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July 16, 2018

The Honorable Jessica A. Palmer-Denig
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600 North Robert Street
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Hon. Judge Palmer-Denig:

I offer the following rebuttal to the July 9, 2018 statement filed on behalf of the Office of the Secretary of State by Bert Black with respect to the Proposed Rules Governing Presidential Nomination Primary Election Administration. This rebuttal discusses specific points in the agency's July 9 statement both at a general level and in relation to specific shortcomings in the proposed rules that I discussed in my testimony at the June 18 public hearing. I argue that the agency's proposed rules leave substantial gaps and ambiguity concerning Presidential Nomination Primary election administration and, therefore, the proposed rules do not meet their substantive requirements to establish rules to implement a Presidential Nomination Primary election. Further, the agency introduces additional ambiguity in ways that increase voter and election official confusion, making the proposed rules unreasonable. The proposed rules are also unreasonable on constitutional grounds. Finally, the agency has not met its procedural obligations for the proposed rules.

Before discussing specific points from the agency's July 9 statement, it important to note three arguments that the agency has not contested:

1. Rules to implement legislation, particularly related to elections, need to resolve ambiguity to avoid arbitrary and uneven decision-making. Because elections are administered simultaneously at multiple locations across the state, ambiguity invites disparate treatment of similarly situated individuals without sufficient time to remedy errors. Accordingly, the appropriate margin of flexibility that should be accorded is decidedly narrower for rules concerning elections than for most rulemaking situations. Proposed election rules that fail to resolve ambiguity or that introduce ambiguity fail to meet the substantive purpose of rulemaking and also are not reasonable.
2. A higher level of scrutiny must apply to reviewing rules governing governmental action than applies to rules governing the actions of private associations.
3. In rulemaking, the agency has a burden to make an affirmative presentation of facts, as indicated in Minnesota Statutes Section 14.14, Subd. 2. When an agency cannot point to the factual basis of its arguments but instead relies on assertion, it has not met this burden. Arguments without such an affirmative presentation of facts fail to establish the need and reasonableness of the proposed rules.

A. The agency's responses to public comments about the proposed rules characterize aspects of the Presidential Nomination Primary in ways that introduce ambiguity in the interpretation and application of the proposed rules and that may rest on misinterpretations of statutory language.

The agency's July 9 statement includes a section of general responses to comments submitted regarding the proposed rules. Two sections of these responses ("Comments from persons who object to being excluded from the PNP" and "Comments from persons who believe that disclosure of the ballot voted is risky") merit further discussion. In these sections, the agency contends that the Presidential Nomination Primary is not an election for public office and that voters may legitimately be excluded from participating in Presidential Nomination Primary because political parties have a right of association. Closer analysis of the agency's responses reveals that the agency's approach to the proposed rules (and possibly the proposed rules themselves) may rest on misinterpretations of statutory language as explicated below. The responses also mistakenly rely on analogy between a party-organized caucus and a state-organized election. In addition to the problems these responses cause for the rules themselves, the responses also have probable effects that merit consideration. Officials applying the rules may look to the agency's submission for guidance in understanding the proposed rules. The possible misinterpretations of statue and mistaken analogy increase the likelihood both of unwarranted disparate impacts on voters and unwarranted disparity in how the rules are applied. Finally, the following discussion offers further support for arguments made at the public hearing that challenge the need, reasonableness, and sufficiency of the proposed rules.

The agency's response contends that the Presidential Nomination Primary is "not an election for public office. The PNP is therefore not an election as defined in Minnesota Statutes, section 200.02, subds. 2, 3, 4, and 5."[1] The ambiguity in the agency's statement—it could be read as the agency making the novel assertion that the Presidential Nomination Primary is not an election, making the irrelevant point that the Presidential Nomination Primary is a different type of election, or inventing a distinction about elections for something other than a public office that is neither in statute nor supported by evidence—necessitates a detailed rebuttal that, unfortunately, traverses into arguments that would otherwise be unnecessary. Additionally, the agency does not explicitly identify the relevance of its contention.

The agency's artful construction as quoted above notwithstanding, the Presidential Nomination Primary most clearly is an election bound by Minnesota Election Law. First, in placing the law about the Presidential Nomination Primary in the Elections chapters of the Minnesota Statutes, the legislature clearly indicated that it is an election. Second, statutory language identifies the Presidential Nomination Primary as an election: section 204.C.04 subd. 2, which provides employees the right to be absent to participate in an election, includes the Presidential Nomination Primary as an election to which this right applies. Furthermore, the contrast between eligibility to participate in caucuses and the Presidential Nomination Primary underscores the latter's status as an election. Only currently registered voters, including same day registrants, may vote in the Presidential Nomination Primary, while people who will become eligible voters by the general election (those who will reach legal voting age or those who will no longer be

[1] Office of Minnesota Secretary of State, Statement to Administrative Law Judge Hon. Jessica A. Palmer-Denig, July 9, 2018, p. 2. (Hereafter Statement)

under correctional supervision) may vote in caucuses and be elected delegates (Minnesota Statutes, 202A.16 subd. 1). The agency also has previously indicated that it views the Presidential Nomination Primary as an election. The Statement of Need and Reasonableness explains the agency's decision to not add new rule parts throughout current rule chapters by writing "adding new information to the existing chapters would cause confusion when administering all other elections."[2] Furthermore, the subtitle of the Statement of Need and Reasonableness begins "Proposed Rules Governing Presidential Primary Election Administration…" indicating clearly that the agency has previously concluded that the Presidential Nomination Primary is an election.

The subdivisions of section 200.02 cited in the second sentence quoted above from the agency's statement merely define some specific types of elections and do not purport to be an exhaustive enumeration of every type of election. More relevant is section 200.015 which states the general applicability of the Minnesota Election Law.

Given that the Presidential Nomination Primary is an election, perhaps the agency's statement puts forth the inventive assertion that the Presidential Nomination Primary is an election for something other than a public office. Yet, the agency does not (and likely cannot) point to any part of Minnesota Election Law relevant to the Presidential Nomination Primary that makes exceptions for elections about something other than a public office or that defines elections as only concerning public offices. Clearly, elections in Minnesota involve more than just public offices, as levy questions, constitutional amendments, and charter amendments demonstrate. Inventing a distinction to separate out elections for something other than a public office from other elections would cause confusion when administering other elections.

While not providing an explicit explanation of how one point follows from the next, the agency's statement then comes to the assertion that the Presidential Nomination Primary "is a way to organize the selection process of privately-affiliated persons exercising their First Amendment freedom of association right in the form of a political party" and, therefore, some proportion of the state's voters can be excluded from participating.[3] The statement introduces a new distinction between a public office and private office that does not appear to be grounded in statute. It also draws analogies from caucus participation as requiring some degree of visibility and public disclosure of one's identity. These assertions have six shortcomings.

1. The Presidential Nomination Primary is an open primary (meaning voters do not need to be party members to vote), not a closed primary (meaning only members of a particular party may vote). The legislative framework (Laws 2016, Chapter 162) for the Presidential Nomination Primary does not use the term "member" of a major party to limit participation. Because voters who are not members of the party may participate, there is not association in the sense that the agency asserts: people who vote in the Presidential Nomination Primary election are not necessarily associating themselves with a political

[2] Office of the Secretary of State, Statement of Need and Reasonableness: Proposed Rules Governing Presidential Nomination Primary Election Administration and the Proposed Amendment of Rules Governing Election Administration, Voter Registration, Petitions, Absentee Ballots, Election Judge Training Program, and Ballot Preparation, Minnesota Rules, 8200, 8205, 8210, 8240, and 8250, and Proposed New Rule Chapter 8215; Revisor's ID Number R-04487, April 26, 2018, p. 25. (Hereafter SONAR)
[3] Statement, p. 3.

party (i.e., they are not claiming to be members), but must only indicate general agreement with principles (i.e., they are expressing agreement with ideas, not affiliating with other voters as a group). By voting in the Presidential Nomination Primary, individuals do not become members of any political party.

2. The Presidential Nomination Primary is distinct from party caucuses and is intended to increase participation in the selection of major party Presidential candidates. Under the new system, both party caucuses and a Presidential Nomination Primary exist as separate modes of political participation. The agency's citation of Minnesota Statutes Section 202A.16 that provides for limitations on caucus participation based on previous voting or future voting intent, therefore, is not relevant to discussion of who can participate in the Presidential Nomination Primary. On the contrary, 202A.16 further shows that caucuses and the Presidential Nomination Primary are distinct, since the provisions in Section 202A.16 have distinguishable and more stringent restrictions on participation for caucuses than the Presidential Nomination Primary (subd. 2) and provide that those present at a caucus make decisions about of who is allowed to participate if an individual is challenged (subd. 3).
3. The agency's statement does not account for the fact that the Presidential Nomination Primary is organized by the State of Minnesota, rather than major political parties; therefore, the Presidential Nomination Primary is not solely the province of these major parties. The fact that the major parties do not determine voter eligibility for participation in the Presidential Nomination Primary provides further support for this interpretation. Additionally, the fact that election judges for the Presidential Nomination Primary election are not limited to those elections judges who are members of major parties participating in the Presidential Nomination Primary election supports this interpretation.
4. The Presidential Nomination Primary does not organize parties' delegate selection processes. It does not determine whom parties select as delegates or how they select those delegates. Rather, the Presidential Nomination Primary election provides a way for a greater number of voters to have input on the selection of major party candidates for President.
5. As the agency's statement indicates, the Presidential Nomination Primary is, by statute, binding on major political parties. As a result, the Presidential Nomination Primary defines particular actions that some individuals (delegates to national party conventions) must take at a future date based on the outcome of an election. Although the basis of selecting those individuals may remain with the major parties (just as the basis for selection of Presidential electors remains with the parties), the actions of those people are controlled by the election result. Consequently, the agency's argument rests on a distinction (between a public office and a party office) that not only is not supported by statute, but also does not stand up to evidence and analysis.
6. The agency's discussion in the section goes well beyond what is in the text of the proposed rules or the legislative framework, neither of which contemplate "exclusion" (a term used by the agency and which appears nowhere in Laws 2016, Chapter 162).[4] To the extent that the agency's proposed rules rely on these statements, they are unreasonable.

