

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
Case No. \_\_\_\_\_**

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Minnesota Voters Alliance, Mary Franson, Cindy Pugh, Duane Quam, and Eric Lucero,

Petitioners,

vs.

State of Minnesota, Office of the Secretary of State, and Secretary of State Steve Simon,  
in his official capacity, or his successor,

Respondents.

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**PETITION FOR AN ORDER TO SHOW CAUSE  
UNDER MINNESOTA STATUTES § 14.44**

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To the Court of Appeals of the State of Minnesota:

**INTRODUCTION**

The Petitioner Minnesota Voters Alliance requests this Court to issue an order to show cause to the Respondent Minnesota Secretary of State, Steve Simon. The writ should require Secretary of State Simon and the State of Minnesota to

- (1) show whether the Secretary may treat a registered challenged absentee voter as “not registered” defined under Minnesota Statute § 203B.04, subdivision 4;
- (2) show how Minnesota Rule 8210.0225 is not contrary to the legislative process governing challenged voters found under Minnesota Statute § 204C.12 and how the same rule does not violate the separation of powers principle; and
- (3) show how Minnesota Rule 8210.0225 is not contrary to the demands of § 201.121, subdivision 2 which requires compliance with the provisions of § 204.C.12 and how it does not violate the separation of powers principle.

The Minnesota Secretary of State has promulgated Minnesota Rule 8210.0225 governing challenged absentee voters in direct conflict with statutory law under Minnesota Statutes § 204C.12 which governs the procedure for voters with a challenged status. Registered voters identified as “challenged” must answer questions from an election judge concerning their eligibility as a voter before casting a ballot.

Instead of following the legislative mandates of § 204C.12, Minnesota Rule 8210.0225, requires that all challenged registered absentee voters be treated as “not-registered” persons. Not only does the rule contradict the legislative intent regarding all challenged voters under § 204C.12, but also the mandates found under § 201.121, subdivision 2, governing persons with a voter status of “challenged–postal return.” Section 201.121, subdivision 2 specifically directs that if a voter is designated as “challenged-postal return” the voter “*shall* comply with the provisions of section 204C.12 *before* being allowed to vote.”<sup>1</sup>

Moreover, for all designated challenges, under Rule 8210.225, the voter is not required to receive notice of the challenge or the type of challenge. And *before* the challenge is addressed and a voter asked questions to overcome the challenge to grant the person the right to receive a ballot, the challenged absentee voter receives a ballot and other materials including a voter registration application; nonregistered voting instructions; a secrecy envelope; a signature envelope; and an addressed and postage paid return envelope,<sup>2</sup> *all at the same time*. Under the rule there is *no vetting process*, contrary to the legislative intent codified under Minnesota Statutes § 204C.12.

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<sup>1</sup> Emphasis added.

<sup>2</sup> *Absentee Voting Administration Guide* 22–23, § 5.3.3 (Office of the Minn. Sec. of State 2018).

Notably, a challenged absentee voter is not a “not-registered” voter as statutorily defined under Minnesota Statutes § 203B.04. And, no statute gives the Secretary the authority to treat the challenged voter the same as a “not-registered” voter to circumvent the legislative mandates.

In any case, the “challenged” designation requires the application of the legislative process under §204C.12 regardless of whether the challenged voter seeks an absentee ballot or appears at the polling place. Rule 8210.0225 is contrary to the legislative process contemplated for challenged voters, and hence, in so doing, the Secretary also violates the separation of powers principle.

Because Minnesota Rule 8210.0225 is contrary to the statutory law governing challenged voters under Minnesota Statutes § 204C.12, this Court should find the rule invalid.

## **PURPOSE OF THE PETITION**

**The purpose of the Petition is to invalidate the Secretary’s rule which circumvents the Legislature’s statutory process governing challenged voters.**

1. The Petitioners request that this Court issue an order to show cause requiring the Secretary of State within 20 days to file a response to

- show whether the Secretary may treat a registered challenged absentee voter as “not registered” as defined under Minnesota Statute § 203B.04, subdivision 4;
- show how Minnesota Rule 8210.0225 is not contrary to the legislative process governing all challenged voters found under Minnesota Statute § 204C.12 which requires a process that must be carried out before the voter is provided a ballot

and how the same rule does not violate the separation of powers principle; and

- show how Minnesota Rule 8210.0225 is not contrary to the demands of § 201.121, subdivision 2 which requires compliance with the provisions of § 204.C.12 and how it does not violate the separation of powers principle.

## **PARTIES**

### **Petitioners**

#### **Petitioner Minnesota Voters Alliance:**

2. The Minnesota Voters Alliance is an organization with members who seek to ensure, as part of their association objectives, public confidence in the integrity of Minnesota's elections, in election results and election systems, processes, procedures, and enforcement, and that public officials act in accordance with the law in exercising their obligations to the people of the State of Minnesota. The Minnesota Voters Alliance also works to protect the rights of its members whenever laws, statutes, rules, or regulations threaten or impede implied or expressed rights or privileges afforded to them under our constitutions or laws or both. Its membership includes candidates seeking elective offices.

#### **Petitioner Mary Franson, Minnesota House of Representatives**

3. Mary Franson is presently a member of the Minnesota House of Representatives, representing House District 8B. Franson is an elected official and is planning to run for office again in 2020. Franson is presently campaigning despite the fact she cannot file her affidavit of candidacy with the Minnesota Secretary of State for elected

office until May 19, 2020 at the earliest.<sup>3</sup> When last elected to office, Franson had a legal right or privilege to take the public office as a result of the election outcome. For the 2020 election contest, Minnesota Rule 8210.0225 threatens Franson's right or privilege to take office again if a significant number of ineligible voters cast ballots and illegally change an otherwise legal or legitimate election result of only eligible voters. Absentee balloting and, hence, the effect of Rule 8210.0225 on Franson's election contest for the November 2020 general elections begins on September 18, 2020.

**Petitioner Cindy Pugh, former member of the Minnesota House of Representatives**

4. Cindy Pugh was a member of the Minnesota House of Representatives, representing House District 33B from 2012–2018. Pugh lost her last election by 216 votes.<sup>4</sup> In the 2018 election contest 11,570 votes were cast for her and 11,786 were cast for her opponent.<sup>5</sup> The votes cast totaled 23,356. Of that total, approximately 6,628 were absentee ballots or 28% of all ballots cast<sup>6</sup>. Pugh is considering running for office again in 2020. Although Pugh has not started campaigning for office she has until May 19 to June 2, 2020 to file her affidavit of candidacy with the Minnesota Secretary of State for elected office.<sup>7</sup> When last elected to office, Pugh had a legal right or privilege to take the public office as a

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<sup>3</sup> Minnesota Secretary of State, Candidate filing period, May 19 to June 2, 2020; <https://www.sos.state.mn.us/election-administration-campaigns/become-a-candidate/candidate-filing-periods/> (last visited Mar. 6, 2020).

<sup>4</sup> Minnesota Secretary of State, 2018 Election Results; <https://www.sos.state.mn.us/elections-voting/2018-general-election-results/2018-precinct-results-spreadsheet/> (last visited Feb. 25, 2020).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Minnesota Secretary of State, Candidate filing period, May 19 to June 2, 2020; <https://www.sos.state.mn.us/election-administration-campaigns/become-a-candidate/candidate-filing-periods/> (last visited Mar. 6, 2020).

result of the election outcome. In light of her close election loss in 2018, for the 2020 election contest, Minnesota Rule 8210.0225 threatens Pugh's right or privilege to take office again if a significant number of ineligible voters cast ballots thereby undermining the credibility and legitimacy of the election results of an election contest involving only eligible voters. Absentee balloting and, hence, the effect of Rule 8210.0225 on Pugh's election contest for the November 2020 general elections begins on September 18, 2020.

**Petitioner Duane Quam, Minnesota House of Representatives**

5. Duane Quam is presently a member of the Minnesota House of Representatives, representing House District 30B. Quam is an elected official and is planning to run for office again in 2020. Quam is presently campaigning despite the fact he cannot file his affidavit of candidacy with the Minnesota Secretary of State for elected office until May 19, 2020 at the earliest.<sup>8</sup> When last elected to office, Quam had a legal right or privilege to take the public office as a result of the election outcome. For the 2020 election contest, Minnesota Rule 8210.0225 threatens Quam's right or privilege to take office again if a significant number of ineligible voters cast ballots thereby undermining the credibility and legitimacy of the election results of an election contest involving only eligible voters. Absentee balloting and, hence, the effect of Rule 8210.0225 on Quam's election contest for the November 2020 general elections begins on September 18, 2020.

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<sup>8</sup> *Id.*

**Petitioner Eric Lucero, Minnesota House of Representatives**

6. Eric Lucero is presently a member of the Minnesota House of Representatives, representing House District 30B. Lucero is an elected official and is planning to run for office again in 2020. Lucero is presently campaigning despite the fact he cannot file his affidavit of candidacy with the Minnesota Secretary of State for elected office until May 19, 2020 at the earliest.<sup>9</sup> When last elected to office, Lucero had a legal right or privilege to take the public office as a result of the election outcome. For the 2020 election contest, Minnesota Rule 8210.0225 threatens Lucero's right or privilege to take office again if a significant number of ineligible voters cast ballots thereby undermining the credibility and legitimacy of the election results of an election contest involving only eligible voters. Absentee balloting and, hence, the effect of Rule 8210.0225 on Lucero's election contest for the November 2020 general elections begins on September 18, 2020.

**Respondents**

**Respondents State of Minnesota, Office of the Minnesota Secretary of State and Secretary of State Steve Simon**

7. The Respondent, State of Minnesota, Minnesota Secretary of State's Office, is a constitutional executive office. The Secretary of State, Steve Simon, acts on behalf of the State of Minnesota in exercising his duties regarding federal, state, county and local elections, promulgating and executing election laws within the State.

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<sup>9</sup> *Id.*

## MINNESOTA RULE AT ISSUE

### Minnesota Rule 8210.0225:

A voter registration application must be sent with the ballot to *any challenged voter* and to each voter whose voter registration application is incomplete under Minnesota Statutes, section 201.061, subdivision 1a, or 201.121, who applies for an absentee ballot. *The absentee ballot process must be administered as if the voter was not registered to vote.*<sup>10</sup>

8. The rule becomes effective upon the date absentee balloting starts for the 2020 general election: September 18, 2020.<sup>11</sup>

## GOVERNING STATUTES

### Minnesota Statutes § 204C.12, subdivisions 1 and 2:

Subdivision 1. Manner of challenging.

An election judge shall, and an authorized challenger or other voter may, challenge an individual based on personal knowledge that the individual is not an eligible voter.

Subd. 2. Statement of grounds; oath.

