestion of the County (and the Court of Appeals), the issue here is not about legislative omission but instead focuses on the reasonable inferences that can be drawn from the language actually used in §13.37 combined with the general operating rules of the Data Practices Act, of which §13.37 is of course a part.

**B. Ramsey County’s Claim that Permitting Public Access to the Unopened Absentee Ballots Could Intrude on the Jurisdiction of the United States Senate.**

The County also advances the argument that “[i]f the Court adopts the rule of law urged by [Appellants], the new rule could potentially usurp the authority of the United States Senate,” and that defining the rejected ballots as not public “shows proper deference to the United States Senate given that the Senate is the final body that judges

the qualifications of its members.” Respondent’s Brief, 9. For a number of reasons, however, the County’s argument on this point has no merit.

**1. Because the County did not Raise the Constitutional Claim in the District Court, it is Barred from doing so on Appeal.**

“A reviewing court must generally consider ‘only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.’” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (citation omitted). Thus parties are typically bound by the arguments they make to the district court, and to argue a different theory on appeal typically precludes review.

In the present case, Ramsey County never raised any argument under Article I, §5 of the U. S. Constitution when before the district court. Specifically, the memorandum submitted to the district court by the County in support of its motion to dismiss for failure to state a claim made no mention whatsoever of any such argument, nor did the County’s notice of motion and motion (dated September 2, 2009).<sup>2</sup>

Furthermore, the Order and Memorandum of the district court from which this appeal is taken (AD-10) contains no reference to such an argument being offered on the part of the County, nor does the district court address the issue on its own initiative.

Thus because the County’s constitutional argument was not “presented and considered by the trial court in deciding the matter before it,” *Thiele*, 425 N.W.2d 582, the argument

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<sup>2</sup>The County never served or filed an Answer in the district court, opting instead to address Respondents’ Complaint by means of a motion to dismiss for failure to state a claim, as permitted by Minn. R. Civ. P. 12 .

falls outside the scope of review on this appeal.

**2. The 2008 Senatorial Election and Proceedings Contesting it were Concluded Long Ago.**

More fundamentally, even if the County's constitutional argument were not barred by failure to present it to the district court, it lacks any substantive merit regardless. The protracted recount and vigorous election contest which followed the 2008 election consumed nearly eight months, culminating on June 30, 2009, when this Court filed its decision in *Coleman v. Franken*, 767 N.W.2d 453 (Minn. 2009). The next day, Gov. Pawlenty signed an election certificate for Al Franken. Shortly thereafter, he was seated in the United States Senate. Complaint, ¶12, AA-8.

More than 18 months have now passed since this Court ruled, with no attempt of any kind by former Sen. Coleman or "any individual citizen," Respondent's Brief, 11, to challenge the outcome of the election in the United States Senate. The County's suggestion that such an option may still be pursued, and that therefore the election materials must remain undisturbed, teeters on the brink of absurdity. If one also considers that Sen. Coleman expressly and unconditionally conceded the election to Sen. Franken within hours of this Court's decision and that in the many months since then has never offered the slightest hint that he might change his mind, the County's argument plunges over that brink.

It is therefore clear beyond any rational debate that no appeal to the U. S. Senate will ever be made, and that the 2008 election was over long ago. Rarely does the law

indulge claims that depend for their legitimacy entirely on unsubstantiated speculation (*cf. Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 576 (1986) noting that in opposing summary judgment, a party must do more than simply show that there is some “metaphysical doubt” as to the material facts). Eventually, common sense must prevail. Thus even if it had any credibility, the County’s claim that public access to the rejected absentee ballots could somehow “frustrate the Senate’s ability to make an independent final judgment,” Respondent’s Brief, 11, simply has no plausible prospect of ever being confronted.

