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I thank the Office of Administrative Hearings and Office of the Secretary of State for the opportunity to address the proposed rules governing Presidential Nomination Primary Election Administration. My comments are directed at chapter 8215 of the proposed rules.

Before addressing specific shortcomings in the rules and statement, I would like to acknowledge the work of the Office of the Secretary of State on this matter. Many of the issues that I will raise concern gaps or ambiguities in the legislation that the rules are to implement. Nevertheless, the proposed rules and Statement of Need and Reasonableness need to address these issues, but have not done so. The proposed rules in Chapter 8215 and the associated Statement of Need and Reasonableness have not demonstrated that the Office of the Secretary of State has fulfilled all relevant legal and procedural requirements and has not demonstrated the need and reasonableness of each portion of the rule with an affirmative presentation of facts. In presenting this material, I focus primarily on the provisions for Polling Place Voting (8215.0300); however, many of the points also apply to other methods of voting.

The first shortcoming in the proposed rules and Statement of Need and Reasonableness is that the Statement does not identify a particular probable cost of complying with the proposed rules: the proposed rules impose a cost on one or more voters for mounting and the State of Minnesota for defending against a constitutional challenge to the rules. Specifically, the proposed rules are vulnerable to three separate challenges based on Article 7, Section 3 of the Minnesota Constitution, which states: “The legislature shall provide for a uniform oath or affirmation to be administered at elections and no person shall be compelled to take any other or different form of oath to entitle him to vote.” The three grounds for challenge are:

1. The rules establish a separate oath or affirmation for Presidential Nomination Primary elections from any other election in Minnesota by requiring that voters state their general agreement with the principles of the party for whose candidate they wish to vote in only the Presidential Nomination Primary elections. Article 7, Section 3 calls for the voters’ oath or affirmation to be “uniform ... at elections.” On its face, having a different oath for one election makes the rules vulnerable to challenge as non-uniform. The proposed rules increase this vulnerability of constitutional challenge by establishing a separate chapter of rules for the Presidential Nomination Primary elections, as discussed in the Statement concerning proposed rule part 8215.0000. The creation of a separate chapter of rules further shows that these provisions are not uniform across elections. Additionally, the Statement of Need and Reasonableness concedes that this statement of support of party principles is an oath and that it is separate from the oath for all other elections. See, for instance, pages 27 (“ensure the rule requirements for the roster are consistent with the statutory provisions regarding the Presidential Nomination Primary’s roster oath”) and 37 (“the additional roster oath for the Presidential Nomination Primary”).
2. The proposed rules in 8215.0300, subpart 2 establish a non-uniform requirement that voters must meet only to entitle them to vote in the Presidential Primary Election by requiring voters make—and here I quote the SONAR, “an affirmative statement”—that they understand their choice of political party will become public information. This



provision compels voters to take a different oath to entitle them to vote in a Presidential Nominating Primary than in any other election in Minnesota.

3. By requiring voters affirm agreement with particular party principles to be entitled to vote, different voters are required to affirm different political beliefs, making the oath non-uniform within the Presidential Nomination Primary election. This point is not refuted by the claim that each party's Presidential Nomination Primary is a separate election, because any voter may only vote for one candidate in one party in any given year. Similarly, an argument that the words of the oath are the same does not refute that the content of the oath will vary from one voter to another based on the parties they select. This difference is distinguished from the other election oath, which to the extent that there is some substantive difference implied in the words (such as the address), only establishes commonality among all voters in a given polling station (that they are of legal voting age, have not had their voting rights stripped, are a Minnesota citizen, and live in the particular place that they are voting). In contrast, voters within the same precinct will be affirming agreement with different principles establishing their eligibility to vote with the separate Presidential Nomination Oath, making the content of the oath non-uniform within an election.

Arguably, the Office of the Secretary of State could—or perhaps should—refuse to promulgate a rule if doing so would violate the Minnesota Constitution, as upholding the Constitution is part of the Secretary of State's oath of office. Similarly, the Office of Administrative Hearings would presumably have a primary duty to uphold the Minnesota Constitution and not approve rules that are contrary to the Constitution.

Even if the Office of the Secretary of State is not convinced about these arguments, the regulatory analysis requires a description of these probable costs of compliance, which the SONAR does not. At a minimum, the SONAR is unreasonable for failing to address the constitutionality of the oath and the likelihood of a constitutional challenge. In addition, the third and fourth factors in the regulatory analysis require describing alternative methods and the grounds for rejecting these methods and determining whether there are less costly or intrusive methods for achieving the purpose of the rule. In this case, the SONAR could describe alternative methods of developing Presidential Nomination Primary rules that fulfill as much of the legislative framework as possible without the risk of such constitutional challenges.