Three additional implications for this court's consideration follow.

[4] A search for the string "excl" in Law 2016, Chapter 162 returns zero results, meaning that "exclude," "exclusion," and related terms are not in the law.

First, a comparison of party caucuses and elections provides further evidence for the need to have unambiguous rules for elections. Ambiguity in law and rules is good for caucuses—the law can set minimum standards that parties must meet and set boundaries around the extent of actions that these parties can take, but ambiguity gives parties an ability to set procedures in ways that support their right of association. The statutory provisions allowing caucus participants to decide on challenges to participate (202A.16 subd. 3) provides a good example. Different parties have flexibility to decide how much people must support a party and what evidence they will use to make judgements. Such ambiguity and associated variation in activity, however, run counter to the purposes of election law, under which voters should be treated equally, no matter their political affiliation.

Second, for the sake of argument, presume that the agency's contentions in this section were true. If so, it would imply that there should be clear standards to determine the eligibility to participate in the Presidential Nomination Primary that are distinct from the standards of eligibility for other types of elections. However, as discussed in my previous testimony, the proposed rules do not set such clear standards. Thus, the agency's arguments in this section, if accepted, would indicate that the proposed rules are not reasonable and do not meet their substantive requirement to implement the law establishing a Presidential Nomination Primary in that they do not provide standards necessary to achieve the purpose of the rules.

Finally, the agency's statements in this section introduce greater ambiguity about how to interpret and apply the proposed rules. Introducing the possibility of "legitimate" exclusion creates uncertainty about voters' ability to participate in Presidential Nomination Primary in ways that could substantially alter the potential effects of the proposed rules and affect a significant number of voters. Additionally, the other problems with the agency's statements cited above create ambiguity for election officials about how to interpret and apply the proposed rules.

These implications provide further reasons that the agency has not met its burden to show that the proposed rules are needed and reasonable and that the agency has not fulfilled its procedural and substantive requirements.

B. A significant number of substantial shortcomings exist in the proposed rules, notwithstanding the agency's responses. As a result of these shortcomings, the proposed rules are unreasonable and do not meet the substantive and procedural requirements.

I now move to discussing points related to my testimony at the June 18 public hearing, discussing the agency's response to my testimony. For the sake of exposition, I have altered the order of presenting the points in the June 18 testimony somewhat. Before addressing specific points, it is important to address a common contention that the agency makes regarding how to judge the need and reasonableness of the proposed rules.

The agency must demonstrate both the need and reasonableness of proposed rules and that the proposed rules sufficiently meet the substantive requirements that gave rise to the rules. To judge whether the agency has done so requires examining the proposed rules as a whole, including

assessing whether there are subjects that might need to be addressed in the proposed rules, but that are not so addressed.

In its statement, the agency often replies that the statutes did not require it make rules on a particular subject and, therefore, it need not do so. This reply is not persuasive for several reasons. First, the statutory language is detailed in neither prescription nor proscription of the particular aspects of the Presidential Nomination Primary that the agency must address in its rules. The statute in 207A.11(c) requires the agency to "adopt rules to implement the provisions of this chapter." Second, in its rulemaking actions thus far, the agency has addressed specific subjects (e.g., election judge training) that are not discussed in the legislation and has resolved some ambiguities in the statutes (e.g., how to provide both for an uncommitted choice and a write-in choice). Third, as the Statement of Need and Reasonableness indicates, the proposed rules seek to clarify provisions and address potential issues to decrease confusion and minimize time that election officials must respond to situations of confusion. In other words, rules are needed to address gaps in statutes derived from the legislative framework and adding such elements to the rules in manners consistent with statutory requirements is reasonable. It follows that if the agency had not included such needed provisions, the rules as a whole would not be reasonable because the agency would not have met its substantive requirements to develop rules to implement the law.

More specifically, my testimony identified a number of gaps in the proposed rules—in other words, there is a need for rules on particular points. Leaving these gaps unaddressed in the rules risks the types of confusion, inconsistencies in election administration, and drains on election officials' time that the proposed rules should prevent. The substantive topics that are unaddressed also are part of the duties of the Secretary of State's office and, therefore, the agency has the authority to develop such rules—that is, it would be reasonable for the agency to develop rules on these topics. Particular topics raised in my testimony that meet these criteria include: rules about challenges; instructions to election judges (about determining voter eligibility); preparation of the polling place roster; and collection, retention, and release of election data.

1. ***To avoid confusion and disparate treatment of similar voters, the proposed rules should contain one or more provisions about challenges to voters at the Presidential Nomination Primary.***

My testimony stated that the proposed rules had a gap in not identifying whether an individual could be challenged as ineligible to vote in a Presidential Nomination Primary election if a challenger alleges that a voter has falsely affirmed that they agree with a party's principles. The agency's statement responds that the legislative framework did not require any provisions on challenges, so that existing provisions of Minnesota Election Law will apply and, therefore, it is not unreasonable to have no provisions about challenges to Presidential Nomination Primary voters in the proposed rules. In its response, the agency references sections of the Minnesota Election Law that govern challenges (204C.12). It does not, however, make explicit the application of these sections to the Presidential Nomination Primary.

Consideration of the provisions in 204C.12 shows the inadequacy of this response. Subd. 1 both allows any voter to challenge an individual based on their personal knowledge and *requires*

election judges to challenge any individual based on their personal knowledge. Subd. 2 states that, in the case of a challenge, election judges shall ask the challenged individual sufficient questions to test the individual's right to vote. Putting these points together yields the following possibilities:

- Any voter who knows another individual's party affiliation or non-affiliation might be able to challenge that individual's choice of party as non-authentic.
- If a voter states that they do not know the general principles of a party in front of an election judge, that election judge may be required to challenge the individual.
- If an election judge knows an individual's political affiliation and activities,[5] that election judge may be required to challenge the individual if they choose a ballot of a party whose principles are not consistent with the election judge's knowledge of that individual's political beliefs.
- Election judges who do not challenge individuals when they are required to do so would not be carrying out their duties under this chapter and, under Subd. 5, would be guilty of a gross misdemeanor. There is no provision that punishes election judges for making honest challenges that result in voters being allowed to vote; therefore, these individuals face pressure to challenge voters in situations when there is ambiguity.
- In the case of any challenge, election judges must ask questions of the voter to determine eligibility. If the challenge is on the basis of not supporting or not knowing whether one supports the principles of a party, the election judge would be required to ask questions of a partisan nature inside the polling place, raising myriad problems.
- If an individual who did not know the principles of the party for the candidate for whom they wanted to vote were challenged, that individual could not leave the polling place to consult information elsewhere and return, because, under Subd. 4 once a challenged voter leaves the polling place, they must not be allowed to return and vote later.

Clearly, there is a cost to voters and to election officials if there is ambiguity about the potential bases and responsibilities for challenging voters at a Presidential Nomination Primary election.

Yet, rather than address this need and reduce the ambiguity, the agency's July 9 statement—part of this rulemaking process—increases the ambiguity. In the statement, the agency distinguishes some voters as those who "would legitimately be voting" in the election and discusses voters who "may legitimately be excluded" from voting.[6] On their face, these statements suggest that there is some objective ground on which otherwise registered voters may be deemed ineligible to vote in the Presidential Nomination Primary. Yet, the proposed rules (and the statutes) do not specify this ground.

2. To avoid confusion and disparities in election administration, the proposed rules should contain one more provisions about determination of eligibility

My testimony noted a gap in the proposed rules: they have no provisions to determine what constitutes sufficient agreement with a party's principles to be eligible to vote in the Presidential Nomination Primary. As I indicated, the failure to include such provisions results in likely costs

[5] The occurrence of such situations would not be surprising, because some election judges are members of major and minor parties, often serving in nearby precincts. These individuals would be likely to know voters who have been involved in party activities in ways that would give them insights about those voters' political beliefs.
[6] Both quotes are from Statement, p. 5.

on voters, potential voters, and election officials. Additionally, by not incorporating such provisions, the proposed rules create ambiguity that could lead to disparate treatment of voters across the state.

In its July 9 statement, the agency made no explicit reference to this gap, discussing only the related points on challenges and penalties that could apply to an individual who votes in a Presidential Nomination Primary election but does not generally support that party's principles. As cited above, the agency's statement does, however, contemplate that there could be a distinction between those who legitimately vote and those who do not and that there are grounds for excluding voters from the Presidential Nomination Primary. These responses introduce greater ambiguity about questions of eligibility.