A challenger must be a resident of this state. The secretary of state shall prepare a form that challengers must complete and sign when making a challenge. The form must include space to state the ground for the challenge, a statement that the challenge is based on the challenger's personal knowledge, and a statement that the challenge is made under oath. The form must include a space for the challenger's printed name, signature, telephone number, and address.

An election judge shall administer to the challenged individual the following oath:

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<sup>10</sup> Emphasis added.

<sup>11</sup> Minnesota Sec. of State Election Calendar, <https://www.sos.state.mn.us/election-administration-campaigns/elections-calendar/> (last visited Mar. 9, 2020).



"Do you solemnly swear (or affirm) that you will fully and truly answer all questions put to you concerning your eligibility to vote at this election?"

The election judge shall then ask the challenged individual sufficient questions to test that individual's residence and right to vote.

**Minnesota Statutes §201.121, subdivision 2:**

Upon return of the notice by the postal service, the county auditor shall change the registrant's status to "challenged" in the statewide registration system. An individual challenged in accordance with this subdivision *shall comply with the provisions of section 204C.12, before being allowed to vote.*<sup>12</sup>

## **JURISDICTION**

9. The Court of Appeals has jurisdiction over this petition under Minnesota Statutes §14.44 and Rule 114.01 of the Minnesota Rules of Civil Appellate Procedure:

The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to the Court of Appeals, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner.... The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, and whether or not the agency has commenced an action against the petitioner to enforce the rule.

10. The reviewing court "shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rulemaking procedures."<sup>13</sup>

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<sup>12</sup> Emphasis added.

<sup>13</sup> *Coalition of Greater Minnesota Cities v. Minnesota Pollution Control Agency*, 765 N.W.2d 159, 164 (Minn. App. 2009) *quoting* Minn. Stat. § 14.45 (2008).

11. The Petitioners seek a determination that Minnesota Rule 8210.0225 is invalid because it is contrary to the governing statute regarding registered challenged voters, namely, Minnesota Statutes § 204C.12.

12. The ultimate beneficiaries of an election are candidates. To obtain the elected office the candidate seeks, requires by law that it be done by eligible voters and without undermining the integrity and credibility of the outcome. The Legislature's statutory scheme to minimize fraud is implemented through § 204C.12, carrying out the constitutional provision of Minnesota under Article VII. Questioning the identified challenged voter *before* a ballot is provided to the voter is a core requirement of § 204C.12. To minimize fraud is to protect the integrity of the election outcome.

13. Minnesota Rule 8210.0225 threatens the rights or privileges of the Petition's candidates to take office if ineligible voters cast ballots thereby undermining the credibility and legitimacy of the election results of an election contest involving other eligible voters. Because the Secretary's promulgated rule governing challenged registered absentee voters contradicts the will and direction of the Legislature in a statutory effort to safeguard and protect the integrity of election outcomes, the candidates are deprived of the benefit of § 204C.12, regarding the election contest as conferring legitimacy on the elected officials to take and hold their respective offices.

## **SUMMARY OF THE LEGAL ARGUMENT**

### **A rule that is contrary to a legislative statute is invalid.**

14. Minnesota Statutes § 204C.12 controls access to a ballot by a person whose voter status is "challenged" by requiring an election judge to assess the challenged person's

answers to specific questions related to the challenge regarding their eligibility to vote. A “challenged” notation is not evidence of ineligibility to vote, but it indicates the possibility of it.”<sup>14</sup> Minnesota Statutes § 203B.04 provides for the statutory authority regarding absentee voting and, specifically, registration at the time of application. The statute defines and identifies a “not-registered” person as a person who has not yet registered and is eligible to vote:

“An eligible voter who is not registered to vote but who is otherwise eligible to vote by absentee ballot may register by including a completed voter registration application with the absentee ballot.”<sup>15</sup>

15. The statutory definition of a “not-registered” person does not include “challenged voters.”

16. Contrary to statutory authority, under Minnesota Rule 8210.0225, governing the absentee ballot process, the Secretary allows the challenged absentee voter to be treated as a “not-registered” voter. In so doing, the Secretary allows a ballot to accompany other voter materials, including a voter registration application, before any vetting of the challenged voter. The Rule ignores the status of the voter as “challenged” at the one point it matters—before receiving a ballot. The purpose of § 204C.12 is to protect the integrity of the election process; whereas, Rule 8210.0225 undermines the legitimate legislative purpose of a “challenged” status.

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<sup>14</sup> *Voter Registration, 2018 Evaluation Report S-4* (Office of the Legislative Auditor, Minnesota (Mar. 2018))

<sup>15</sup> Minn. Stat. § 203B.04, subd. 4.

17. Under § 204C.12, the challenged voter does not receive a ballot until after the election judge questions the voter about the challenge and is satisfied with the responses.

18. Furthermore, if the challenged voter’s “answers to the questions fail to show that the individual is not eligible to vote in that precinct and the challenge is not withdrawn, the election judge shall verbally administer the oath on the voter certificate to the individual. After taking the oath and completing and signing the voter certificate, the challenged individual shall be allowed to vote.”<sup>16</sup> The “voter certificate” is not the same as a voter signature certificate.<sup>17</sup>

19. Meanwhile, if the same challenged voter physically appeared at a polling place, an election judge would ask specific questions regarding the challenge to allow the voter to overcome the challenge before receiving a ballot. <sup>18</sup> For instance, in the 2018 Election Judge Guide,<sup>19</sup> the guide provides the definitions for various “challenges” which includes:

- “Challenged-Felony;”
- “Challenged-Guardianship;”
- “Challenged-Voted Out of Precinct;”
- “Challenged-Name and Address;”
- “Challenged-Address;”
- “Challenged-AB Address;”
- “Challenged-Postal Return;”
- “Challenged-Unverified;” and
- “Challenged-Other.”<sup>20</sup>

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<sup>16</sup> Minn. Stat. § 204C.12, subd. 3.

<sup>17</sup> Minn. Stat. § 200.02, subd. 26; “‘Voter signature certificate’ means a printed form or label generated from an electronic polling place roster that contains the voter’s name, address of residence, date of birth, voter identification number, the oath required by section 204C.10, and a space for the voter’s original signature.”

<sup>18</sup> Minn. Stat. § 204C.12, subd. 2.

<sup>19</sup> At the time of the filing of this Petition, the Secretary of State had not written an Election Judge Guide for 2020.

<sup>20</sup> *2018 Election Guide* at 17 (Office of the Minnesota Secretary of State (circa 2018)).

20. The election judge is required to ask certain specific questions to determine if the “challenged” person is eligible, *after* taking an oath.<sup>21</sup> For instance, questions for a “challenged” felon:

“Are you on probation or parole for a felony conviction?”<sup>22</sup>

21. However, in some circumstances, multiple questions are asked of challenged voters. After taking an oath,<sup>23</sup> “the training that one county provides to election judges includes three questions for persons challenged due to a felony conviction: (1) What is your legal name? (2) Have you ever been convicted of a felony? (3) If yes, have your civil rights been restored?”<sup>24</sup>

22. Questions for a “challenged” guardianship are:

“Are you under court-ordered guardianship in which the court revoked your right to vote? Were you found by a court to be legally incompetent?”<sup>25</sup>

23. Questions for a “challenged” absentee ballot (AB) address are:

“What is your residential address?”; “Did you submit an application for an absentee ballot using another residential address?”; “Have you returned that voted absentee ballot?”<sup>26</sup>

24. With the Secretary treating the challenged absentee voter as a “not-registered voter,” there is no vetting before receiving a ballot. No Minnesota law suggests a ballot may be provided to the challenged voter prior to their completing the statutory vetting process.

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<sup>21</sup> *Id.* 18.

<sup>22</sup> *Id.*

<sup>23</sup> *Voter Registration, 2018 Evaluation Report* 49.

<sup>24</sup> *Id.*

<sup>25</sup> *2018 Election Guide* 17.

<sup>26</sup> *Id.*

25. Notably, under Minnesota Rule 8210.0225, the Secretary does not require a notice be provided to the registered challenged absentee voter identifying the type of challenge that served as the basis of questioning the voter's eligibility.

26. Minnesota Statutes § 204C.12, governing challenged voters and the process to overcome the challenge, does not give the Secretary the authority to promulgate rules that are contrary to the specific intent of the Legislature. As the Secretary has previously stated to the federal court of appeals regarding the interpretation of § 204C.12, and in particular, how the statute provides explicit government obligations regarding challenged voters:

“Minn. Stat. § 204C.12, subd. 1 (2010), are clear indications of how Minnesota law creates government obligations: *explicitly*.<sup>27</sup>

27. Likewise, the Secretary has represented to the same court that §204C.12 provides an “explicit legal duty” regarding how an election judge is to act when a voter is identified as being “challenged:”

[L]ocal *election judges* have an explicit legal duty to act when they reasonably believe that an ineligible person is attempting to vote....And the remainder of section 204C.12 sets forth the process that the election judge is obligated (and authorized) to conduct when a challenge is made to a voter's eligibility: the challenge procedure, under which the prospective voter is placed under oath and asked “sufficient questions to test that individual's residence and right to vote.”<sup>28</sup>

28. The rules and processes promulgated by the Secretary for absentee voters are contrary to the law and violate separation of powers principles. Through the promulgated

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<sup>27</sup> Br. of Appellees, Ritchie and Swanson at 23 (original emphasis) *Minnesota Voters Alliance, et al. v. Mark Ritchie and Lori Swanson*, 2012 WL 5947165 (C.A.8).

<sup>28</sup> *Id.* citing Minn. Stat. § 204C.12, subd. 1 and *quoting* subdivisions 2–5.

rule at issue, Minnesota Rule 8210.0225, the entire statutory scheme for challenged voters under § 204C.12 who seek absentee ballots is voided.

29. The Secretary is simply not following the requirements of the statute.

## **ARGUMENT**

### **I. Persons wishing to cast a ballot in Minnesota must first register to vote.**

30. Before a person can vote in Minnesota, the person must first register to vote. Minn. Stat. § 201.054. If a person is not registered to vote, he or she may not cast a ballot in any election:

An eligible voter must register in a manner specified by section 201.054, in order to vote in any primary, special primary, general, school district, or special election held in the county.<sup>29</sup>

Registration is done through a voter registration application as outlined under Minnesota Statute § 201.054:

An individual may register to vote:

- (1) at any time before the 20th day preceding any election as provided in section 201.061, subdivision 1;
- (2) on the day of an election as provided in section 201.061, subdivision 3; or
- (3) when submitting an absentee ballot, by enclosing a completed registration application as provided in section 203B.04, subdivision 4.<sup>30</sup>

31. When a registered voter's status is "challenged," there can be any number of reasons why the person's eligibility is being questioned. This would include, for instance,

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<sup>29</sup> Minn. Stat. Ann. § 201.018, subd. 2 (Westlaw through 2013) (original emphasis).