The potential costs of these constitutional issues cannot be sidestepped by the proposed rules by referring to requirements of the legislative framework, because rules promulgated must also comply with the Minnesota Constitution, which is superior to statutory law.

The second shortcoming in the proposed rules concerns provisions in 8215.0300 Subparts 2 and 3 that require voters to affirm agreement with the principles of the party of the candidate for whom they wish to vote. The provisions of the rules require that a voter must first affirm general agreement with the principles of the party before getting a ballot. If a voter does not do so, election judges may refer the voter to an information poster. The proposed rules do not indicate what election judges or voters must do in a situation in which a voter does not know the principles of the party. By not including such provisions, the proposed rules do not meet regulatory analysis factors one (classes affected and bearing costs) and factor five (probable

costs of complying). For the avoidance of doubt, costs of complying include non-financial costs, which the SONAR discusses with reference to factor six and which includes items such as “voter confusion, reduction in election integrity, and additional burdens carried by election administrators.”

The Statement of Need and Reasonableness has not met the rule-making burden on this point through an affirmative presentation of facts. Readily accessible facts indicate that many voters may not have information about a party’s principles.

That voters may focus much more on particular candidates than political parties—let alone party principles—should come as no surprise after the 2016 Presidential election. Even in the current Congressional election cycle, news coverage indicates that personal loyalty, rather than fidelity to party, defines voters’ choices.<sup>1</sup> Charismatic candidates or candidates who attract significant media attention may inspire voters who wish to support these candidates in a Presidential Nomination Primary election. Such voters may not know party principles, but may know candidates that they support.

Additionally, findings from the Pew Research Center show that the largest group of voters in the US are those who identify as politically independent and, even though many of these voters lean toward one party, they do so more out of opposition to another party (e.g., “[I]ndependents, who now outnumber both Republicans and Democrats and overwhelmingly ‘lean’ to one party or the other, are far more likely to cite negative than positive factors for why they form their loose partisan ties.”<sup>2</sup> “For independents who lean toward a party, the belief that the other party’s policies are harmful is the most frequently cited reason for their partisan leaning.”<sup>3</sup>). Some portion of these politically independent voters who lean toward one party likely have preferences among Presidential candidates, but may very well not be familiar with the principles of the party.

In each case, voters who wish to vote in the Presidential Nomination Primary may show up at their polling place without familiarity with the principles of the party of the candidate they wish to support.

The proposed rules are silent on what to do in such a situation in which voters state that they do not know the principles of a party. Would such an admission make the voter ineligible to vote? If so, the requirement to affirm agreement with these principles then becomes a prerequisite of particular knowledge to enable an individual to vote, which would raise additional grounds for Constitutional objections to the rules. We have a uniform oath requirement for voting due to the insidious history in the United States of using tests of knowledge to disqualify voters. To the

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<sup>1</sup> Susan Davis, “Republican Primaries Focus On Candidates’ Loyalty To Trump.” National Public Radio, Morning Edition, May 4 2018. <https://www.npr.org/2018/05/04/608419097/republican-primaries-focus-on-candidates-loyalty-to-trump> Most recently accessed, June 17, 2018.

<sup>2</sup> Pew Research Center, “Partisanship and Political Animosity in 2016: Highly Negative Views of the Opposing Party – and Its Members.” June 22, 2016. <http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/> Most recently accessed June 17, 2018.

<sup>3</sup> Hannah Fingerhut, “Why Do People Belong to a Party? Negative Views of the Opposing Party are a Major Factor.” March 29, 2018. <http://www.pewresearch.org/fact-tank/2018/03/29/why-do-people-belong-to-a-party-negative-views-of-the-opposing-party-are-a-major-factor/> Most recently accessed, June 17 2018.

extent that one major party's principles are more opaque than another major party's principles, the test of knowledge required to vote would appear even more arbitrary.

It is possible that election judges may refer such voters to instruction posters, referenced in subpart 3. These posters, however, could not contain information about these party principles without violating rules against having partisan material posted inside a polling place.

This leaves the voter back in the same position: Unable to vote without the knowledge of the principles, facing the dilemma of either being turned away from the polling place or affirming something that they do not know. Either situation is a cost to that voter. Responding to such situations has costs on election officials and for the integrity of our elections.