Most, and possibly all, of the problems of the ambiguity about both eligibility and challenges could be addressed with relatively simple additions that are consistent with statute. For the sake of clarity, the rules should incorporate a provision that states that the new requirements for voting in the Presidential Nomination Primary (that voters affirm that they generally support the principles of the party whose ballot they select and that voters agree that their choice of ballot will be public information) do not determine if any individual is an eligible voter. Such an addition is consistent with Minnesota Statutes Chapters 200.02 Subd. 15 and 201.014, which define eligible voters and eligibility to vote. The rules could also include a provision indicating that no challenges are to be made on the basis of the new requirements for voting in the Presidential Nomination Primary. Such an interpretation is consistent with Minnesota Statutes Section 204C.12 Subd. 1 that a challenge is based on "personal knowledge that the individual is not an eligible voter."

3. ***Due to one or more probable violations of the Minnesota Constitution's uniform oath at elections provision, the proposed rules are unreasonable. Additionally, the Statement of Need and Reasonableness is deficient for not addressing these constitutional issues.***

My statement identified shortcomings in the rules related to the Minnesota Constitution's uniform oath at elections provision. The agency's response to this argument relies on two contentions: (a) such constitutional challenges would be without merit and, (b) even if such challenges had merit, they would not invalidate the need and reasonableness of the proposed rules because the legislative framework included the same provisions which, therefore, would still exist in the absence of the proposed rules. I address each response in turn to show that the agency's responses do not refute the shortcomings previously identified.

Before presenting this analysis, it is important to note that this court does not need to go as far as making a determination that the proposed rules violate the Minnesota Constitution to demonstrate that the proposed rules are not reasonable or that the Statement of Need and Reasonableness is deficient (although such a determination may be warranted in this case). Rather, this court needs only to apply the standard that the agency proposing the rules must demonstrate the reasonableness through an affirmative presentation of facts, meaning that if there is sufficient doubt about the constitutionality of the proposed rules, this court could use its authority under Minnesota Statutes Chapter 14.15 Subd. 4.

(a) **The grounds for constitutional challenge under the uniform oath provision of the Minnesota Constitution to the proposed rules are robust.**

In its response, the agency's statement misreads my previous testimony in significant ways. First, my testimony relies on provisions of the Minnesota Constitution, not the United States Constitution, in addressing provisions regarding the uniform oath. As a result, the agency's first paragraph referring to the United States Constitution and other states' primaries is not relevant to this discussion. Moreover, it is important to note that the agency again confuses states with open and closed primaries in its statement. The statement makes no reference to any state with an open system with the requirements that voters affirm support of a party and voters' selection of party is made public, which would be more directly relevant to other issues discussed in this hearing.

Second, the agency's statement mischaracterizes my previous testimony in stating that I argued that there was an "inherently un- or less-constitutional quality to partisan primaries." On the contrary, the previous testimony took no position on partisan primaries as such, but examined the particular oath provisions in the proposed rules.

Third, the agency's response does not explicitly address each of the three possible separate challenges to the proposed rules. To reiterate, the rules are in violation by:

(i) Establishing an oath or affirmation for the Presidential Nomination Primary election that is different from all other elections, making the oath non-uniform at elections.
(ii) Having a separate, second oath as a required prerequisite to vote at the Presidential Nomination Primary.
(iii) Having a non-uniform oath for Presidential Nomination Primary election voters, because voters for different parties must affirm agreement with different political beliefs to vote.

Despite the agency acknowledging only the first of these three possible challenges in summarizing my testimony, I will read its statement liberally in responding to its arguments.

On the first ground for challenge, the agency states that my testimony "misreads the uniform oath provision and assumes that the exact same oath must be applied at every election. There is nothing in the Minnesota Constitution that specifically indicates that."[7] The agency's response is not persuasive, because the phrase "a uniform oath or affirmation to be administered at elections" means precisely that the oath is the same from one election to the next. First, the term uniform does suggest "exact same" and in plain language also means to always have the same form across time and cases.[8] Second, the Constitution's language uses oath in the singular ("a uniform oath") while using "elections" in the plural. It does not read "uniform oaths at elections" or "uniform oath for any election," either of which would allow different elections to have different oaths. Third, the agency does not point to any authority or language for its interpretation. Fourth, the agency further asserts that uniform oath provision exists only to

[7] Statement, p. 4.
[8] Consider the following three definitions from the dictionaries I have at home or in my office: "Always the same, as in character or degree; unvarying" *American Heritage Dictionary of the English Language*, 4th Ed., p. 1881; "Of one form, character, or kind; having, maintaining, occurring in or under, the same form always; that is or remains the same in different places, at different times, or under varying circumstances; exhibiting no difference, diversity, or variation" *Oxford English Dictionary*, 2nd Ed., Vol XIX, p. 59; "Having always the same form, manner, or degree : not varying or variable" *Webster's Ninth New Collegiate Dictionary*, p. 1290.

prevent voters from not being allowed to vote due to impermissible discrimination; however, the second half of Article 7, Section 3 ("no person shall be compelled to take any other or different form of oath") prevents such discrimination. The agency's reading of Article 7, Section 3 would render the first half of the article superfluous. Fifth, the agency's final response—that as long as the oath for a particular election is the same for all voters, there is no violation of the Minnesota Constitution—merely reasserts its earlier arguments. I will, however, address this final response in discussing the third ground for constitutional challenge.

The agency has not made any response to the second ground for challenge. For the sake of clarity, I will explain this point again and demonstrate that the agency's Statement of Need and Reasonableness concedes the substance of the argument. As the proposed rules indicate, to participate in the Presidential Nomination Primary election, voters must affirm agreement with party principles and make an affirmative statement that their choice of party will become public information. Rather than being appended to the standard election oath (what one might call the eligibility oath following the analysis in the section B.2 of this rebuttal statement), the proposed rules locate these additional requirements on the roster separately from the eligibility oath required at all elections, indicating that these additional requirements are a second oath that people must complete to be allowed to vote. Having a second oath violates Article 7, Section 3 by not being "a uniform oath" (in the singular) and by compelling voters to make an "other or different form of oath" to vote. As further indicated in my previous testimony, the agency's Statement of Need and Reasonableness concedes that the unique requirements for the Presidential Nomination Primary are a second oath (emphasis added): "The proposed rule part requires adding to the voter's certificate ***the additional roster oath*** for the Presidential Nomination Primary…"[9] The agency's assertion that "there is no inherent right to vote in that [Presidential Nomination Primary] should a voter be unwilling or unable to make the decision to select a party"[10] further demonstrates that the rules impose an additional form of oath above and beyond the eligibility oath. Furthermore, the analysis in B.1 and B.2 of this rebuttal statement indicates that there is, by statute, a definition of eligibility and an oath related to eligibility. That oath alone should determine ability to vote in the Presidential Nomination Primary. But, the rules require that voters further affirm both support for a party's principles and an agreement that their choice of ballot be made public information, either or both of which compel individuals to take another oath to be entitled to vote.

Although the agency did not acknowledge the third ground for challenge it in its July 9 statement, one could use a liberal reading of its statement as offering a response. As summarized earlier, the agency states that as long as the oath used in the Presidential Nomination Primary has the same words for all voters, there is not a violation of the uniform oath. That statement could be read to apply to this third ground for challenge. Such a reading, however, does not take account of my previous testimony that explained that the content of the oath will vary based on differences in the principles parties espouse.

(b) **Statutory provisions and directions to develop rules are not sufficient reason to promulgate rules that violate the Minnesota Constitution.**

[9] SONAR, p. 37.
[10] Statement, p. 5.

The agency contends that these constitutional challenges fall outside the scope of review of the rulemaking process because the framework legislation directs it to promulgate rules and because this framework legislation created statutory language about the additional Presidential Primary Election oath. The agency's contention neglects the fact that constitutional requirements always supersede statutory requirements and that Secretary of State has taken an oath of office to uphold the Minnesota Constitution and United States Constitution. It strains credulity to believe that the agency would simply draft and put forth for adoption rules without consideration of their constitutionality and without mentioning potential constitutional challenges in a Statement of Need and Reasonableness if legislation directed the agency to promulgate rules that restricted women's ability to vote or created impediments for voters based on race, religious affiliation, national origin, or age. In short, statutory provisions do not provide an excuse for the rulemaking process to bypass constitutional considerations.

The agency also argues that any challenge to the proposed rules would not invalidate the statute. While true, this argument does not address the fact that rules promulgated by the State of Minnesota must not violate the Minnesota Constitution.

Finally, the agency argues that it need not consider costs involved with a constitutional challenge as part of its analysis, because litigation is easy to initiate and, therefore, such cost would need to be part of every Statement of Need and Reasonableness. The agency's argument here is curious: If litigation is easy to initiate, it would seem that such litigation costs are readily foreseeable and easy to include in its analysis. The only question would be whether litigation is likely. A contentious rule—and the tone of some of the submissions that the agency received about its proposed rules suggests that there are Minnesota voters who do not like the rule—would seem a relatively easy basis to distinguish these proposed rules from other cases of rulemaking.