<sup>30</sup> Minn. Stat. Ann. § 201.054 (Westlaw through 2013).

questions regarding the person's residency, a felony conviction (whether the felon is on parole or probation), citizenship, or under a guardianship court order.<sup>31</sup> The questions are related to the requirements to be an eligible voter as found under Minnesota Statutes § 201.014:

Except as provided in subdivision 2, an individual who meets the following requirements at the time of an election is eligible to vote. The individual must:

- (1) be 18 years of age or older;
- (2) be a citizen of the United States; and
- (3) maintain residence in Minnesota for 20 days immediately preceding the election.

Subd. 2. Not eligible.

The following individuals are not eligible to vote. Any individual:

- (1) convicted of treason or any felony whose civil rights have not been restored;
- (2) under a guardianship in which the court order revokes the ward's right to vote; or
- (3) found by a court of law to be legally incompetent.

32. The statutory laws are consistent with the requirements of Article VII, § 1 of the Minnesota Constitution in protecting the right to vote and defining eligible and ineligible voters:

Every person 18 years of age or more who has been a citizen of the United States...shall be entitled to vote in that precinct. The place of voting...shall be prescribed by law. The following persons shall not be entitled or permitted to vote at any election in this state: A person not meeting the above requirements; a person who has been convicted of treason or felony, unless

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<sup>31</sup> See e.g., Minn. Stat. §§ 201.061, subd. 1a; 609.165, subd. 1.



restored to civil rights; a person under guardianship, or a person who is insane or not mentally competent.

33. Likewise, Minnesota Statute § 204C.12 is consistent with constitutional law and expresses the intent of the Legislature in dealing with competing interests of ensuring eligible voters can register to vote and have their votes count and safeguards so that ineligible voters cannot register or vote

**II. Because absentee voting is a privilege, the statutory requirements of the Legislature governing challenged voters must be adhered to, even by the Secretary of State.**

34. Minnesota Statutes §14.44 provides the procedure to determine the validity of a rule and for engaging this Court’s jurisdiction:

The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to the court of appeals, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner....

35. This Court has original jurisdiction to determine the validity of an agency's rules, including amendments.<sup>32</sup> A § 14.44 declaratory judgment action is a pre-enforcement challenge.<sup>33</sup>

36. Minnesota Statutes § 204C.12 requires a challenged voter to answer *additional questions* under *oath* when his or her eligibility to vote is in doubt, by an *election judge*, before *being allowed to vote*. The statute does not state the challenged voter may be treated as another “type” of voter, but is explicit as to the necessity of additional questions by an election judge under oath.

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<sup>32</sup> *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *see* Minn. Stat. § 14.44; *see also* Minn. Stat. § 14.02, subd. 4 (“rule” defined).

<sup>33</sup> *Id.*

37. The challenged Minnesota Rule 8210.0225 directly contradicts the legislative statutory process applicable to *all* challenged voters, whether voting at the polling place or absentee. The rule requires that challenged registered absentee voters be treated as “not registered” voters—a statutorily defined term—without regard to § 204C.12:

A voter registration application must be sent with the ballot to *any challenged voter* and to each voter whose voter registration application is incomplete under Minnesota Statutes, section 201.061, subdivision 1a, or 201.121, who applies for an absentee ballot. *The absentee ballot process must be administered as if the voter was not registered to vote.*<sup>34</sup>

38. Notably, all challenged absentee voters are already “registered voters.” Here, the rule does *not* require a challenged registered absentee voter to answer *additional questions* under *oath* by *an election judge* before *being allowed to vote*, but merely to be treated as “not registered,” as if the challenged absentee voter has never registered as a voter.

**III. Section 204C.12 reflects the Legislature’s intent to safeguard the integrity of elections for eligible voters.**

**Treating a challenged registered absentee voter as a “not registered” voter contradicts the explicit mandates of § 204C.12.**

39. “Concerns about voting often center on two competing interests: ensuring sufficient access so that all eligible persons can register and vote, and providing sufficient safeguards so that ineligible persons cannot register and vote.”<sup>35</sup> Notably, “[e]lection integrity and ballot access are important to our democracy. Eligible citizens should have confidence that they will be able to vote in elections and that their votes will count. At the

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<sup>34</sup> Emphasis added.

<sup>35</sup> *Voter Registration, 2018 Evaluation Report* 52.

same time, it is important that the election process guards against voter fraud and voting by people who are not eligible to vote.”<sup>36</sup>

40. “It is important, at the outset, to consider the nature of absentee voting in the election process. The opportunity of an absentee voter to cast his vote at a public election by mail has the characteristics of a privilege rather than of a right. Since the privilege of absentee voting is granted by the legislature, the legislature may mandate the conditions and procedures for such voting.”<sup>37</sup> In *Bell v. Gannaway*, the Minnesota Supreme Court explained that “voting by absentee ballot is a privilege, not a right, and affirmed the mandatory nature of absentee voting requirements.”<sup>38</sup> The Court reiterated that because “the privilege of absentee voting is granted by the legislature, the legislature may mandate the conditions and procedures for such voting.”<sup>39</sup> And while the absentee voter is to adhere to “strict compliance with the requirements for voting by absentee ballot [as] mandatory,”<sup>40</sup> the issues here are not whether the registered challenged absentee voter failed to follow the law governing absentee voting, but whether the *Secretary* has violated the law regarding the Legislature’s statutory requirements governing registered challenged absentee voters.

41. For example, in the absentee ballot process under the promulgated Rule 8210.0225, the Minnesota Secretary of State treats a challenged absentee voter as a “not-registered” voter in which the challenged voter will receive a ballot with other voter materials

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<sup>36</sup> *Id.* 3.

<sup>37</sup> *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975) (citations omitted); *KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 790 (Minn. 2011) (“Voting in absentia is a privilege....”)

<sup>38</sup> *Gannaway*, 227 N.W.2d at 802-03.

<sup>39</sup> *Id.*, 227 N.W.2d at 802 *quoting* *In re Contest of Gen. Election Held on November 4, 2008, for Purpose of Electing a U.S. Sen. from State of Minnesota*, 767 N.W.2d 453, 462 (Minn. 2009).

<sup>40</sup> *Id.*, 227 N.W.2d at 803 (“Voters who seek to vote under these provisions must be held to a strict compliance therewith.”).

in the absentee ballot process. Receiving the ballot before the vetting process required by law under Minnesota Statutes § 204C.12, is contrary to the legislative intent of protecting the integrity of the election process when questions of a voter’s eligibility arise. This statement is not made in a vacuum.

42. During a federal litigation dispute with the Minnesota Voters Alliance involving § 204C.12, the Secretary identified and declared the purpose and function of § 204C.12 as facilitating the challenge process in which *additional* information is *required* to be obtained, under oath, before voting:

[To] [f]acilitate the challenge process, under which voters are required to provide additional information under oath before being allowed to vote. *See* Minn. Stat. § 204C.12 (2010).<sup>41</sup>

We agree.

43. The Secretary has also previously stated to the U.S. Court of Appeals for the Eighth Circuit about the interpretation of § 204C.12, particularly, how the statute provides explicit government obligations regarding challenged voters:

“Minn. Stat. § 204C.12, subd. 1 (2010), are clear indications of how Minnesota law creates government obligations: *explicitly*.”<sup>42</sup>

We agree.

44. Likewise, the Secretary has represented to the same court that §204C.12 provides an “explicit legal duty” regarding how an election judge is to act when a voter is identified as being “challenged” including the procedure to follow. The procedure requires the taking of an oath and sufficient questions regarding either an individual’s residence

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<sup>41</sup> Br. of Appellees, Ritchie and Swanson at 28, *Minnesota Voters Alliance, et al. v. Mark Ritchie and Lori Swanson*, 2012 WL 5947165 (C.A.8).

<sup>42</sup> *Id.*

(“challenged-postal return,” *see* §201.121) and right to vote (including, but not limited to “challenged-felon,” “challenged-citizenship,” or “challenged-guardianship”):

[L]ocal *election judges* have an explicit legal duty to act when they reasonably believe that an ineligible person is attempting to vote....And the remainder of section 204C.12 sets forth the process that the election judge is obligated (and authorized) to conduct when a challenge is made to a voter's eligibility: the challenge procedure, under which the prospective voter is placed under oath and asked “sufficient questions to test that individual's residence and right to vote.”<sup>43</sup>

We agree.

45. Minnesota Statutes § 204C.12 controls access to a ballot by a person whose voter status is “challenged” by requiring an election judge to assess the challenged person’s answers to specific questions related to the challenge regarding their eligibility to vote. On the other hand, Minnesota Statutes § 203B.04 provides for the statutory authority regarding absentee voting and, specifically, registration at the time of application. The statute defines and identifies a “not-registered” person as a person who has not yet registered and is eligible to vote:

“An eligible voter who is not registered to vote but who is otherwise eligible to vote by absentee ballot may register by including a completed voter registration application with the absentee ballot.”<sup>44</sup>

46. The statutory definition of a “not registered” person does not include “challenged voters.” First, a “challenged voter” is already registered. Second, the voter, because of the challenge, is not “otherwise eligible to vote.” His or her eligibility is at issue.

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<sup>43</sup> *Id. citing* Minn. Stat. § 204C.12, subd. 1 and *quoting* subdivisions 2–5.

<sup>44</sup> Minn. Stat. § 203B.04, subd. 4.

47. Third, to become eligible to vote *and receive a ballot*, the challenged voter must overcome the challenge through questions of an election judge specific to the challenge as required under Minnesota Statutes § 204C.12. Finally, only *after* the vetting process and overcoming the challenge does the registered voter receive a ballot.<sup>45</sup>

48. Contrary to statutory authority, under Minnesota Rule 8210.0225, governing the absentee ballot process, the Secretary allows the challenged registered absentee voter to be treated as a “not-registered” voter. In so doing, the Secretary allows a ballot to accompany other voter materials, including a voter registration application, before any vetting—that is, additional questions, sufficient to the election judge to test the right to vote<sup>46</sup>—of the challenged voter.

49. If the same challenged voter physically appeared at a polling place, an election judge would ask specific questions regarding the challenge to enable the voter to overcome the challenge *before* receiving a ballot. With the Secretary treating the challenged absentee voter as a “not-registered voter,” there is no vetting before receiving a ballot. No law suggests a ballot may be provided to the challenged voter prior to their completing the statutory vetting process. The accompanying voter registration application is not specific to the challenge. Moreover, once received, no record is made that the answers to the questions were satisfied sufficiently to *receive* a ballot to cast.

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<sup>45</sup> *See id.*

<sup>46</sup> Inclusive of any challenge regarding residency. Minn. Stat. § 204C.12, subd. 1.