To summarize this second point: By neglecting to establish rules for voters who are unfamiliar with party principles, the proposed rules impose a cost on a particular class of voters and on election officials who will need to respond in the situation (and may well do so differently at different polling places). In addition, the Statement of Need and Reasonableness does not describe any of these classes of people who will bear these costs, nor does it identify the probable costs that these people will bear.

Allow me to cite a personal example here. In 2016, there was a major party candidate for President whose campaign I supported. As an active member of a minor party, I am aware of the fact that the party from which this candidate was seeking nomination has a rule about caucus participation that states that individuals who are active members of another political party may not participate in this major party's caucus. I am unaware of any other statement of this party's principles. If the proposed rules were in effect and Minnesota had had a Presidential Nomination Primary in 2016, I would not know whether I would be allowed to vote to express my preference for this particular candidate for whom I would have wanted to vote in the 2016 general election if that candidate were to have been on the ballot. The only principle about the party that I know for certain is that it demands exclusivity about party membership. Can that principle overrule my preference for expressing support for a candidate?

A third set of shortcomings in the proposed rules concerns the oath or affirmation in 8215.0300 subpart 1. The proposed rules and Statement do not discuss how officials should respond to allegations of voters falsely affirming agreement with party principles. In particular, there are no provisions indicating whether a voter may be challenged as ineligible due to that voter not supporting the principles of one or all major parties; there are no provisions indicating what, if any, penalties could apply to a voter who votes in a Presidential Nomination Primary when the voter does not generally agree with a party's principles; and there are no provisions to determine what constitutes sufficient agreement with a party's principles to be eligible to vote for candidates of a particular party. The failure to provide this information results in costs to voters and potential voters who will face confusion about their eligibility to vote and to electoral officials who have no guidance about what to do in situations when such questions arise. The Statement of Need and Reasonableness does not discuss these costs.

Although the draft rules make provisions to reduce the likelihood of other voters or poll observers knowing a particular voter's selection of party, the Statement indicates that some

voters may make an oral declaration of party choice, which other voters or poll observers may hear. Additionally, even in non-audible indications of party choice, the Statement makes clear that absolute privacy of party selection is not possible (e.g. referencing 8215.0300, subp. 4, the Statement discusses seeking “to protect voter anonymity as best as possible”). In cases of voting by mail, a witness will see the voter’s selection of party (8215.0500, subp. 3 “show your witness that party’s blank ballot”). In any of these instances, the particular selection of party could result in an individual voter being challenged as not actually supporting the principles of that party in general.

Additionally, some individuals who are members of a minor party and are known as such in their community could be challenged as not generally supporting the principles of any major party if they vote in a Presidential Nomination Primary.

The proposed rules do not indicate whether such a challenge to eligibility to vote in a Presidential Nomination Primary on a particular party’s ballot is allowed. As a result, there is a cost that voters face in that uncertainty and a cost for election officials who have no guidance of what to do if somebody raises a challenge to a voter.

The proposed rules also do not indicate what, if any, penalty would follow when voters state that they generally support a party’s principles but either do not support these principles or do not know whether they support these principles. The enabling legislation states that the felony penalty for deliberately providing false information does not apply to the additional Presidential Nomination Primary oath. However, the draft rules do not include that language, either on the ballot or in the rules. By excluding this provision of the law, the proposed rules introduce additional ambiguity that seems likely to lead to some voters not knowing that these felony provisions do not apply to the additional oath, creating a new cost in the rules beyond the legislative framework. Additionally, not providing for any information about penalties for making a false additional Presidential Nomination Primary oath (whether deliberately or unknowingly) would potentially increase voter confusion. If people presume that the existing provisions about deliberately providing false information is a felony with punishment that could result in five years imprisonment and a \$10,000 fine applies to their claims of support of a party’s principles—a presumption that is not unreasonable—they may simply leave the polling place without voting simply by virtue of the ambiguity introduced by the proposed rules, which is not in the legislation.

By not including provisions for how to determine whether a voter is in general agreement with the principles of a party, the proposed rules also create costs associated with voter confusion and unclear direction to election officials. The proposed rules give no indication of the basis on which officials could determine whether a voter who purports to generally agree with a party’s principles actually does so. Similarly, the proposed rules provide no guidance about the quantum of support of principles that would qualify as meeting a “general agreement” standard: is support of a substantial minority, simple majority, or super majority of principles required? Beyond these problems of determining voters’ support, the rules are also silent about how to gauge what exactly the principles of a major party are. The variety of potential ways of doing so are fraught with difficulty, a subject which the Statement of Need and Reasonableness does not address. For instance, relying on party produced documents (such as a platform) would require either that a



public official, rather than a party itself, determine the meaning of a platform or would require that party officials, rather than public officials, determine eligibility for voting.