4. ***To avoid confusion and potential grounds for constitutional challenges, the proposed rules should contain one more provisions about how election officials should respond to voters who do not know party principles.***

My testimony identified a gap in the proposed rules that makes them unreasonable: the proposed rules provide no instructions on how to respond to voters who, when asked to affirm their general support of a party's principles, do not know these principles. This gap in the proposed rules imposes particular costs on election officials and an identifiable class of voters (unaffiliated voters). My statement contained ample and uncontroverted evidence that this class of voters is substantial and that it is likely that a significant number are unlikely to know party principles, but are likely to support a candidate. Analysis in my testimony suggested that because the proposed rules do not address this gap, the requirement that voters affirm support for a party's principles could become a knowledge test that serves as an unconstitutional prerequisite to voting.

The agency's reply to these points provides further evidence that it has not met its burdens to demonstrate the need and reasonableness of its rules and that it has not met the procedural requirements of the rulemaking process. Before addressing particular points in the agency's response, it is important to note that the agency did not refute or object to any of the evidence that I presented about politically independent voters who lean toward one party or the other: they are the largest group of voters and they lean toward one party based on opposition to another

party rather than embrace of the party for whom they vote. Therefore, there will be some proportion of these voters interested in voting for a Presidential nominee but not familiar with a party's principles. The agency also did not refute or object to the evidence presented that shows voters frequently focus on candidates, rather than parties or party principles.

(a) **The agency's statement fails to make an affirmative presentation of facts and does not respond to the substance of the objection.**

The agency begins its response to this point by mischaracterizing the content of my testimony. I did not call for what the agency calls "detailed provisions for the provision of information on the principles of the various major parties."[11] Rather, my testimony repeatedly stated that the proposed rules need provisions for how to respond to situations that are likely to emerge when a voter states that they do not know the principles of the party of the candidate for whom they want to vote. Indeed, my testimony indicated that providing such information would not be a legal or reasonable response.

The agency's statement includes the following passage: "members of the public who would legitimately be voting at a partisan primary of this kind, where there are no other contests on the ballot, are highly likely to understand the difference between the various parties."[12] There are two problems with the agency's contention.

First, the agency misconstrues the standard of its own rule and of the statutes. Voters do not need to show that they understand differences between parties, but must affirm that they agree with one party's principles. Voters need not have any knowledge of other parties or the relative positions of parties.

Second, the agency merely asserts that voters will have understanding without providing any supporting evidence. Contrast the agency's assertion with the evidence presented in my testimony that indicates clearly that a significant proportion of voters focus on candidates rather than parties—in other words, that these voters are independent of the party but exercise judgement about candidates. Additionally, uncontroverted evidence shows that to the extent that voters consider parties, the voters lean toward one party out of opposition to another party, rather than support of the party to which they lean. Such voters would not necessarily know much about the party for whose candidates they vote beyond know that the party is opposed to the other party or parties.

(b) The agency's attempt to draw parallels shows further shortcomings in its proposed rules and lends additional support to a challenge that they impose an unconstitutional knowledge test on voters.

The agency compares excluding voters from the Presidential Nomination Primary to states with party registration, discussing parties' "inherent right to exclude nonmembers from a party function."

[11] Statement, p. 5.
[12] Statement, p. 5.

First, the Presidential Nomination Primary is a state-organized function, as argued previously. It does not require voters to be members of a party; therefore, there is no inherent right to exclude voters based on non-membership in any political party.

Second, the analogy is telling in that in states with closed primaries requiring that voters register with a party before the election, a party is able to share information with voters about its principles during the party registration process. That is not the case with the Presidential Nomination Primary and this difference is why the problem identified in my testimony emerges.

Additionally, the agency's statement compares the Presidential Nomination Primary to ballot questions in Minnesota elections, stating that voters "are expected to come to the polls with the information needed to have made a choice."[13] The agency's argument about the elections process not having a function to educate voters is not relevant to this discussion. Furthermore, the agency overstates its argument. Titling and wording ballot questions are necessary and serve the function of informing voters about the questions on which they are voting. As the agency is certainly aware, for Constitutional amendments, there is careful wording of the ballot language subject to litigation. When people are asked to vote on such questions, great care is taken to ensure that voters know what they are voting about. Ballots also provide additional information for Constitutional amendment questions by stating that failure to vote on a question has the same effect as a no vote.

Contrary to the agency's contention, voting on ballot questions is not a parallel situation to a Presidential Nomination Primary. In fact, a comparison demonstrates key differences that offer additional support to my testimony and that suggest that provisions of the proposed rules may impose an unconstitutional knowledge test on voters. Voters do not have to attest to the fact that they know about the questions on which they are voting before they vote on ballot questions. They simply show up at their polling place (or request an absentee ballot or vote by mail) and affirm that they are eligible voters. While it is certainly preferable that voters are informed, there is neither an expectation nor a prerequisite of knowledge for voting on ballot questions. In the case of school district referenda, the comparison is particularly apt, because Minnesota allows school districts to hold elections on such referenda as special elections—meaning that such a levy referendum might be the only item on the ballot at that election (just as a Presidential Nomination Primary will be the only item on a ballot).

To vote in a Presidential Nomination Primary election, the voter must first affirm that they agree with the general principles of a party. To do so, they must have knowledge of those principles, which could result in a challenge that the oath imposes an unconstitutional requirement of knowledge. The agency's statements about "legitimate" exclusion as part of this rulemaking process increase the likelihood of such a challenge. The agency's citation of the constitutionality of other states' closed primary systems does not reduce this risk, because such systems rely on party registration, which is, as explained above, distinct. Additionally, the agency has not provided evidence that any open primary system has a requirement that voters affirm support for a party's principles (rather than a candidate).

[13] Statement, p. 5.

5. ***By excluding from the proposed rules language on the inapplicability of the felony provision in Minnesota Election Law 204C.10(a), the proposed rules create ambiguity that is not in Laws 2016, Chapter 162. This ambiguity introduced by the proposed rules is likely to impose costs on voters that was not foreseen in or required by the legislation.***

In my testimony, I noted that the proposed rules were silent with respect to penalties for making a false affirmation on the additional Presidential Nomination Primary oath. I explained that this silence, particularly by not including information about the lack of the felony provision applying to this part, would likely lead to some voters falsely concluding that the felony provisions apply to the additional Presidential Nomination Primary oath. I further explained that such costs derive solely from the proposed rules, rather than the legislative framework that requires the agency promulgate rules to implement the legislation.

In its statement, the agency wrote that the statue sets penalties, but that point does not respond to the objection that I raised. The agency went on to suggest that a county attorney "might determine that Minnesota Statutes, section 643.241 might apply, making it a petty misdemeanor."[14] I presume that the agency meant to reference section 645.241. While an interesting point to consider (and discussed later), this statement does not respond to the substance of my testimony: that not providing any information about penalties under the rules, particularly on the ballot, increases voter confusion and, therefore, makes the proposed rules unreasonable.

6. ***Ambiguities unresolved and compounded by the proposed rules have probable effects on classes of individuals.***

In my testimony, I explained that people from disadvantaged backgrounds have a greater likelihood of seeing legally connected systems and processes as something to avoid, particularly when these systems or law seem arbitrary. The lack of clarity in the proposed rules—particularly elements of the proposed rules and this rulemaking process that introduce ambiguity, such as the exclusion of information on the inapplicability of the felony penalty—would likely increase fears of participating in elections in ways that disproportionately harm members of disadvantaged groups. The scholarly evidence suggests that, from the perspective of people with less power, ambiguity is seen as arbitrary authority.[15]

The agency made no response to this point in its submission.

7. ***To avoid confusion, disparities in data recording, and potential disparate impact on voters, the proposed rules should contain one more provisions about data retention.***

[14] Statement, p. 6.

[15] See, for instance: Sarah Brayne. 2014. "Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment." *American Sociological Review* 79(3); Patricia Ewick and Susan Silbey. 1998. *The Common Place of Law: Stories from Everyday Life*. Chicago: University of Chicago Press; Robert J. Sampson and Dawn Jeglum Bartusch. 1998. "Legal Cynicism and Subcultural Tolerance of Deviance: The Neighborhood Context of Racial Differences." *Law & Society Review* 32(4); Laura Beth Nielsen. 2000. "Situating Legal Consciousness: Experience and Attitudes of Ordinary Citizens about Law and Street Harassment." *Law & Society Review* 34(4).

My testimony identified a gap in the proposed rules concerning data retention, which creates uncertainty for county auditors and the Office of the Secretary of State, while also creating uncertainty for voters about how their personal voting history will be disclosed.

In its statement, the agency contends that ample laws and regulations exist to provide necessary guidance to resolve the concern. If so, the rules should establish a means to communicate such resolution clearly.

Other aspects of the agency's response, however, indicate such clarity may not be obvious to others. The agency states that party choice from all elections will be government data. The agency maintains that, after a subsequent Presidential Nomination Primary, the party choice from the previous Presidential Nomination Primary "would rotate off the public information list but remain with the Office of the Secretary of State. The position of the Office is that all information other than the public information list is private data."[16]

There are two issues that merit consideration. First, if the agency maintains that party choice for elections that have rotated off are no longer public data and become private data, then it should clarify whether entities may continue to retain and use these private data after the data become private.

Second, it is not clear that the agency's contention that party choice will rotate off and no longer be public data is correct. The agency states that this choice will remain government data. Minnesota Statutes section 13.01 subd. 3, however, establishes that there is a presumption that government data are public unless there are specific provisions stating that they are not. There is no requirement in section 201.091, subd. 4 that choices from prior Presidential Nomination Primaries rotate off or become non-public.