**IV. Rule 8210.0225 is invalid because it contradicts another law, § 201.121, subdivision 2, governing residency challenges that specifically identifies the § 204C.12 processes to be followed.**

50. Another example of how Rule 8210.0225 contradicts § 204C.12 is found under Minnesota Statutes § 201.121, subdivision 2, and hence, should be declared invalid. Section 201.121, subdivision 2 governs challenges related to notices of registration. Section 201.121, specifically requires that certain persons be marked “challenged” when a mailed notice of registration is returned as non-deliverable. This would be noted as a “challenged-postal return.”<sup>47</sup> This challenge means that the registered voter’s residence is in question.<sup>48</sup> Notably, §201.121, subdivision 2 directs compliance with § 204C.12:

The notice shall indicate that it must be returned if it is not deliverable to the voter at the named address. Upon return of the notice by the postal service, the county auditor shall change the registrant's status to "challenged" in the statewide registration system. An individual challenged in accordance with this subdivision *shall comply with the provisions of section 204C.12, before being allowed to vote.*<sup>49</sup>

51. “‘Shall’ is mandatory.”<sup>50</sup> Thus, in following the required statutory process under § 204C.12, before being allowed to vote, the election judge, must determine the correct residency of the individual, under oath, and after the questions are answered to the judge’s satisfaction, the voter will then be provided a ballot to cast.

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<sup>47</sup> *Voter Registration, 2018 Evaluation Report e.g., App. B, Ex. B.1 n.b.*

<sup>48</sup> *Id.*

<sup>49</sup> Minn. Stat. § 201.121, subd. 2 (emphasis added).

<sup>50</sup> Minn. Stat. § 645.44, subd. 16. The scope of the definition “shall” applies here: “The following words, terms, and phrases used in Minnesota Statutes or any legislative act shall have the meanings given them in this section, unless another intention clearly appears.” Minn. Stat. § 200.02.

52. What § 201.121, subdivision 2 demonstrates is that Minnesota Rule 8210.0225 contradicts the specific legislative command under subdivision 2 for “challenged-postal return” to follow the process under § 204C.12. In addition, § 201.121, subdivision 2, does not state—nor does § 204C.12—that a challenged postal return registered voter is to be treated as a “not-registered” voter. In short, because Minnesota Rule 8210.0225, requires that all challenged voters be treated as “not-registered” persons, the rule is in direct conflict with § 201.121, subdivision 2 and should be found invalid.

53. If Rule 8210.0225 fails for this particular postal-return challenge, it fails as a whole since the rule does not make any exception for any particular type of challenge. Because the rule applies to all challenge types, it contradicts and violates the legislative mandates of §204C.12.<sup>51</sup>

54. Notably, the Secretary does not require a notice be provided to the challenged absentee voter identifying the type of challenge that served as the basis for questioning the voter’s eligibility. Under §204C.12, subdivision 1, the challenged voter is to be notified as he or she experiences at the polling place:

An election judge shall...challenge an individual...based on personal knowledge that the individual is not an eligible voter.

55. Notification is essential to ensure that the challenged person understands the type of challenge and how to respond to the notice and subsequent questioning. It is also essential to be given by the election judge prior to providing a ballot. If for instance, the

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<sup>51</sup> In 2017, the Legislative Auditor reviewed certain records of Minnesota’s Statewide Voter Registration System and found that 30,661 voters had a designated status as “challenged.” Of those, 17,882 (58%) were challenged as a result of a “postal return” which would be governed under § 201.121, subdivision 2. *Voter Registration 2018 Evaluation Report* e.g., App. B, Ex. B.1 n.b.



challenged voter answers a question that reveals he or she is not eligible to vote, a ballot is not provided. If the challenged voter is not sure or would not know how to answer the question and the challenge is not withdrawn, he or she may still obtain a ballot through a second process under § 204C.12, subdivision 3, after taking an oath and executing a voter certificate. However, under Rule 8210.0225, that process is not applied to the challenged absentee voter.

56. In essence, § 204C.12, governing challenged voters and the process to overcome the challenge, does not give the Secretary the authority to promulgate rules that are contrary to the specific intent of the Legislature. The Secretary lacks the authority to treat challenged voters as “not-registered voters” when the statutory definition of “not registered” cannot apply to the challenged voter.

57. Moreover, the Secretary has no authority to provide a challenged absentee voter a ballot before the challenge vetting process has occurred. In particular, the challenged voter under statutory law is to receive a heightened scrutiny over that of any other type of voter. Rule 8210.0225, governing applications from *challenged voters*, illegally treats the challenged absentee voter the same *as non-challenged voters* who have yet to register to vote:

A voter registration application must be sent with the ballot to any challenged voter...who applies for an absentee ballot. *The absentee ballot process must be administered as if the voter was not registered to vote.*<sup>52</sup>

The challenged voter in the absentee ballot process is given no more scrutiny than the not-registered voter, yet § 204C.12 explicitly states otherwise, as the Legislature intended.

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<sup>52</sup> Minn. R. 8210.0225 (emphasis added).

58. Under the latest publicly available Absentee Voting Administrative Guide (2018), the regular absentee ballot board will review the absentee ballot envelopes.<sup>53</sup> Under the acceptance criteria, the process includes a review of the voter registration application and, under Minnesota Rule 8210.0225, the board is to apply the same acceptance criteria to the challenged absentee voter as to a not-registered voter:

The voter is registered and eligible to vote in the precinct or has included a properly completed VRA with proof of residence marked on the signature envelope;

- a. If the voter was sent nonregistered materials, double-check their registration status in SVRS....Their registration status could have changed between transmission of the blank ballot and the receipt of the voted ballot. If the voter is now registered, *a VRA is not necessary*.<sup>54</sup>

59. The guidelines do not require any more scrutiny by the regular absentee board of the challenged voter other than noting if the voter is registered. The guide does not suggest the voter registration application, even if properly completed, overcomes the challenge to accept the ballot. But, because the challenged absentee voter is registered, the guide instructs the board to find it not necessary and, hence, the challenged registered absentee voter is considered as having met the acceptance criteria and the ballot is accepted.<sup>55</sup> Rule 8210.0225 thus creates a contradictory process under which a challenged (already) registered voter is “registered” by being issued a voter registration application that is then abandoned. Further, the process fails to follow the Legislature’s statutory safeguards under § 204C.12.

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<sup>53</sup> *Absentee Voting Administration Guide* 37 § 10.1.

<sup>54</sup> *Id.* §10.1.4 (emphasis added).

<sup>55</sup> *Id.* 37–38.

**V. Invalidating Rule 8210.0225 will advance the compelling interest the Legislature sought to promote under § 204C.12 for fair elections among eligible voters.**

60. Invalidating Rule 8210.0225 will not impose a severe burden on the absentee individual's right to vote. Section 204C.12 advances the state's compelling interest—fair elections of *eligible voters* in selecting a candidate for elective office.

61. The Secretary has previously declared in an Eighth Circuit proceeding, also involving the Minnesota Voters Alliance and the interpretation of § 204C.12, what obligations are imposed upon the government under the statute. The Secretary wrote that the statute explicitly obligates the government<sup>56</sup> to follow a process when a voter's eligibility is challenged:

“[T]he prospective voter is placed under oath and asked ‘sufficient questions to test that individual’s residence and right to vote.’”<sup>57</sup>

62. Rule 8210.0225 does not follow the explicit obligations of § 204C.12. Instead, the Secretary treats the registered challenged absentee voter as a “*not-registered*” voter. However, § 204C.12 does not reflect that the Secretary can treat the challenged voter in a process that would otherwise circumvent the commands identified by the Secretary himself: obtaining additional information, under oath, through sufficient questions to test the challenged voter's residency and right to vote *before* providing the voter with a ballot. The rule fails to facilitate the challenge process the Legislature explicitly contemplated

“under which voters are required to provide additional information under oath *before being allowed to vote*. See Minn. Stat. 204C.12.”<sup>58</sup>

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<sup>56</sup> , Br. Of Appellees, Ritchie and Swanson at 28, *Minnesota Voters Alliance, et al. v. Mark Ritchie and Lori Swanson* 2012 WL 5947165 (C.A.8).

<sup>57</sup> *Id.* citing Minn. Stat. § 204C.12, subd. 1 and *quoting* subdivisions 2–5.

63. Rule 8210.0225 does not require the challenged voter to provide *additional information*. Since the challenged absentee voter is already a registered voter having previously completed a voter registration application, it is the subsequent information government officials obtained from other sources which resulted in a challenge of that absentee voter. Having the challenged absentee voter complete another voter registration application, for instance, as one additional piece of material that the challenged absentee voter receives, *with the ballot*, is *not* the additional information to be sought *under oath* before getting a ballot as the Secretary appears to understand and has previously represented to another court.

64. The Secretary, because of his explicit obligation under § 204C.12 governing challenged voters, cannot process a challenged absentee voter as a “not-registered” voter and must find another method that would not contradict the legislative obligations placed on the government.

**VI. Rule 8210.0225 allowing absentee balloting for challenged voters without additional questioning or any vetting of the challenge is contrary to statutory law.**

65. While the Secretary may propose that there is little harm in providing a registered challenged absentee voter with a ballot without notice or questioning the validity of the challenge, the Legislature might disagree and find the dismissal of or failure to follow the prescribed statutory process for challenged voters as harmful to the integrity and

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<sup>58</sup> *Id.* (emphasis added; “See” emphasis is original). The quote from the Secretary’s Court of Appeals for the Eighth Circuit brief included the referenced citation to Minnesota Statutes § 204C.12.

credibility of Minnesota’s elections. In March 2018, the Office of the Legislative Auditor released its review of Minnesota’s election process.<sup>59</sup>

66. The 2018 Legislative Auditor’s report found that more than 26,000 voters who cast a ballot in November 2016 were also identified as “challenged” because they failed one or more eligibility tests. The Auditor then examined a small sampling of those 26,000 voters and found that, of 612 voters identified as “challenged - felon” (here identified as “felons”), only 20 of the 612 may have been eligible voters when they did cast a ballot.<sup>60</sup> In other words, of 612 challenged voters, 97% may have been ineligible to vote, as far as the Auditor could determine.

67. Moreover, the promulgated rule at issue, Minnesota Rule 8210.0225, allows the registered challenged absentee voter to indefinitely cast a ballot with impunity by foregoing the scrutiny of the challenge and of an election judge as the voter would experience at the polling place. The harm, which cannot be characterized as “little,” is found within the warning of the 2018 Legislative Auditor’s report; 97% of 612 is 594; 97% of 26,000 is 25,220. Even if the percentage is as low as 50%, 13,000 “maybe ineligible voters” is not a di minimus number. And, while 26,000 challenged voters does not reflect who might have voted by absentee ballot, with the promulgated Rule 8210.0225, the registered challenged absentee voter is provided a free path to the ballot box without scrutiny—contrary to the Legislature’s statutory command of questioning the validity of every underlying challenge before providing that voter with a ballot as found under Minnesota Statute § 204C.12.