**3. It is Doubtful that an Appeal to the United States Senate  
Could still be Pursued.**

There are relatively few precedents interpreting the scope and procedural contours of Article I, §5 to the federal Constitution. Certainly that provision confers ultimate jurisdiction over disputes involving senatorial elections on the United States Senate itself. But implicit in Ramsey County’s argument is the notion that a senatorial candidate’s right to bring such an appeal continues indefinitely. Despite the scarcity of precedent, there are decisions that cast considerable doubt on this assumption, however.

For example, in *Roudebush v. Hartke*, 405 U.S. 15, 92 S.Ct. 804, 31 L.Ed.2d 1 (1972), the Supreme Court considered an election contest arising out of the closest senatorial election in Indiana history. The incumbent (Vance Hartke) lead by a small margin after the initial vote count; Hartke was issued an election certificate and seated before the recount had been completed. He then contended that because he had already

been seated, the courts were without authority through any election contest to alter the Senate's judgment: "Since the Senate has now seated Hartke, and since this Court is without power to alter the Senate's judgment, it follows, [Hartke's] argument goes, that the case is moot." 405 U.S. 19-20, 92 S.Ct. 807.

The Supreme Court eventually disagreed with Hartke, but only because "the Senate has postponed making a final determination of who is entitled to the office of Senator, pending the outcome of this lawsuit." 405 U.S. 20, 92 S.Ct. 808. In other words, the Senate had seated Hartke conditionally. Absent that, the clear implication of the Court's decision is that once the Senate actually accepts *and seats* a senator unconditionally, the Senate's final judgment on the election has been rendered, and no further appeals may be brought to that body. In the instant case, there were no conditions attached when Sen. Franken was seated (certainly none have been identified by the County or made part of the record). Thus even if an appeal to the Senate was somehow pursued after all this time, it is extremely doubtful that it would be considered valid, or that the Senate would accept it.

**C. Ramsey County's Claim that Voter Privacy will be Compromised if Access is Permitted.**

The third argument offered by Ramsey County is that "[v]oter privacy will be permanently los[t] if this Court determines that rejected absentee ballots constitute public data subject to disclosure to the public," and that "there is no way that secrecy of the ballots or voter privacy can be protected if this Court adopts the interpretation advanced

by” Appellants. Respondent’s Brief, 13. This claim, however, is a complete red herring, as the district court found.

Oddly, the County’s brief provides virtually no detail to support its rhetorical salvos, failing to actually explain how voter privacy would in fact be compromised should public access to the ballots be permitted. The County does describe certain hypothetical situations under which “any individual or entity” could supposedly obtain just one (or a small number) of rejected absentee ballots, but from there simply leaps to the conclusion that “if the Court accepts the statutory construction advanced by [Appellants], the voter preferences of all of the individuals who submitted a rejected absentee ballot would be at risk of disclosure.” *Id.*, at 14. In its brief to the Court of Appeals, the County did elaborate somewhat more as to how it sees public access to the rejected ballots threatening voter privacy, though that explanation hardly produces a more persuasive argument.

In Ramsey County at least, each absentee ballot evidently contains a small notation identifying the ward and precinct in which it was cast. Since during the recount process that followed the 2008 election, the names of absentee voters whose ballots were rejected became public, and since “in some instances, only one absentee ballot per precinct was rejected,” Respondent’s Brief to Court of Appeals, 23, the County’s argument to this Court seems to be that an “entity or individual” could deduce how voters in such precincts voted by obtaining a copy of what would be the only rejected

absentee ballot from that precinct, and correlating it to a voter's name.

In the first place, however, this argument has no relevance or application whatsoever with respect to the vast majority of the absentee ballots that were rejected, since relatively few of the total absentee ballot rejections that occurred in Ramsey County (or throughout the state) happened in precincts where there were only a very small number of such rejections. The County implicitly concedes this by stating that “in *some instances*” only one ballot per precinct was rejected. *Id.*

Furthermore, as the district court concluded, even if the improbable inquiries about voter identity described by the County were actually to be attempted by someone, County officials have simple, routine, and effective procedures available by which any risk of compromising voter privacy can be completely eliminated. As described in Appellants' initial brief, the Data Practices Act and decisions construing it require that public and private data be separated where they appear in the same document or record; *only* the portions which could not be used to identify the subject of the data must be disclosed. Here, as the trial court noted (AD-15), information appearing on an absentee ballot such as the ward and precinct number “can be redacted and separated from the public information.” That step requires nothing more than the simple expedient of blacking out the small notation on the ballot containing the ward and precinct numbers.