A court decision in the past week magnifies the concerns about the points that I have raised.[17] The court ordered that the Office of the Secretary of State must release to the plaintiff all data from the Statewide Voter Registration System in its possession, not just the data in the Public Information List. In its ruling, the court held that these additional data not on the Public Information List are public data, excepting specific types of restricted data identified in Minnesota Statutes 201.091 subd. 9 and instances where voter safety is concerned (voters covered by Safe at Home and petitions under 201.091 subd. 4) The agency's possible appeal of this decision does not make the decision any less relevant to the point here: clear guidance is necessary.

Without such guidance, it is not clear what county auditors and the Office of the Secretary of State must retain in the public information list.

8. ***The agency should clarify section 8200.7200 of the proposed amendments to the rules on election administration concerning reporting obligations for petty misdemeanors to avoid confusion, disparities in data reporting, and potential disparate impact on voters.***

[16] Statement, p. 6.

[17] Cilek and Minnesota Voters Alliance v. Office of the Minnesota Secretary of State. July 11, 2018. Second Judicial District of Minnesota. 62-CV-17-4692.

The following point emerges based on the agency's July 9 statement.[18] As a whole, this point underscores the need for greater clarity in the proposed rules about data retention.

As cited above, the agency's submission stated that county attorneys could possibly charge voters with a petty misdemeanor for voting in a Presidential Nomination Primary if the voters do not support or do not know that they support a party's principles. This situation also raises additional public records implications. Another section of proposed rule amendments (8200.7200) submitted by the agency under this rulemaking procedure mandates county attorneys to report to the Office of the Secretary of State the outcome of any charging decision about alleged violations of voting laws (without limiting these reports only to crimes or to felonies). Because information about petty misdemeanor convictions is public, county attorneys reporting the decision to charge and a plea or conviction might report the public details to the Office of the Secretary of State. The new subd. 2 provision in 8200.7200 (data submitted to the Secretary of State maintains the same classification as the data have with county attorneys) increases this likelihood by focusing on data classification: some county attorneys may determine that they should send more detailed information about such cases because they contain public information. If so reported, it is unclear whether such information would be linked to an individual's voting record. While the amendment proposed by the Secretary of State on June 18 to the proposed rules mitigates some of the potential harm and confusion that could result, it does not resolve it.

9. The agency has not met its procedural requirements to provide additional notice about the rulemaking procedure to particular classes of persons likely to be affected by the proposed rules.

In a post-hearing comment, I briefly expanded on points that emerged during the June 18 hearing. During the hearing, I asked the agency's representatives about what it had done to notify unaffiliated (independent) voters, a class that could reasonably be seen to be particularly affected by the proposed rules. While I do not have a precise record of the response, I recall that the representatives stated that the individual who coordinated the notification for the agency was not present so they did not want to give a definitive answer, but that they could not recall any particular efforts. In addition, another participant's testimony pointed to additional classes of persons who would probably be affected by the rule. After the hearing, my review of the Additional Notice section of the Statement of Need and Reasonableness did not reveal any particular efforts to reach out to these classes of persons or groups representing these classes of persons.

In its July 9 statement, the agency refers to "the general publicity provided … as shown by various exhibits in the record" and the Additional Notice section of the Statement of Need and Reasonableness, stating that there are organizations that could but did not comment on the effects. In addition, the agency states that the notice plan was approved by this court.

[18] While some aspects of this point go beyond my testimony, there is a clear connection to my concerns about data retention and to other parties' submissions and testimony.

The last point—this court's approval of the notice plan—does not absolve the agency of its responsibility to notify these classes of persons. It is not the court's duty to supplement the proposed plan or identify missing categories of stakeholders.

Concerning the exhibits in the record, I can only find the list of exhibits for the current public hearing. While acknowledging that there could have been exhibits submitted for the July 2017 hearing of which I am unaware, the list of exhibits in the record for this hearing contain only one item dated prior to the draft rules and Statement of Need and Reasonableness: a request for comments published in the *State Register* (Exhibit A), which does not show general publicity or the type of notice in publications that might be read by the affected classes of persons as contemplated in 14.14 Subd. 1.

None of the organizations listed in Additional Notice section appear to be organizations that specifically serve the classes of individuals mentioned in the comment (unaffiliated voters, people experiencing intimate partner violence, and LGBT youth).

The agency's assertion in the Statement of Need and Reasonableness that the organizations and individuals represent the vast majority of those who would be affected by the rules is refuted by the evidence in the record that unaffiliated voters are the largest group of voters.

The agency did not argue that it could not have reasonably known that these classes of persons were likely to be affected—a statement that could be contradicted by ample evidence. The agency administers the Safe at Home program. During committee hearings at which the agency was represented, members of the Senate Finance (May 3 and May 9, 2016) committee discussed the prevalence of unaffiliated voters who may have unique concerns about the Presidential Nomination Primary. Nor does the agency provide any statement or evidence suggesting that these classes of people would not be particularly affected.

This failure to notify does not seem to fall under the harmless error exception, because the agency shows neither that any persons from the groups participated in the rule-making process nor that it took corrective action.

CONCLUSION

The agency's responses to the testimony and public submissions do not refute the objections that I raised. Many of the agency's responses rest on untenable assertions that are not supported with evidence. The agency has not refuted much of the evidence and analysis that I presented. When it has engaged these points, the agency's contentions do not stand up to further scrutiny.

As a result, the proposed rules have numerous and significant shortcomings, including:

(1) The proposed rules do not meet the substantive requirements to establish rules to implement a Presidential Nomination Primary election because they do not resolve numerous ambiguities about administering the Presidential Nomination Primary and, therefore, do not meet the purpose of the rules. These gaps in the rules include not addressing:

a. The possibility of challenges at the Presidential Nomination Primary on the basis of voters' agreement with party principles (as explained in B.1 in this rebuttal);
b. The determination of voters' eligibility to participate in the Presidential Nomination Primary (as explained in B.2);
c. The treatment of voters who do not know the principles of the major party of candidates for whom they wish to vote (as explained in B.4);
d. Procedures for data retention (as explained in B.7); and
e. Reporting requirements for petty misdemeanor voting offenses (as explained in B.8).

(2) The proposed rules are not reasonable because they contain provisions that could violate constitutional requirements, including
   a. The Minnesota Constitution's uniform oath at election provision by establishing an oath not uniform across elections, by requiring a second oath to participate in the Presidential Nomination Primary election, or by having a non-uniform oath for voters in the Presidential Nomination Primary election (as explained in B.3); and
   b. Prohibitions against tests of knowledge to participate in an election (as explained in B.4);

(3) The proposed rules are not reasonable because they introduce ambiguities that will increase confusion for voters and election officials in ways that are likely to affect certain classes of individuals disproportionately, including;
   a. Not clearly indicating that felony provisions for making an untrue oath at an election do not apply to the additional oath required of voters at the Presidential Nomination Primary (as explained in B.5 and B.6); and
   b. Arguments that the agency put forth about legitimate voters and legitimate exclusion from participation in the Presidential Nomination Primary (as explained in sections A and B.4);

(4) The agency has not met its procedural requirements due to the lack of affirmative presentation of facts to support its arguments, due to deficiencies in its notification procedures, and due to deficiencies its Statement of Need and Reasonableness, including:
   a. Not providing an affirmative presentation of facts in support of its proposed rules;
   b. Not addressing constitutional issues in the Statement of Need and Reasonableness (as explained in B.3); and
   c. Not providing sufficient notification to classes of persons likely affected by the proposed rules (as explained in B.9).

For the forgoing reasons, I urge the court to determine that the need and reasonableness of the proposed rules have not been established.

STATE OF MINNESOTA
Office of Minnesota Secretary of State
Steve Simon

July 16, 2018

The Honorable Jessica A. Palmer-Denig
Administrative Law Judge
Office of Administrative Hearings
600 Robert Street North
Saint Paul MN 55101

Dear Judge Palmer-Denig:

This is a response to the rebuttal submission of Erik Larson.

Given the short time available, this response is also short.

The Office of the Secretary of State stands by the presentation of the facts that has been made in the SONAR and in the post-hearing responses. The Office believes that the rules proposed are needed and reasonable and , contrary to Mr. Larson, that the proper procedures have been followed.

The Office believes that in fact, a number of the organizations that were in the notice plan do represent unaffiliated voters, including the League of Women Voters, Common Cause, Take Action, ACLU of Minnesota, Citizens for Election Integrity Minnesota, Minnesota Public Interest Research Group, FairVote Minnesota, and others.

The Legislature of this state has set the basic parameters of the presidential nomination primary, which will take place in 2020 per the statutory provisions, whether or not these or other rules are in force; the statutes do not address the issues raised by the two witnesses.

The ambiguities that are described by Mr. Larson are, in part, of his own creation and do not arise from the rules, or the statutes, and do not need to be addressed by the rules.

> The proper forum for challenging the constitutionality of the Legislatively-mandated oath is the district court. Any problems the district court finds with the oath will need to be dealt with by the Legislature, and then, if at all, by subsequent rules.
>
> The oath asks the voter a simple question – that the voter is in "general agreement with the principles of the party for whose candidate I intend to vote" and either the voter does or does not agree.