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<sup>59</sup> *Voter Registration 2018 Evaluation Report*.

<sup>60</sup> *Id.* 49–50.

68. And it matters. As previously stated, Petitioner Pugh lost her last election in 2018 by 216 votes.<sup>61</sup> In that election contest 11,570 votes were cast for her and 11,786 were cast for her opponent.<sup>62</sup> The number of votes cast totaled 23,356. Of that total, 6,628 were absentee ballots or 28% of all ballots for the two candidates.<sup>63</sup> While the Secretary appears not to keep a record of the number of “challenged” absentee ballots, the failure of the Secretary through Rule 8210.0225 to apply the Legislature’s statutory process embodied under § 204C.12 regarding challenged voters, can affect the integrity and credibility of the election contest and affect the right or privilege of a candidate to take elected office.

69. In another election contest, Minnesota Voters Alliance member Matthew Bliss found himself in a similar circumstance in 2018 when he lost the election contest by a mere 11 votes. A total of 16,897 votes were cast, 8,443 for Bliss; and 8,454 for his opponent.<sup>64</sup> Of the total of 16,897 cast, 5,847 votes were by absentee ballot.<sup>65</sup> The absentee ballots accounted for 35% of the total votes cast. Like Pugh, Bliss is planning to run for office again in 2020, yet the Secretary’s insistence of applying Rule 8210.0225 in contradiction to §204C.12, can affect the integrity and credibility of the election contest and affect the right or privilege of a candidate to take elected office.

70. In yet another close 2018 election contest, former incumbent Kathy Lohmer, House District 39B, lost her re-election bid by 137 votes. Of the total 22,607 votes cast,

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<sup>61</sup> Minnesota Secretary of State, 2018 Election Results; <https://www.sos.state.mn.us/elections-voting/2018-general-election-results/2018-precinct-results-spreadsheet/> (last visited Feb. 25, 2020).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

5,766 were by absentee, or 26% of the total votes.<sup>66</sup> Close elections can be affected by absentee balloting and with the relatively high percentages of absentee balloting, there must be diligence to minimize the effect of ineligible voters against the votes of eligible voters contemplated by § 204C.12.

71. When the Secretary circumvents the statutory commands of the Legislature, it has consequences. The Legislative Auditor reminds us about election integrity and that the election process guards against voter fraud and people not eligible to vote:

Election integrity and ballot access are important to our democracy. Eligible citizens should have confidence that they will be able to vote in elections and that their vote will count. At the same time, it is important that the election process guards against voter fraud and voting by people who are not eligible to vote.<sup>67</sup>

72. As the Secretary has previously declared in federal court, § 204C.12 explicitly directs election judges as to the methodology to apply to challenged voters to ensure the confidence of eligible citizens that they will be able to vote and that their vote will fully count by guarding against fraud or voting by ineligible people:

[To] [f]acilitate the challenge process, under which voters are required to provide additional information under oath before being allowed to vote. *See* Minn. Stat. § 204C.12 (2010).<sup>68</sup>

By law, as the Secretary has previously expressed, there is a process to follow as the Legislature has explicitly directed:

[L]ocal *election judges* have an explicit legal duty to act when they reasonably believe that an ineligible person is attempting to

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<sup>66</sup> *Id.*

<sup>67</sup> *Voter Registration 2018 Evaluation Report* 3.

<sup>68</sup> Br. of Appellees, Ritchie and Swanson at 28, *Minnesota Voters Alliance, et al. v. Mark Ritchie and Lori Swanson*, 2012 WL 5947165 (C.A.8).

vote....And the remainder of section 204C.12 sets forth the process that the election judge is obligated (and authorized) to conduct when a challenge is made to a voter's eligibility: the challenge procedure, under which the prospective voter is placed under oath and asked "sufficient questions to test that individual's residence and right to vote."<sup>69</sup>

73. Thus, a rule that contradicts and results in the circumvention of the intent of the Legislature undermines the confidence of eligible voters in an election and fails to guard against election fraud or the casting of ballots by people not eligible to vote.

**VII. Additional questions are asked by an election judge of challenged voters at the polling place while the challenged absentee balloting process allows for circumvention of the law.**

74. Generally, administrative rules carry the force of law<sup>70</sup> and must be construed consistently with the statutory scheme they implement.<sup>71</sup> If, however, the rule conflicts with a statute, the statute controls.<sup>72</sup> Here, the Legislature was not silent regarding the questioning of voters whose eligibility to vote has been challenged before receiving a ballot as found under § 204C.12. The Legislature was specific in the sequence of the process to be followed *before* a ballot is given to a challenged voter to cast in an election contest.

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<sup>69</sup> *Id. citing* Minn. Stat. § 204C.12, subd. 1 and *quoting* subdivisions 2–5.

<sup>70</sup> *See* Minn. Stat. § 270C.06 (2014).

<sup>71</sup> *Berglund v. Comm'r of Revenue*, 877 N.W.2d 780, 784–85 (Minn. 2016) *citing* *Anderson v. Farm Serv. Agency of U.S. Dep't of Agric.*, 534 F.3d 811, 814 (8th Cir. 2008) (noting that if a statute is silent with respect to a certain issue, "regulations are given controlling weight unless arbitrary, capricious, or contrary to the statute").

<sup>72</sup> *Id. citing* *Billion v. Comm'r of Revenue*, 827 N.W.2d 773, 781 (Minn. 2013) (recognizing the applicable statute "prevails" over a conflicting administrative rule); *Special Sch. Dist. No. 1 v. Dunham*, 498 N.W.2d 441, 445 (Minn. 1993) (stating that "[i]t is elemental that when an administrative rule conflicts with the plain meaning of a statute, the statute controls"); *Dumont v. Comm'r of Taxation*, 278 Minn. 312, 315–16, 154 N.W.2d 196, 199 (1967) ("[I]f the legislature has acted in a specific area, the administrative agency may not adopt a rule in conflict with the statute.").



75. The underlying issue here is statutory interpretation: whether the Secretary of State exceeded his authority beyond the imposed legislative limits regarding challenged voters as found under Minnesota Statute § 204C.12.

76. The object of statutory interpretation is to “ascertain and effectuate the intention of the legislature.”<sup>73</sup> A court will apply the plain meaning of a statutory provision if the legislative intent “is clear from the unambiguous language of the statute.”<sup>74</sup> The court will also “give effect to all of the statute’s provisions,” and “no word, phrase, or sentence should be deemed superfluous, void, or insignificant.”<sup>75</sup> “[The court] construe[s] nontechnical words and phrases according to their plain and ordinary meanings” and “look[s] to dictionary definitions to determine the plain meanings of words.”<sup>76</sup>

77. In the absence of statutory definitions, we may consider dictionary definitions to determine the meaning of a statutory term.<sup>77</sup> But the “relevant definition of a term depends on the context in which the term is used.”<sup>78</sup> If, after applying these principles, the court concludes that the statute is not ambiguous, “our role is to enforce the language of the statute and not explore the spirit or purpose of the law.”<sup>79</sup>

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<sup>73</sup> Minn. Stat. § 645.16 (2018); *see also* *Linn v. BCBSM, Inc.*, 905 N.W.2d 497, 501 (Minn. 2018).

<sup>74</sup> *Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 716–17 (Minn. 2014).

<sup>75</sup> *Allan v. R.D. Offutt Co.*, 869 N.W.2d 31, 33 (Minn. 2015) (quotation omitted).

<sup>76</sup> *Larson v. Nw. Mut. Life Ins. Co.*, 855 N.W.2d 293, 301 (Minn. 2014).

<sup>77</sup> *State v. Alarcon*, 932 N.W.2d 641, 646 (Minn. 2019) *citing* *Shire v. Rosemount, Inc.*, 875 N.W.2d 289, 292 (Minn. 2016).

<sup>78</sup> *State v. Nelson*, 842 N.W.2d 433, 437 n.2 (Minn. 2014).

<sup>79</sup> *Christianson v. Henke*, 831 N.W.2d 532, 537 (Minn. 2013).

78. We begin with the underlying statute that governs challenges questioning the eligibility of a voter, Minnesota Statutes § 204C.12. The statute, under subdivision 2, establishes the statutory process when a challenged voter is identified:

An election judge must challenge (give notice to) the voter identified as being challenged;

An election judge shall administer to the challenged individual the following oath allowing him or her to swear to their eligibility:

"Do you solemnly swear (or affirm) that you will fully and truly answer all questions put to you concerning your eligibility to vote at this election?"

The election judge shall then ask the challenged individual sufficient questions to test that individual's residence and right to vote.<sup>80</sup>

79. The statutory mandates are explicit. The statute states that the election judge must ask the challenged individual "sufficient questions to test the individual's residence and right to vote." As a guideline of what those questions might be, the most recent publicly available Election Judge Guide (2018), published by the Secretary, identified examples of appropriate questions regarding the challenged voter's eligibility:

Felony: "Are you on probation or parole for a felony conviction?"

80. However, in some circumstances, multiple questions are asked of challenged voters. After taking an oath,<sup>81</sup> "the training that one county provides to election judges includes three questions for persons challenged due to a felony conviction: (1) What is your

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<sup>80</sup> Minn. Stat. § 204C.12, subd. 2.

<sup>81</sup> *Voter Registration 2018 Evaluation Report* 49.

legal name? (2) Have you ever been convicted of a felony? (3) If yes, have your civil rights been restored?”<sup>82</sup>

Guardianship: “Are you under court-ordered guardianship in which the court revoked your right to vote?” “Were you found by a court to be legally incompetent?”

Citizenship: “Are you a citizen of the United States?”<sup>83</sup>

Challenged” absentee ballot (AB) address: “What is your residential address?”; “Did you submit an application for an absentee ballot using another residential address?”; “Have you returned that voted absentee ballot?”<sup>84</sup>

81. If the challenged individual indicates through his or her answers that they are eligible to vote, a line is drawn through the challenged notation in the polling place roster, and then the voter may proceed to sign the roster and vote. <sup>85</sup> “If the challenged individual's answers to the questions show ineligibility to vote in that precinct, the individual shall not be allowed to vote.”<sup>86</sup>

82. In addition,

If the answers to the questions fail to show that the individual is not eligible to vote in that precinct and the challenge is not withdrawn, the election judges shall verbally administer the oath on the voter certificate to the individual. After taking the oath and completing and signing the voter certificate, the challenged individual shall be allowed to vote.<sup>87</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> *Election Judge Guide* 18 ¶2, Roster Challenge Procedure (Minnesota Secretary of State (2018)).

<sup>84</sup> *Voter Registration 2018 Evaluation Report* 49.