In addition, the trial court's Order effectively gives the County considerable discretion in making judgments about what disclosures could potentially infringe on

voter confidentiality. For this reason, not only can the County redact the ward and precinct information on ballots, but it could also decline to respond to requests that are tailored to a particular precinct or other small geographical area. Nothing in the district court's Order (or in the Data Practices Act) compels the County to respond to such inquiries if the requester might reasonably deduce the identity of the voter from the requested information. And the Order expressly gives the County broad legal protection in exercising its discretion.

Appellants emphasize, however, that this concern about voter privacy exists—even hypothetically—with respect to only a very small percentage of the total absentee ballots that were rejected. For the great majority of those ballots, no such issue would arise, and the fact that in a few instances more caution might be required to protect voter privacy hardly justifies a complete prohibition on any public access to all of the rejected ballots.

**D. The Issue of Whether the Public “has all of the Information it Needs.”**

The County's final argument is that the “reasons why the absentee ballots in question were not counted by election officials has been thoroughly litigated,” Respondent's Brief, 15, and that the “public has all the information it needs to be able to assess whether rejecting the absentee ballots was properly done.” *Id.*, at 16. This argument also fails, for a number of reasons.

As an initial matter, a government agency's evaluation of a request for public access to particular records should hardly include consideration of whether “the public

has all the information it needs.” Use of such a factor invites serious distortions in applying the laws that call for access to government records.

Furthermore, the factual predicate of the County’s argument is clearly flawed. As discussed in Appellants’ initial brief, it has long been recognized that there is a strong and direct relationship between public access to governmental proceedings and public confidence in those proceedings, an interest of no small magnitude, and one that would have few more important applications than with respect to elections in a democracy. Plainly the recount and litigation following the 2008 senatorial election provoked widespread public concern and controversy, as did the final resolution. Permitting broad public access to documents relating to that election—especially those that were at the heart of the dispute between the candidates, as the rejected absentee ballots were—is arguably one of the most effective ways in which to engender public confidence in the outcome. “People in an open society do not demand infallibility from their institutions, but it is difficult to accept what they are prohibited from observing.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

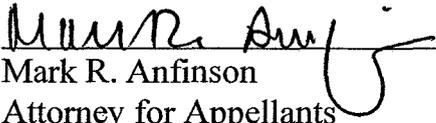
Even if the County is right in claiming that the “reasons why the absentee ballots in question were not counted . . . has been thoroughly litigated,” the act of disclosure itself will independently tend to generate trust and confidence in the process, as well as in the result. Thus in a very real sense, the public does not have “all the information it needs” and that it can benefit from regarding the rejected absentee ballots.

The County also objects that if access to the rejected ballots is permitted, it would then allow those ballots to be tabulated, which the County suggests is something to be avoided at all costs. This, however, misses a key consideration in terms of another possible benefit that public access could produce. The state Legislature continues to actively debate the issue of how “Minnesota’s complicated absentee ballot laws” might be improved, so that the disenfranchisement which results when ballots are rejected can be reduced. While counting the rejected absentee ballots would not plausibly support claims that the election was decided wrongfully, since the rejections which occurred appear for the most part to have been called for by existing state law, should such a tabulation show that the election result might have been affected had more of the ballots not been rejected, it would create a powerful argument in favor of further legislative reforms by demonstrating the importance of enacting statutes which maximize the likelihood that every one who attempts to vote will in the end have his or her vote counted.

### CONCLUSION

For the reasons described above and in their initial brief, Appellants respectfully request that the decision of the Court of Appeals be reversed.

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