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E-mail: secretary.state.@state.mn.us | Web site: www.sos.state.mn.us

There is no ground for challenging the voter on the basis of the oath set forth in either statute or rule, nor should there be one. Eligibility to vote on that ground is an after-the-fact issue, just as other eligibility questions may be, to be handled by county attorneys, not election officials.

The law on the presidential nomination primary is clear that it is to be conducted in the same manner as the state primary; those laws provide ample guidance on implementing this election.

Best regards,

BERT BLACK
Legal Advisor
Office of the Secretary of State

The Advocates
FOR HUMAN RIGHTS

July 16, 2018

The Honorable Jessica Palmer-Denig, Administrative Law Judge
Office of Administrative Hearings
600 Robert St. N.
St. Paul, MN 55101

Dear Judge Palmer-Denig,

The Advocates for Human Rights would like to thank the court for the opportunity to provide a statement in rebuttal to the written submissions made on July 9, 2018, to supplement the organization's written submission of the same date.

Summary

The Office of the Secretary of State (hereinafter the agency) offers little response to the main concerns outlined in Amy Bergquist's testimony, as further supported by The Advocates for Human Rights' written submission on July 9, 2018. The agency implicitly concedes that voters in jurisdictions that do not use e-pollbooks will face disclosure of their party preference to others at their precinct, particularly to individuals in their household who may cause them harm for selecting a particular political party. Moreover, the agency fails to respond to reasonable proposed changes to the rules that would guard against voter intimidation, particularly for victims of intimate partner violence and LGBTQ youth of voting age. Instead, the agency doubles down on a flawed set of rules that facilitate such voter intimidation.

Even after hearing testimony from Ms. Bergquist, the agency continues to disregard straightforward adjustments to the proposed rules that would better ensure voter safety and deter voter intimidation and offers no explanation of why such adjustments would be unworkable. The agency, in violation of Minn. Stat. §§ 14.131 and 14.23, did not "describe alternative methods for achieving the purposes of the proposed rule that were seriously considered and give reasons why these alternatives were rejected."[1] The court therefore should find that the agency has not met all of the legal and procedural requirements and has not established the reasonableness of the rules, and the court therefore should submit the rules to the Chief Administrative Law Judge for further review.

I. The agency needs to incorporate additional rules to give effect to the opt-out provision in Minnesota Statutes Section 201.091 subdivision 4 in presidential nomination primary elections.

The agency has an affirmative obligation to ensure that voters are able to opt out of public disclosure of their choice of political party. The agency asserts that the opt-out procedure in Section 201.091 subdivision 4 "already exists and needs no additional rules for its implementation."[2]

The Safe at Home program, which allows people to opt out of public disclosure of their address and other voting information, is not readily available to victims of domestic violence who still live with their abusers or to LGBTQ youth of voting age who live with unsupportive family members. The process

[1] Mark Shepard, House Research, Short Subjects: Rulemaking: Process for Adopting Rules, updated June 2012, available at http://www.house.leg.state.mn.us/hrd/pubs/ss/ssadprule.pdf, last accessed July 15, 2018.
[2] Office of Minnesota Secretary of State, Written Statement, July 9, 2018, at 7.

of enrolling in the Safe at Home program requires individuals to "visit a Safe at Home Application Assistant" who is "an employee of a victim service agency who has been trained to assist with the Safe at Home process."[3] These procedures assume that the beneficiary of Safe at Home is has left the abusive environment and can safely go to the office of an organization that serves victims of intimate partner violence.

The endangered voters identified in Amy Bergquist's testimony are eligible to opt out of disclosure of their choice of political party, but for them to do so and thereby avoid or minimize the risks of voter intimidation, the agency must take steps beyond the Safe at Home program. Those voters are likely to apprehend the risk only at the moment they sign in at the polling place, when they see that their party choice will be visible to others and when they affirm that their choice of political party is public information. The agency's rules must address that risk at that particular moment, when voters are at the highest risk of encountering voter intimidation.

II. The agency's rules fail to cure a defect in the new election oath which negates the opt-out option in Section 201.091 subdivision 4.

Ms. Bergquist testified that the portion of the election oath under the rules that states that choice of party affiliation is public information disregards the option available to all voters to opt out of public disclosure of information under Section 201.091 subdivision 4. The agency does not dispute that this opt-out provision pertains to a voter's choice of political party.

The agency responds to this point by saying that "in the majority of cases, this [opt-out] option is simply not relevant to the voter."[4] For some voters, however, the oath the agency proposes is problematic.

For voters who have already opted out, the oath is false. Those voters would technically be unable to sign the acknowledgement that their choice of political party is public information because they know it is not. And therefore, under the agency's proposed rules, they would be unable to vote. Moreover, other voters and election judges who know that a person has opted out would be able to challenge those voters based on the false affirmation.

For voters who have not opted out and who do not know about the opt-out provision, the oath is misleading and imperils voter safety. It suggests that they have no alternative to public disclosure of their political party beyond refusing to vote in the presidential nomination primary election. It thereby discourages them from seeking out information about the ability to opt out.

To cure this defect in the oath prescribed by the legislature, the agency should use its rulemaking authority to add to the oath a notification of the opt out provision in Section 201.091 subdivision 4.

Moreover, the agency should add to that notification a procedure by which voters can opt out on the spot, at the time they vote. As referenced in the previous section, the proposed rules create a new, specific danger that did not exist previously. They facilitate voter intimidation in a way that is not resolved by Safe at Home or any other relevant provision or program. Because the new rules create a new risk, they create the additional need to give effect to the opt-out provision by making available to all voters the opportunity to opt out at the time they receive notification that their voter information is otherwise public.

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[3] Office of the Minnesota Secretary of State, Safe at Home: Enrollment Process, accessed July 15, 2018, available at https://www.sos.state.mn.us/safe-at-home/enroll-in-safe-at-home/enrollment-process/.

[4] Office of Minnesota Secretary of State, Written Statement, July 9, 2018, at 7.

III. According to publicly available information, many precincts in the presidential nomination primary election will require voters to face automatic disclosure of their party preference on the polling place roster, facilitating voter intimidation.

The agency implicitly concedes that voters in jurisdictions that do not use e-pollbooks will face disclosure of their party preference to others at the precinct who later sign in on the same page of the polling place roster. A recent report from the Office of the Legislative Auditor confirms that "[v]oters who sign a paper roster might see information about other registered voters."[5]

In response to Ms. Bergquist's testimony on this point, the agency simply asserts without evidence that "in many jurisdictions covering a likely majority of voters in any [presidential nomination primary election], elections are conducted using e-pollbooks, and the information of a voter is not visible to other voters."[6] The agency goes on to assert, again without evidence, that by 2020, "the proportion of voters who will be in jurisdictions that have foregone paper rosters is likely to increase substantially."[7]

According to the Office of the Legislative Auditor, in the 2016 presidential election, "[e]ight percent of precincts statewide used e-pollbooks."[8] After receiving the agency's written submission, The Advocates for Human Rights reached out to Mr. Black by telephone to request data on the proportion of precincts using e-pollbooks in 2016, and the agency's projections regarding their use in 2018 and 2020. Mr. Black declined to provide that information in response to the informal request, directing The Advocates for Human Rights instead to submit a Data Practice Request. The Advocates for Human Rights has done so.

The evidence available from the Office of the Legislative Auditor, and the evidence produced by the agency in response to the Data Practice Request, demonstrates that the agency's assertion about the prevalence of e-pollbooks in Minnesota precincts is misleading. The agency has an affirmative obligation to present the Administrative Law Judge with evidence in support of any factual contentions it makes that are germane to the rulemaking process.

In response to The Advocates for Human Rights' Data Practice Request, the agency concedes that it "do[es] not track the number of precincts that are using e-pollbooks, specifically."[9] Despite raising this evidentiary point in its written statement to the court on July 9, the agency's response to the Data Practice Request states that "[i]t will take a substantial number of hours to review individual jurisdictions' documentation for a specific count. If you wanted to proceed, there would likely be a substantial cost and we will not be able to provide the information by the Monday 4:30 PM deadline . . . ."[10]

Evidence produced by the agency shows that in 2016, one jurisdiction (Stearns County) used e-pollbooks in just two precincts, another (Wright County) used them in just six precincts, and a third (Hennepin County) used them in 290 precincts (of 422).[11] Based on these data, of the approximately

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[5] Office of the Legislative Auditor, State of Minnesota, Program Evaluation Division, Voter Registration: 2018 Evaluation Report, at 41 n. 8, available at https://www.auditor.leg.state.mn.us/ped/pedrep/voterreg.pdf.

[6] Office of Minnesota Secretary of State, Written Statement, July 9, 2018, at 7.

[7] *Ibid.*

[8] Office of the Legislative Auditor, *supra* note 5, at 41.

[9] Bert Black, Email to The Advocates for Human Rights, July 13, 2018, attached as Exhibit A.

[10] *Ibid.*

[11] Bert Black, Email to The Advocates for Human Rights, Attachment 1, attached as Exhibit B. It is unclear whether Crow Wing County also used e-pollbooks in some or all of its precincts in 2016. Crow Wing County submitted a certification that any e-pollbooks it would use meet "M.S. 201.225 requirements," *id.*, attachment 2, attached as Exhibit C, but Crow Wing County does not appear on the agency's list of "2016 Notifications of Intent to use Electronic Rosters," *id.*, attachment 1, attached as Exhibit B. The Report of the Office of the Legislative Auditor demonstrates that not all precincts in Crow Wing County used e-pollbooks in 2016. Office of the Legislative Auditor, *supra* note 5, at 41. But documents produced by the agency do not provide a breakdown of how many Crow Wing County precincts used e-pollbooks in 2016.