<sup>85</sup> *Election Judge Guide* 18 ¶3.

<sup>86</sup> Minn. Stat. § 204C.12, subd. 3.

<sup>87</sup> *Id.*

“After taking the oath and completing and signing the voter certificate, the challenged individual shall be allowed to vote.”<sup>88</sup>

83. As previously noted, the Secretary identified the purpose and function of § 204C.12 as facilitating the challenge process in which *additional* information is *required* to be obtained, under oath, before voting:

[To] [f]acilitate the challenge process, under which voters are required to provide additional information under oath before being allowed to vote. *See* Minn. Stat. § 204C.12 (2010).<sup>89</sup>

84. Nowhere under § 204C.12 does it make any reference to a process involving a “not-registered” voter. A “not-registered” voter is statutorily defined under Minnesota Statutes § 203.04, subdivision 4:

“An eligible voter who is not registered to vote but who is otherwise eligible to vote by absentee ballot may register by including a completed voter registration application with the absentee ballot.”

85. A voter whose voter status is “challenged,” is already a registered voter. The status “challenged-citizenship” or “challenged-felon,” for instance, is assigned by the Secretary to the registered voter in the Statewide Voter Registration System (SVRS) which is a compilation of records of data on all Minnesota registered voters through a database

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<sup>88</sup> *Id.* A voter certificate is not a “voter signature certificate.” A voter signature certificate has a specific legislative definition: it “means a printed form or label generated from an electronic polling place roster that contains the voter's name, address of residence, date of birth, voter identification number, the oath required by section 204C.10, and a space for the voter's original signature. A voter signature certificate is not a ‘voter certificate’ under section 204C.12.”

<sup>89</sup> Br. of Appellees, Ritchie and Swanson at 28, *Minnesota Voters Alliance, et al. v. Mark Ritchie and Lori Swanson*, 2012 WL 5947165 (C.A.8).

maintained by the Secretary but updated by county election auditors.<sup>90</sup> Because a challenged voter, specifically a challenged absentee voter, is a registered voter, by legislative definition the voter cannot be considered or treated as a “not-registered” voter especially when the process circumvents the legislative process governing challenged voters as found under § 204C.12.

86. First, a “challenged voter” is already registered. Second, the voter, because of the challenge, is not “otherwise eligible to vote.” Third, to become eligible to vote *and receive a ballot*, the challenged voter must overcome the challenge through a vetting process before an election judge, as required under Minnesota Statutes § 204C.12. Finally, only *after* the vetting process and overcoming the challenge does the challenged registered voter receive a ballot and, hence, become allowed to vote.<sup>91</sup> And while it may be impractical to question the challenged voter before an “election judge” in the absentee process, under the law the challenged absentee voter must receive greater scrutiny *because of the challenge* than the average non-registered voter, as the legislature contemplated.

87. Yet, the Secretary has promulgated a rule for challenged absentee voters to receive a ballot before vetting occurs, and to treat them as “not-registered voters.” And, although the Secretary has authority to govern the absentee ballot process including methods

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<sup>90</sup> See e.g., Minn. Stat. § 201.022.

<sup>91</sup> See *id.* Minnesota Statute § 204C.12, subdivision 3 does not explicitly state the ballot is to be provided after the vetting process but, the intent is inherently understood by the negative expression of the Legislature in denying the right to a ballot if questions are not sufficiently answered: “If the challenged individual's answers to the questions show ineligibility to vote in that precinct, the individual shall not be allowed to vote.” *Id.*

of return under Minnesota Statute § 203B.08, subdivision 4,<sup>92</sup> he cannot promulgate rules that are contrary to governing statutes.

88. The rule at issue is 8210.0225:

A voter registration application must be sent with the ballot to any challenged voter...who applies for an absentee ballot. *The absentee ballot process must be administered as if the voter was not registered to vote.*<sup>93</sup>

89. The Secretary has effectively changed the status of the challenged absentee voter to “not registered” at the only time when the voter status has any impact, namely, when the voter seeks a ballot. The treatment of the challenged voter as “not registered” has significant consequences as it pertains to the legislative intent when confronting challenged voters whose eligibility is questioned and, hence, on the validity of the vote and the credibility of the election results.<sup>94</sup>

90. Under the Secretary’s rule, the challenge process is circumvented. A challenged voter can avoid the polling place vetting process by selecting the absentee ballot process the Secretary has put into place. There is no vetting when treated as a “not-registered” voter. The rule does not comport with § 204C.12. For instance, under Minnesota Statute § 204C.12, subdivision 1, an election judge must inform—notify—a voter if his or her eligibility to vote is challenged:

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<sup>92</sup> Minnesota Statutes § 203B.08, subdivision 4 states that “[t]he secretary of state shall adopt rules establishing procedures to be followed by county auditors and municipal clerks to assure accurate and timely return of absentee ballots. The rules of the secretary of state may authorize procedures and methods of return in addition to those specified in this section.”

<sup>93</sup> Minn. R. 8210.0225 (emphasis added).



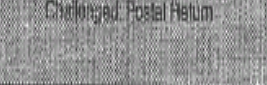

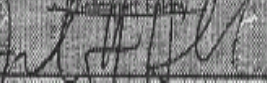



<sup>94</sup> See, *Voter Registration 2018 Evaluation Report*.

An election judge shall, and an authorized challenger or other voter may, challenge an individual based on personal knowledge that the individual is not an eligible voter.

91. Only after the vetting process is completed and after a certification is obtained from the challenged voter, will he or she be permitted to receive a ballot and cast a vote. Likewise, a challenge to the residency of a voter under Minn. Stat. § 201.121, subdivision 2, requires compliance with § 204C.12:

“An individual challenged in accordance with this subdivision shall comply with the provisions of section 204C.12, before being allowed to vote.”

92. Actual polling rosters identify voters as “challenged” and the reason for the “challenged” designation, such as “Challenged: Felon” or “Challenged: Postal Return:”

Voter Name and Address	Voter Signature	District/Precinct	ID Number
1. ARNOLD, CHRISTOPHER JOHN 4408 VICTORY AVE	Challenged: Felon 	1-2 MINNEAPOLIS 1520 MINNEAPOLIS W-4 P-04	0003499162 
95			
3. WALSTROM, EDWARD ROBERT 4000 EMERSON AVE N	Challenged: Postal Return 	1-2 MINNEAPOLIS 1530 MINNEAPOLIS W-4 P-06	0004727894 
96			
7. HEFLIN, FREDERICK DEVON 3018 MORGAN AVE N	Challenged: Felon 	1-2 MINNEAPOLIS 1560 MINNEAPOLIS W-5 P-02	0003981410 
97			
10. TUCKER, JAMIE LYNN 2929 EMERSON AVE N APT 310	Challenged: Postal Return 	1-2 MINNEAPOLIS 1580 MINNEAPOLIS W-5 P-02	0004340583 
98			

<sup>95</sup> Cilek Aff.-Decl. (Nov. 27, 2017); Ex. A-1:1, *Andrew Cilek and Minnesota Voters Alliance v. Off. Of the Minn. Sec. of State*, 62-CV-17-4692 (Ramsey Cty. Distr. Ct., J. Jennifer Frisch), *affirmed*, *Cilek v. Off. of Minnesota Sec. of State*, 927 N.W.2d 327, 333 (Minn. App. 2019), *review granted* (June 18, 2019).

<sup>96</sup> *Id.* Ex. A-3:3.

<sup>97</sup> *Id.* Ex. A-5:7.

<sup>98</sup> *Id.* Ex. A-6:10.

<b>Voter Name and Address</b>	<b>Voter Signature (and Voter History Status)</b>	<b>District/Precinct</b>	<b>Voter ID Number</b>
Arnold, Christopher John 4408 Victory Ave.	Challenged: Felony	1530 Minneapolis W-4 P-04	0002499162
Walstrom, Edward Robert 4000 Emerson Ave. N.	Challenged: Postal Return	1530 Minneapolis W-4 P-04	0004727894
Heflin, Frederick Devon 3018 Morgan Ave. N.	Challenged: Felony	1560 Minneapolis W-5 P-02	0003981410
Tucker, Jamie Lynn 2929 Emerson Ave. N. Apt. 310	Challenged: Postal Return	1560 Minneapolis W-5 P-02	0004340583

93. Notably, the sample rosters reflect how the election judge crossed off the identified challenge and the challenged voter then executed the roster reflecting a paper “record” of the challenge process.

94. But, if the challenged absentee voter submits his or her voter materials as a “not-registered voter,” Minnesota Rule 8210.0225 does not contemplate a vetting process or closer scrutiny of the eligibility of the challenged voter. Minnesota Statutes § 204C.12 does not treat a challenged voter as a “not-registered voter.”

95. Also, under the latest publicly available Absentee Voting Administrative Guide (2018), the Regular Absentee Ballot Board will review the absentee ballot envelopes.<sup>99</sup>. Under the acceptance criteria, the process includes a review of the voter registration application and the board is to apply the same acceptance criteria to the challenged absentee voter as to a not-registered voter:

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<sup>99</sup> *Absentee Admin. Guide* 37 § 10.1.



The voter is registered and eligible to vote in the precinct or has included a properly completed VRA with proof of residence marked on the signature envelope;

- b. If the voter was sent nonregistered materials, double-check their registration status in SVRS....Their registration status could have changed between transmission of the blank ballot and the receipt of the voted ballot. If the voter is now registered, *a VRA is not necessary*.<sup>100</sup>

96. The guidelines do not require any more scrutiny by the Regular Absentee Ballot board of the challenged voter other than noting whether the voter is registered. The guide does not suggest the voter registration application, even if properly completed, overcomes the challenge to accept the ballot. But, because the challenged absentee voter is registered, the guide instructs the Board to find the voter registration application not necessary and, hence, the challenged absentee voter is considered as having met the acceptance criteria and the ballot is accepted.<sup>101</sup>

97. The Board's actions are consistent with Rule 8210.0225 in that *nothing* is done to ensure compliance with the Legislature's mandates under § 204C.12.

98. Therefore, Minnesota Rule 8210.0225 is invalid because it is contrary to the statute governing challenged voters under §204C.12.

**VIII. The Secretary of State may not usurp the powers of the legislature through arbitrary actions when the laws specifically limit his authority.**

99. This is not the first time the Secretary of State has tried to exceed and usurp the powers of the legislature under similar circumstances as expressed in this Petition only to

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<sup>100</sup> *Id.* §10.1.4 (emphasis added).

<sup>101</sup> *Id.* 37–38.

be thwarted by the Minnesota Supreme Court. For instance, in *Limmer v. Ritchie*,<sup>102</sup> the Supreme Court held that the Secretary of State exceeded his statutory authority by providing titles for questions printed on the ballot regarding proposed constitutional amendments that were different from those titles passed by the legislature. The issue here is not so much about voter registration but, rather, the limitations of powers of the Secretary of State.

100. Throughout its history, the Minnesota Supreme Court has jealously guarded the constitutional division of powers. Justice Elliott, in *State v. Brill*, described at length the history of the doctrine of separation of powers with its limits on the executive and judiciary branches as well as the legislative branch:

The tendency to sacrifice established principles of constitutional government in order to secure centralized control and high efficiency in administration may easily be carried so far as to endanger the very foundations upon which our system of government rests. That system, devised and elaborated with infinite care and wide knowledge of history and political theory, rests upon certain conceded fundamental principles.

\* \* \*

In speaking of the old Constitution of Virginia, Jefferson said: 'All the powers of government, legislative, executive, and judicial, result to the legislative body. The concentrating these in the same hands is the precise definition of a despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not a single one.' Jefferson, Notes on Virginia, p. 195; Story, Const. Law, vol. 1, § 525.<sup>103</sup>

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<sup>102</sup> *Limmer v. Ritchie*, 819 N.W.2d 622 (Minn. 2012).

<sup>103</sup> *State v. Brill*, 111 N.W. 639, 640-41 (1907).

101. The separation of powers doctrine is familiar to this Court, but bears repeating because of the significance of the doctrine’s role in this controversy: “Under the Separation of Powers Clause, no branch can usurp or diminish the role of another branch.”<sup>104</sup>

102. The three departments of state government, the legislative, executive, and judicial, are independent of each other. Neither department can control, coerce, or restrain the action or non-action of either of the others in the exercise of any official power or duty conferred by the Constitution, or by valid law, involving the exercise of discretion.

103. The Minnesota Constitution states in Article III that “[t]he powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise *any* of the powers properly belonging to either of the others except in the instances *expressly* provided in this constitution.”<sup>105</sup> Article III bars any department from assuming or asserting any “inherent powers”— powers not “expressly” given—that properly belong to either of the others. In short, no “department can control, coerce, or restrain the action or inaction of either of the others in the exercise of any official power or duty conferred by the Constitution.”<sup>106</sup>

104. Minnesota Supreme Court precedent has also “recognized that where the constitution commits a matter to one branch of government, the constitution prohibits the other branches from ... interfering with the coordinate branch's exercise of its authority.”<sup>107</sup>

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<sup>104</sup> See Minn. Const. art. III, § 1; *Brayton v. Pawlenty*, 768 N.W.2d 357, 365 (Minn. 2010).

<sup>105</sup> *Id.*, emphasis added.

<sup>106</sup> *Id.*

<sup>107</sup> *Limmer*, 819 N.W.2d at 627-28 (Minn. 2012) *citing In re Civil Commitment of Giem*, 742 N.W.2d 422, 429 (Minn. 2007); *see also State ex rel. Birkeland v. Christianson*, 179 Minn. 337,

The parties' dispute here centers on statutory interpretation—the extent of the Secretary of State's authority.

105. The Court may avoid the “thorny separation of powers problem” and construe the statutes in dispute “to avoid a constitutional confrontation if it is possible to do so;”<sup>108</sup> but, where a statute is ambiguous, the court may adopt a construction even “if the construction that avoids a constitutional confrontation is the ‘less natural’ construction” so long as the construction is a reasonable one.<sup>109</sup> Here, Minnesota Statutes § 204C.12 is unambiguous. It is the promulgated rule 8210.0225 that directly contradicts § 204C.12; hence, the Secretary has exceeded his authority and contradicted the intent of the Legislature.

106. Despite any aversion to delve into this area of the law, it must not be forgotten that the Secretary of State has forsaken the explicit mandate of a legislative policy, enacted through law, for an improper use regardless of the intention—good or bad. The Executive Branch’s usurpation of the Legislature’s power cannot be tolerated in a republican form of government especially in an area of the law of intended oversight, development, security, and accessibility as it pertains to voter registration.

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340, 229 N.W. 313, 314 (1930) (explaining that no branch of government “can control, coerce or restrain the action or nonaction of either of the others in the exercise of any official power or duty conferred by the constitution”).

<sup>108</sup> *Id.* at 628 *quoting State v. Gaiornik*, 794 N.W.2d 643, 648 (Minn. 2011); *see also Giem*, 742 N.W.2d at 429 (“We have held that if we can construe a statute to avoid a constitutional confrontation, we are to do so.”); *In re Harbut*, 385 N.W.2d 305, 313 (Minn. 1986) (“Again, we employ the principle that this court must construe a statute in such a way as to avoid constitutional conflict.”).

<sup>109</sup> *Id. Gaiornik*, 794 N.W.2d at 648 (quoting *State ex rel. Doe v. Madonna*, 295 N.W.2d 356, 363 (Minn. 1980)); *see also Hutchinson Tech., Inc. v. Comm'r of Revenue*, 698 N.W.2d 1, 18 (Minn. 2005) (interpreting a statute in a manner that was inconsistent with its plain language in order to avoid the conclusion that statute violated the Commerce Clause).

107. When the Legislature passes a law concerning voters that is specific in nature, the Secretary of State has no option but to adhere to its declaration. In this case, in particular, the Secretary has reached too far. The promulgation of Minnesota Rule 8210.0225, seeks to circumvent the statutory intent of the Legislature and the explicit process governing challenged voters. The process to overcome the questioning of the eligibility of a voter at the polling place must be and was intended to be the same for all challenged voters, including those who seek absentee ballots.

108. The legislative intent of requiring a challenged registered voter to be vetted via a statutorily defined process to overcome a challenge serves to preserve the integrity of the election process by ensuring that only eligible voters cast ballots. When rules are promulgated to avoid an established statutory electoral process, they undermine the legislative intent of protecting the credibility of the election process.

109. Conducting the required challenged process before providing a ballot does not interfere with the challenged elector's right to vote. No administrative benefit, such as ensuring a timely process, can justify circumventing the legislative procedure for preventing ineligible voters from receiving ballots. This is especially true when the absentee process being accessed by the challenged person is a matter of convenience and privilege which the Legislature has offered to eligible voters.

110. Further, the Secretary's abandonment of the required challenge procedure is particularly offensive to statutory demands, absent a showing that the procedure would restrict a challenged person's general access to absentee voting, even though the general restriction would still not justify voiding the required process. The absentee ballot process

must be consistent with § 204C.12, requiring a vetting process to overcome the challenge to the satisfaction of an election judge prior to issuing a ballot to the challenged voter.

111. Through the promulgated rule at issue, Minnesota Rule 8210.0225, the entire statutory scheme for challenged voters under § 204C.12 who seek absentee ballots is avoided. As a result, ineligible persons who would be blocked from, or who would choose not to seek, access to ballots are permitted to vote, thereby threatening the validity of close elections.

**IX. The Petitioners have standing to challenge and seek appellate review of Minnesota Rule 8210.0225.**

112. This Court has “original jurisdiction to determine the validity of an agency’s rules, including amendments.”<sup>110</sup> But a petitioner must have standing to challenge an administrative rule under Minnesota Statutes § 14.44.<sup>111</sup> Standing exists only “when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner.”<sup>112</sup> There must be a showing that the rule is or is about to be applied to the petitioner’s disadvantage.<sup>113</sup> A mere possibility of an injury or mere interest in a problem does not render the petitioner aggrieved or adversely affected so that standing exists.<sup>114</sup>

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<sup>110</sup> Minn. Stat. § 14.44.

<sup>111</sup> *Ctr. for Biological Diversity v. Minnesota Dept. of Nat. Resources*, A12-1680, 2013 WL 2301951, at \*2 (Minn. App. May 28, 2013) *citing* *Rocco Altobelli, Inc. v. State, Dep’t of Commerce*, 524 N.W.2d 30, 34 (Minn. App. 1994).

<sup>112</sup> *Id.* (quoting Minn. Stat. § 14.44).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

113. Further, this Court “shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rulemaking procedures.”<sup>115</sup>

114. The Petitioners seek a determination that Minnesota Rule 8210.0225 is invalid because the rule is contrary to the governing statute regarding registered challenged absentee voters found under Minnesota Statutes § 204C.12. And, with elections to be held on November 3, 2020, and absentee voting to begin on September 18, 2020,<sup>116</sup> the effect and enforcement of the Rule 8210.0225 is not a mere possibility, speculative, or hypothetical.<sup>117</sup>

115. The ultimate beneficiaries of an election are candidates. They are unique—and a select group—from the general citizenry because they plan to run for elected office, know the challenges to obtain the office, and when ascended to that office by obtaining a majority of the votes cast, they have done so as a right or privilege. The Petitioners Mary Franson, Cindy Pugh, Duane Quam, and Eric Lucero are either present or former members of the House of Representatives who have started their respective election campaigns for elected office in 2020, or are considering to run.

116. Likewise, they are all members of the Minnesota Voters Alliance which has a longstanding interest in defending the rights of its members. Here, the Alliance is ensuring the credibility of the Petitioner candidates’ ascension to the elected offices sought if they win

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<sup>115</sup> *Coalition of Greater Minnesota Cities v. Minnesota Pollution Control Agency*, 765 N.W.2d 159, 164 (Minn. App. 2009) quoting Minn. Stat. § 14.45 (2008), citing *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 102 (Minn. App. 1991), review denied (Minn. July 24, 1991).

<sup>116</sup> Minnesota Election Calendar, Minnesota Secretary of State’s Office; <https://www.sos.state.mn.us/election-administration-campaigns/elections-calendar/> (last visited on February 25, 2020).

<sup>117</sup> *Coalition of Greater Minnesota Cities*, 765 N.W.2d at 164.

their respective election contests. This includes defending the rights of members in regard to election matters. The Alliance has worked to protect the rights of its members whenever laws, statutes, rules, or regulations threaten or impede implied or expressed rights or privileges afforded to them under the U.S. or Minnesota Constitutions or laws or both. The Alliance, like the individual Petitioners, has standing.

117. The Minnesota Voters Alliance contends the issues raised regarding Rule 8210.0225 are not hypothetical situations or speculative claims of potential harm, and has cited the detrimental effects that an overbroad application of the rule would have on its member candidates.<sup>118</sup> And, as candidates for public elective office, they have a more particularized interest than the general citizenry.<sup>119</sup>

118. Recently, the Minnesota Voters Alliance successfully represented its members against the Minnesota Secretary of State before the U.S. Supreme Court on First Amendment grounds challenging a Minnesota law that prevented voters from wearing a political badge, political button, or anything bearing political insignia inside a polling place on Election Day. The Court found the ban violated the Free Speech Clause of the First Amendment.<sup>120</sup>

119. In another recent case against the Secretary of State and now before the State Supreme Court, the Minnesota Voters Alliance has acted to protect the rights and privileges of its members against the misapplication of legislative commands under Minnesota's Government Data Practices Act. Prevailing in state district court and the court of appeals,

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<sup>118</sup> *Coalition of Greater Minnesota Cities*, 765 N.W.2d at 164.