4,111 precincts in Minnesota, approximately 7.2% of them used e-pollbooks in 2016, consistent with the report of the Office of the Legislative Auditor.

The agency's representation to the court that "in many jurisdictions covering a likely majority of voters in any [presidential nomination primary election], elections are conducted using e-pollbooks,"[12] therefore seems to count the entire population of voters in those three counties, even though fewer than 53% of the precincts in those three counties used e-pollbooks in 2016.

Evidence produced by the agency demonstrates that even in 2018, many counties that will use e-pollbooks will not use them in all precincts.[13] According to that information, only 18 of 87 counties will be using e-pollbooks in all precincts in 2018.[14] An additional 25 counties will be using e-pollbooks in some but not all precincts in 2018.[15] For those counties, the percent of precincts using e-pollbooks ranges from 2.96% (Ramsey County[16]) to 96.67% (Swift County).[17] Of the counties with only partial implementation of e-pollbooks for 2018, the median percent of precincts using e-pollbooks is 31.25% (Lyon County).[18] According to data produced by the agency, 34 counties will not use e-pollbooks at all in 2018.[19]

Even with the benefit of legislative grants administered by the Office of the Secretary of State for the purchase of e-pollbooks before the 2020 presidential nomination primary election, not all counties that will be using e-pollbooks will use them in all precincts.[20] The report of the Office of the Legislative Auditor notes that the Secretary of State's Office "received requests for funding [for e-pollbooks] that exceeded the appropriation," demonstrating that the cost of e-pollbooks will likely prohibit their introduction in some precincts.[21]

Moreover, some counties did not receive or did not seek grants, and presumably will not be using e-pollbooks at all.[22] According to information produced by the agency, 27 of the 34 counties that will not use e-pollbooks in 2018 did not receive funding for implementation of e-pollbooks for the 2020 presidential nomination primary election.[23] Information from the Office of the Legislative Auditor demonstrates that some jurisdictions are reluctant to shift to e-pollbooks, citing "several reasons . . . , including implementation costs, county size, and access to internet connectivity."[24] The report quotes one county election official as saying, "We have a small population and the cost/benefit is not there where it's a good fit for us at this time. Paper works just fine for our small population."[25] Another county election official responded that "[t]he county does not have the funds available for EPollbooks. Many of the townships would not be able to connect for county-wide internet. The town halls do not have internet or even very good cell phone service at some of the polling places."[26]

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[12] Office of Minnesota Secretary of State, Written Statement, July 9, 2018, at 7.
[13] Bert Black, Email to The Advocates for Human Rights, Attachment 3, attached as Exhibit D.
[14] *Ibid.*
[15] *Ibid.*
[16] See *ibid* at 8. The evidence produced by the agency states that five precincts in Ramsey County will use e-pollbooks in 2018, but two of those precincts are called "P1 Hennepin" and "P2 Hennepin." It is not clear whether these precincts exist in Ramsey County. Nonetheless, the figure above includes these precincts in the analysis for Ramsey County.
[17] Bert Black, Email to The Advocates for Human Rights, Attachment 3, attached as Exhibit D.
[18] *Ibid.*
[19] *Ibid.*
[20] Bert Black, Email to The Advocates for Human Rights, Attachment 5, attached as Exhibit F.
[21] *Ibid.*
[22] *Ibid.*
[23] Bert Black, Email to The Advocates for Human Rights, Attachments 3 & 4, attached as Exhibits D & F.
[24] Office of the Legislative Auditor, *supra* note 5, at 42.
[25] *Ibid.*
[26] *Ibid.*

Even if it were true that a majority of precincts currently use e-pollbooks,[27] or will be using them by 2020 with the benefit of the legislative grants administered by the Secretary of State's Office,[28] the agency does not dispute that some precincts will continue to use a traditional, hard-copy polling place roster. To say that some voters will not face disclosure of their choice of political party at the polling place does not deny the fact that other voters will face such disclosure. Nor does it deny the fact that some of those voters will be subject to voter intimidation, including physical violence, because of that disclosure.

Apart from its discussion of e-pollbooks, the agency provides no response to the alternatives proposed by Ms. Bergquist in her testimony, as reiterated in the written submission from The Advocates for Human Rights. If most precincts will be using e-pollbooks at the time of the first presidential nomination primary election, then there will likely be only a de minimis cost to implement those alternatives in the remaining precincts that will continue to use hard-copy polling place rosters.

Further, those alternatives would be consistent with a law passed by the 2017 legislature that requires election judges to make sure that information about a voter's challenged status is concealed from other voters.[29] Under this law, election judges in precincts using hard-copy polling place rosters must have a way to conceal voter information from other voters. The proposed rules should incorporate this mechanism to protect the privacy of all voters at the polling place.

IV. People voting from home do not have the option of voting absentee in person prior to the election, and they face other barriers to casting their vote safely.

Ms. Bergquist testified that people in jurisdictions where voters vote from home also face risk of voter intimidation. The agency misconstrued this argument as one concerning absentee voters.[30] One option the agency offers for those individuals is the opportunity to "vote absentee in person prior to the election." But in jurisdictions where people vote by mail, there is no in-person polling place. Moreover, such jurisdictions use voting by mail because they are largely rural and voters would have difficulty traveling to a centralized location to cast their votes. Such voters would also have difficulty availing themselves of the other alternatives the agency offers: "find another witness, or a notary public."

The agency offers no response to the simple alternatives Ms. Bergquist offered in her testimony: allow voters to present both blank ballots to the witness, and require all jurisdictions to use a third envelope.

V. The agency's rules constitute discrimination based on political opinion in violation of the International Covenant on Civil and Political Rights.

The agency's position that a presidential nomination primary election is merely a means for individuals to enter into a private association with a political party is disingenuous and is in tension with the International Covenant on Civil and Political Rights, to which the United States is a party. The agency in its written submission contends that "[p]rivate associations such as major parties, have the right to select their membership, as long as they do not discriminate illegally in that process."[31] That much is true, but this freedom of association has nothing to do with the presidential nomination primary election. Yet in

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[27] The agency's statement does not make this point. Rather, it says that "in many jurisdictions . . . elections are conducted using e-pollbooks." The agency does not define jurisdiction, nor does it assert that each jurisdiction it references uses e-pollbooks in every precinct in the jurisdiction. Some jurisdictions use e-pollbooks in some precincts but not others. See, *e.g.*, Exhibits B, C, D, F.

[28] Office of the Legislative Auditor, *supra* note 5, at 42; see also Exhibit F.

[29] Office of the Legislative Auditor, *supra* note 5, at 41 n. 8 (citing *Laws of Minnesota* 2017, chapter 92, art. 1, sec. 18, codified as *Minnesota Statutes* 2017, 204C.10(e)).

[30] Office of Minnesota Secretary of State, Written Statement, July 9, 2018, at 7.

[31] *Id.* at 3.

support of this argument, the agency asserts for the first time in its written submission that "the PNP is not an election for public office."[32]

The agency's proposed rules constitute impermissible discrimination based on political opinion because they prohibit some voters from voting in the presidential nomination primary election based on their political opinion. As Ms. Bergquist testified and as The Advocates for Human Rights noted in its written submission, Article 25 of the Covenant recognizes that all citizens have the right "[t]o vote . . . at genuine periodic elections" without discrimination with respect to political opinion. The Covenant does not distinguish among various types of elections, and it expressly forbids discrimination based on political opinion. As set forth in Article 2 of the Covenant, the obligations set forth in the Covenant pertain to government actors, not private entities. When a government holds an election, it must not discriminate based on political opinion.[33] Yet under the agency's proposed rules, citizens whose political opinions are not in "general agreement" with a major political party are barred from voting.

VI. Conclusion

The agency ignores hearing testimony presenting alternatives to the proposed rules that would minimize the risk of voter intimidation. Those alternatives would be consistent with the relevant statutes and would have the added benefit of informing voters of their option to opt out of public disclosure of their voting history. These alternatives involve minimal additional cost while enhancing public safety.

The agency misleadingly suggests that most precincts are already using e-pollbooks to sign in at their precincts, and that therefore any concerns Ms. Bergquist raised about disclosure of information at the polling place will be resolved by that time. The agency fails to provide evidence regarding their use, broken down by precinct. The agency further concedes that for voters using traditional hard-copy presidential nomination primary election ballots, the polling place roster discloses the voter's choice of political party to other voters during Election Day.

The court should find that the agency has not met all of the legal and procedural requirements and has not established the reasonableness of the rules, and the court therefore should submit the rules to the Chief Administrative Law Judge for review.

Submitted by: Amy Bergquist
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612-746-4694.

Attachments: Exhibit A, Bert Black, email to The Advocates for Human Rights, July 13, 2018
(continued)

[32] *Id.* at 2.

[33] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, Art. 2 ("1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.").