<sup>119</sup> *Minnesota Env'tl. Sci. and Econ. Rev. Bd. v. Minnesota Pollution Control Agency*, 870 N.W.2d 97, 101 (Minn. App. 2015)

<sup>120</sup> *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1882 (2018).



the Alliance sought the production of information from the statewide voter registration system. Both the district court and appellate court held that data on registered voter status, reason for a challenge, and voter history on active, inactive, or deleted Minnesota voters are public data.<sup>121</sup>

120. And finally, just before this Petition's filing, in federal district court, the Minnesota Voters Alliance represented its landlord members in a First Amendment action against Saint Paul and Minneapolis. On March 2, 2020, the federal court granted the Alliance summary judgment. The court declared the challenged city ordinances that required landlords to provide voter-registration information and applications to new tenants facially unconstitutional as a matter of law, and permanently enjoined the cities from enforcing the ordinances.<sup>122</sup>

121. The Minnesota Voters Alliance, as to its petitioner members, contends that the application of Rule 8210.0225, as directly contradicting Minnesota Statutes § 204C.12 as applied to registered challenged absentee voters, could be detrimental to Petitioners Mary Franson, Cindy Pugh, Duane Quam, and Eric Lucero as candidates in the upcoming November 2020 election. This is not a hypothetical situation or speculative claim of potential harm. The application of the rule can interfere with or threaten the rights or privileges of each Minnesota Voters Alliance member candidate upon the result of an election contest. And absentee voting is prevalent.

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<sup>121</sup> *Cilek v. Off. of Minnesota Sec. of State*, 927 N.W.2d 327 (Minn. App. 2019), *review granted* (June 18, 2019) (oral argument held; disposition pending).

<sup>122</sup> *Minnesota Voters All. v. City of St. Paul*, 19-CV-0358 (WMW/HB), 2020 WL 996876 (D. Minn. Mar. 2, 2020).

122. For instance, in the 2018 general election, of 2,611,365 votes cast, 561,000 were accepted absentee ballots.<sup>123</sup> Even for 2020, a week-and-a-half before the presidential primaries on March 3rd, close to 40,000 have had already voted absentee.<sup>124</sup> The number of absentee ballots can affect an election outcome. And because the Petitioners Mary Franson, Cindy Pugh, Duane Quam, and Eric Lucero, as candidates, are members of the Minnesota Voters Alliance, the Alliance has a particularized interest greater than that of the general citizenry.<sup>125</sup>

123. The statutes the Legislature passed seek to protect the integrity of elections as required under Minnesota's Constitution, article VII, § 1:

Every person 18 years of age or more who has been a citizen of the United States...shall be entitled to vote in that precinct. The place of voting by one otherwise qualified who has changed his residence...shall be prescribed by law. The following persons shall not be entitled or permitted to vote at any election in this state: A person not meeting the above requirements; a person who has been convicted of treason or felony, unless restored to civil rights; a person under guardianship, or a person who is insane or not mentally competent.

124. Protecting the integrity of elections and hence the credibility of the respective outcomes is critical to the electorate and the candidates especially in close elections. For instance, Petitioner Cindy Pugh was a member of the Minnesota House of Representatives,

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<sup>123</sup> Minnesota Secretary of State, 2018 Election Results; <https://www.sos.state.mn.us/elections-voting/2018-general-election-results/2018-election-statistics/> (last visited Mar. 3, 2020).

<sup>124</sup> “More than 36,000 Minnesotans have already voted in presidential primary,” David H. Montgomery (Feb. 21, 2020) (“Close to 40,000 Minnesotans have already voted in Minnesota’s 2020 presidential primary, a week and a half before Super Tuesday....”) <https://www.sos.state.mn.us/elections-voting/2018-general-election-results/2018-election-statistics/> (last visited Mar. 3, 2020).

<sup>125</sup> See, *Minnesota Envtl. Sci. and Econ. Rev. Bd. v. Minnesota Pollution Control Agency*, 870 N.W.2d 97, 101 (Minn. App. 2015).

representing House District 33B from 2012–2018. Pugh lost her last election by 216 votes.<sup>126</sup> In the 2018 election contest 11,570 votes were cast for her and 11,786 were cast for her opponent.<sup>127</sup> The votes cast totaled 23,356. Of that total, 6,628 were absentee ballots or 28% of the ballots cast<sup>128</sup>

125. Pugh is now considering running for office again in 2020. When last elected to office, Pugh had a legal right or privilege to take the public office as a result of the election outcome. In light of her close election loss in 2018, for the 2020 election contest, Minnesota Rule 8210.0225 threatens Pugh’s right or privilege to take office again if a significant number of ineligible voters cast ballots thereby undermining the credibility and legitimacy of the election results of an election contest involving only eligible voters.

126. “The rule is well established that one who has been elected, holds a regular certificate of election, and has qualified, is entitled to possession of the office until and unless his [or her] election has been set aside in a direct attack, by election contest or quo warranto. The orderly conduct of the business of government requires that this rule be followed. Otherwise there would be such delay and uncertainty as to who should hold the office as to result in public inconvenience, disorder, violence, and interruption of the orderly transaction of public business.”<sup>129</sup>

127. Although not a Petitioner, but a Minnesota Voters Alliance member, the Alliance finds the 2018 race of Matt Bliss relevant because the results involved an 11 vote

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<sup>126</sup> Minnesota Secretary of State, 2018 Election Results; <https://www.sos.state.mn.us/elections-voting/2018-general-election-results/2018-precinct-results-spreadsheet/> (last visited Feb. 25, 2020).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *State v. Magie*, 235 N.W. 526, 527 (Minn. 1931).

difference between candidates. Bliss once served in the Minnesota House of Representative for District 5A. He lost the election by 11 votes, confirmed after an automatic recount. A total of 16,897 votes were cast 8,443 for Bliss; 8,454 for his opponent.<sup>130</sup> Of the total of 16,897 cast, 5,847 votes were by absentee ballot.<sup>131</sup> The absentee ballots accounted for 35% of the total votes. When last successfully elected to office, like Pugh, Bliss had a legal right or privilege to take the public office as a result of the election outcome. If he were to run again, Minnesota Rule 8210.0225 threatens Bliss's right or privilege to take office again if a significant number of ineligible voters cast ballots thereby undermining the credibility and legitimacy of the election results of an election contest involving only eligible voters.

128. In short, the rule promulgated by the Secretary, Minnesota Rule 8210.0225 regarding challenged absentee registered voters can affect the integrity and credibility of the election results.

129. To obtain the elected offices that the candidates seek must be done by eligible voters and without doubt of questions as to the integrity and credibility of the outcomes. The Legislature's statutory scheme to minimize fraud through § 204C.12, carrying out the Minnesota constitutional provision under Article VII,<sup>132</sup> is implemented by questioning the identified challenged voter *before* a ballot is provided to the voter. To minimize fraud is to protect the integrity of the election outcome.

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<sup>130</sup> Minnesota Secretary of State, 2018 Election Results; <https://www.sos.state.mn.us/elections-voting/2018-general-election-results/2018-precinct-results-spreadsheet/> (last visited Feb. 25, 2020).

<sup>131</sup> *Id.*

<sup>132</sup> The provision governs voting eligibility and ineligibility. Minn. Const. art. VII, § 1.

130. Minnesota Rule 8210.0225 threatens the rights or privileges of the Petitioner candidates to take office if a significant number of ineligible voters cast ballots and illegally change an otherwise legal or legitimate election result of only eligible voters. Because the Secretary's promulgated rule governing challenged registered absentee voters contradicts the will and direction of the Legislature's statutory effort to safeguard and protect the integrity of the election outcome at the polling place and in absentee balloting, the candidate is deprived of the benefit of § 204C.12, regarding the election contest especially as it relates to being a legitimately elected official.

**X. Should the Petitioners prevail in their challenge before this Court, they should be entitled to attorney fees, expenses, costs, and any other just disbursement.**

131. Minnesota Statutes § 15.471, allows for an award for attorney fees, expenses, costs, and other just disbursements if the Petitioners prevail.

## **CONCLUSION**

132. For the foregoing reasons, the Petition should be granted.

## **PRAYER FOR RELIEF**

For the foregoing reasons, the Petitioners request that the Court:

1. Issue an order to show cause to require the Respondent Secretary of State, within 14 days, to respond to this Court to:
  - show whether the Secretary may treat a registered challenged absentee voter as "not registered" as defined under Minnesota Statute § 203B.04, subdivision 4;

- show how Minnesota Rule 8210.0225 is not contrary to the legislative process governing all challenged voters found under Minnesota Statute § 204C.12 which requires a process that must be carried out before the challenged voter is provided a ballot and how the same rule does not violate the separation of powers principle, and
  - show how Minnesota Rule 8210.0225 is not contrary to the demands of § 201.121, subdivision 2 which requires compliance with the provisions of § 204.C.12 and how it does not violate the separation of powers principle.
2. Issue a scheduling order allowing the Petitioners to reply to the Respondents within seven days of the filing and service of the response, and hold a hearing immediately after the filing and service of the Petitioners' reply;
  3. After the hearing, issue an order finding Minnesota Rule 8210.0225 invalid and enjoining the Minnesota Secretary of State from using Rule 8210.0225 as a process for challenged absentee voters because it is contrary to the legislative intent governing challenged voters under Minnesota Statutes § 204C.12;
  4. Issue an order finding that Minnesota Rule 8210.0225 is invalid because the rule contradicts the statutory scheme governing "challenged" registered voters as found under Minnesota Statutes § 204C.12, and § 201.121, including but not limited to the failure to give notice to challenged registered absentee voters of the type of challenge that questions their eligibility to vote; for failing to question the challenged registered absentee voter under oath before giving the person a ballot; for treating the challenged absentee voter as a "not-registered" voter; and for giving a ballot to the challenged absentee voter before questioning the challenged voter;
  5. Award the Petitioners any statutorily-allowed attorneys' fees, expenses and costs, including but not limited to those authorized under the Minnesota Equal Access to Justice Act, Minn. Stat. § 15.471, et seq., and any other applicable law; and

6. Award to the Petitioner Minnesota Voters Alliance or other Petitioners or both, any other remedy or relief the Court determines is just and equitable.

Dated: March 13, 2020.

/s/Erick G. Kaardal  
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*Attorney for Petitioners*

### **ACKNOWLEDGMENT**

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minnesota Statute §549.211, subd. 3, to the party against whom the allegations in this pleading are asserted.

Dated: March 13, 2020

/s/ Erick G. Kaardal  
Erick G. Kaardal