Exhibit B, attachment 1 to Exhibit A
Exhibit C, attachment 2 to Exhibit A
Exhibit D, attachment 3 to Exhibit A
Exhibit E, attachment 4 to Exhibit A
Exhibit F, attachment 5 to Exhibit A

STATE OF MINNESOTA
Office of Minnesota Secretary of State
Steve Simon

July 16, 2018

The Honorable Jessica A. Palmer-Denig
Administrative Law Judge
Office of Administrative Hearings
600 Robert Street North
Saint Paul MN 55101

Dear Judge Palmer-Denig,

This response is made to the written comment filed by The Advocates for Human Rights, on July 9, 2018.

That comment addresses three general points:

a) Alleged violation of an international agreement;
b) Disclosure during the voting process of the party choice;
c) Disclosure of the party choice on the public information list.

Legislative Action:

Before addressing any specific point, it must again be noted that the Legislature has by enacting Laws 2016, Chapter 162, and the Governor, by signing that law, made it the policy of the state to undertake this party process using the mechanism of the state's ability to administer voting. However, this is not an election for public office.

Moreover, the Legislature could have provided for some of the changes suggested by The Advocates for Human Rights, but chose not to.

1) The Legislature of this state and every other state in the country (and their research staffs) can safely be assumed to be aware of international agreements. The fact that the Legislature enacted the presidential nomination primary with provisions making the party choice public is evidence that the Legislature does not believe that the International Covenant on Civil and Political Rights prevents the scheme being enacted in Minnesota where the party choice is public information. Similarly, all the states that have party registration that make the party choice of their voters public have made the same determination. That determination is reasonable.
2) The Legislature amended section 204C.10 to provide for additional text for the presidential nomination primary roster oath in clause (b). In clause (e) of the same section, the statute provides that when challenges appear on the roster, they are to be hidden from the view of

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any voter other than the one challenged. The Legislature could easily have added that the party choice is to be added to the material hidden from other voters. They did not.

3) The Legislature, in Laws 2016, Chapter 162, section 1, amended Minnesota Statutes, section 201.09, subd. 4 to provide that the public information list would expressly include the party choice of all voters voting in the most recent presidential nomination primary. The same subdivision is the place where the text relating to the opt-out provision cited by The Advocates for Human Rights in part III of their comment. The Legislature did not change that statutory text, and did not include the provisions suggested by The Advocates for Human Rights. The legislature could have required more publicity for the opt-out process, and immediate application; they did not

The Office of the Secretary of State suggests that the fact that the Legislature chose not to address these items suggests that the absence of these items from the proposed rules is reasonable, and the absence does not make the rules unreasonable. The objections raised by the Advocates are, in substance, objections to the underlying legislation and the legislature is the more appropriate forum for their objections and is the body that should consider and craft a remedy if it so chooses.

It must also be noted that if all or part of the rules being proposed are found to be unreasonable, or are withdrawn pursuant to the report of the administrative law judge, the statute has sufficient detail as enacted to proceed with all of the features of the presidential nomination primary to which the Advocates for Human Rights object.

Specific issues:

A) International agreement

The International Covenant on Civil and Political Rights is cited by The Advocates for Human Rights as a reason to deny the need and reasonable ness of the proposed rules. They cite Article 25, which provides:

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

Article 2 provides:

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

1) The presidential nomination primary is not an election for public office, but is a party function to determine the proportion of national delegates pledged to presidential candidates, which has been for at least the last five presidential elections in one of the two current major parties, and in the last presidential election for the other current major party, been carried out privately. Following the 2016 legislative enactment, the same function is to be administered by government.
A political party is a private association. Under the First Amendment, private associations do have certain rights, including self-determination. Government cannot interfere, for example, in the determination of the political party with respect to who may participate in determinative votes. As a party function, it is reasonable to exclude persons who do not identify with the party. See Rule 16 (d)(2) of the Republican National Committee, https://prod-cdn-static.gop.com/media/documents/2016-Republican-Rules-FINAL_1529681395.pdf. (Visited July 15, 2018)

Article 2, section 4(e) of the Charter of the Democratic Party contains a provision that provides that convention delegates are to be selected by voters who are Democrat (except as a State Party varies that), https://s3.amazonaws.com/uploads.democrats.org/DNC_Charter_Bylaws_3.12.18.pdf.

(Visited July 15, 2018)

The Minnesota DFL has not varied that, see, Minnesota DFL Constitution, Article 1, section 2, https://www.dfl.org/wp-content/uploads/2018/06/2018-06-03-DFL-Constitution-State-Convention-Rev-B.pdf, and Official Call, Precinct Caucus Section II) B.) I) a): https://www.dfl.org/wp-content/uploads/2018/04/2017-12-14-Call-Amended-2-December-2017-Final2c-Rev-B.pdf. (Visited July 15, 2018)

Requiring that the voter declare their party choice for a party function is not a violation of the International Covenant on Civil and Political Rights, and is consistent with the United States Constitution, as the parties have chosen this requirement themselves.

2) There is a remedy to the disclosure for those persons who are truly in danger. They can opt-out of appearing in the public information list, pursuant to the existing language in section 201.091, subd. 4, but they will have to provide the documentation required by the Legislature to the Secretary of State or the County Auditor. This is consistent with the International Covenant on Civil and Political Rights.

B) Disclosure during the voting process.

The Advocates for Human Rights are concerned that the party choice of a voter is collected and displayed on the roster. They specifically object to the collection on paper rosters. However, this method of collection – recording the party name on the roster - was specified by the Legislature, see Laws 2016, Chapter 162, section 10 (b). They suggest that a separate document be used to record the party choice. That is contrary to the legislation and therefore is inappropriate expansion of the rules beyond (and contrary to) the statute.

The Advocates also suggest the use of a manila folder with a cut-out window. The Office of the Secretary of State appreciates the suggestion and has considered it but has determined that because of the nature of the varied positions of voters on the roster page, and due to the entire process, that the suggestion is unworkable.

As the Office has referenced in its first post-hearing comment, filed July 9, 2018, the vast majority of voters at the presidential nomination primary in 2020 will be using e-Pollbooks.

- In 2016, three counties used e-Pollbooks, including all of Hennepin other than Minneapolis. (Minneapolis started using e-Pollbooks in the 2017 municipal election). Hennepin (with Minneapolis) is 22% of the state's population.

- In 2018, there are at least 48 counties that will use e-Pollbooks in whole or in part.

- 57 counties have been awarded $2.427 million dollars, from the Voting Equipment Grant Account, funded in Laws 2017, First Special Session, Chapter 4. Article 1, section 6, (also see Article 3, Section 7 of the same act) with a one-third match, for a total of over $3.2 million dollars that must be spent on e-Pollbook equipment prior to the 2020 presidential nomination primary.

The Office of the Secretary of State believes that the proposed rule is needed and reasonable and is consistent with the statutory requirement. If you, as the Administrative Law Judge, find that some additional provision for privacy is required in those precincts not using an ePollbook system, the Office asks that instead of requiring a specific methodology, that you instead require an outcome, and let the election judges in the precinct render that outcome as they determine or as local election officials who run polling places determine. The Office again notes that the

Legislature had the opportunity to direct that information be covered up as discussed in the beginning of this response, but chose not to do so.

With respect to persons not voting on Election Day, The Advocates for Human Rights allege certain issues for those voters, suggesting that the rules will require disclosure to their abusers their party choice.

The Legislature has specifically stated in Laws 2016, Chapter 162, section 10 (a) that the presidential nomination primary must be conducted in the same manner as the state primary, except as specifically provided. Thus, the absentee voting statutes and rules apply to the presidential nomination primary. However, the absentee voting statutes and rules do not require an absentee voter to vote from home. They merely require a witness. The witness does not have to be a co-domiciliary of the voter. It can be any Minnesota voter. In addition, the voter can vote in-person at any time during the 46 days prior to the presidential nomination primary, at the office of the county auditor, or other designated locations in the county.

C) Opt-out from the public information list
The Advocates for Human Rights suggest that there should be publicity at the polling places advertising the opt-out as well as the ability to opt-out immediately from having one's party preference indicated at the public information list.

However, the statute only allows for one's entire record to be removed from the public information list, not simply specific parts of the information. The cure suggested is, first of all, to a section of law that the Legislature had the opportunity to amend, see the discussion at the beginning of this response, and did not. The suggested alternative is a matter for legislative action, not a rulemaking, because the suggested action would widen the scope and accessibility of the opt-out process. The statute requires that there be a written, signed statement regarding the safety of the voter or their family, not simply a checkoff box. It would also be overbroad to adopt the suggestion; there is a process in place under the law, and there is a risk that many ineligible persons would use this method, either deliberately, or out of confusion, to obscure their party choice. The Legislature has provided an existing method which needs no expansion to serve the at-risk voters described by The Advocates for Human Rights.

Conclusion:

The Office of the Secretary of State understands and is not unsympathetic to the objections raised by the Advocates, but the Advocates objections are to the underlying policy established by the legislature and not the rules. The issue of the mandatory collection of party choice, the display on the roster, and the inclusion of the party choice in the public information lists were all policy considerations addressed directly in the enabling legislation. The Office of the Secretary of State has proposed rules that are consistent with these policies in the enabling legislation. The Office of the Secretary of State believes that the rules as proposed, with the modification announced at the hearing, are needed and reasonable, are authorized by law, and consistent with the enabling legislation. For these reasons and because the required processes for rulemaking have been followed, the Office asks for your approval.

Best regards,

BERT BLACK
Legal Advisor
Office of the Secretary of State