This third set of shortcomings indicates that the rules as proposed contain no objective grounds for determining voters' agreement with party principles and no enforcement mechanism for any violation. Without such an objective standard or enforcement, the proposed rules undermine any purported benefit of the legislative framework in requiring voters to affirm agreement with party principles. If the standard is simply left to the subjective opinion of voters, the standard to determine eligibility would vary widely in ways that could result in some potential voters not participating. As a result, the proposed rules do not meet the legislative framework's requirement that the rules will implement the provisions of the law.

The uncertainties associated with 815.0300 subparts 1, 2, and 3 indicate a fourth shortcoming in the regulatory analysis in the Statement of Need and Reasonableness: The draft rules' silence on issues of determining eligibility has probable effects on classes of people who will unevenly bear costs and reap benefits from the rules. Although I am a professor of sociology whose fields of expertise include sociology of law, I should note that I am not purporting to speak on behalf of any professional association of which I am member. That said, sociolegal scholarship has long indicated differences in individuals' use of and engagement with law based on their social class and racial and ethnic background. Studies in this field illustrate that individuals from more disadvantaged backgrounds are more likely to see law and connected systems—such as electoral systems—as something to avoid, particularly when rules seem arbitrary. The lack of clarity in the proposed rules would heighten such fears, particularly given the legislative framework's provisions to make additional information about voters' party selection public.

A related, but distinct, probable effect concerns empowering political operatives who would seek to discourage people from voting. By leaving rules concerning eligibility ambiguous, the proposed rules facilitate people or groups that seek to exclude certain populations from voting. The silence of the proposed rules enables such actors to make factually true statements that could have the consequence of suppressing votes among some populations. For example, one can imagine door hangers or phone calls in advance of an election declaring something like: "If you want to vote in the Presidential primary on Tuesday, Minnesota law requires that you support the party's principles before you get a ballot. The law also requires that you allow the state to make your choice of party public information. If you do not agree with a party's principles or do not know whether you support those principles and you vote in the primary, you will be breaking the law." The lack of clarity in the rules about these issues opens the door to such attempts to influence electoral outcomes through shaping who turns out to vote.

The fifth and final shortcoming that I will discuss concerns a gap in the proposed rules and Statement of Need and Reasonableness. The legislative framework contains ambiguity about data retention for voters' selection of parties.

The law reads in section 201.091 subdivision 4:

The county auditor shall make available for inspection a public information list which must contain the name, address, year of birth, and voting history of each registered

voter in the county. The list must include the party choice of any voter who voted in the most recent presidential nomination primary.

The law is unclear about whether a voter's voting history includes only the party choice for the most recent Presidential Nomination Primary or if the choice becomes part of the voting history and the entire history of such party choices will be included as part of the voting history whenever a voter has voted in the most recent Presidential Nomination Primary.

By not resolving this ambiguity, the proposed rules impose uncertainty about the duties of county auditors and the Office of the Secretary of State. Additionally, the gap creates a cost to voters concerned about how long government officials will retain data about their choice of party. These voters will not be able to make an informed decision about how much to weigh the release of information about their choice of party.

By not addressing this ambiguity, the Statement of Need and Reasonableness fails to describe the classes of persons affected, the probable costs of implementation, the probable costs of complying, and the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule. If the public records will contain a complete history of party selection, the Statement would need to explain that in so promulgating the rule, political parties and operatives would benefit from having a more complete record of voters' history of party choices and, therefore, be better enabled to target particular voters with specific appeals. If the public records will not contain this complete history, more of the cost of these efforts would be borne by these parties and operatives. If the public records contain such a complete history, it would seem that some voters would also bear costs of being more particularly targeted in close election contests as swing voters.

To summarize: Rules to implement legislation need to resolve ambiguity to avoid problems, particularly when these rules are proposed permanent rules for elections. Conducting an election under an ambiguous set of rules is a recipe for arbitrary and uneven decision-making. The proposed rules do not resolve—and in some cases introduce—ambiguities about conducting Presidential Nomination Primaries. The ambiguities include not addressing situations involving voters who do not know the principles of the party of the candidate for whom they wish to vote, not addressing how to respond to allegations of false affirmations of support of party principles, and not addressing the retention of data of voters' choice of party. These ambiguities will result in probable costs from the rules that the regulatory analysis does not identify. In addition, the analysis does not indicate the costs associated with constitutional challenges to the rules. Accordingly, the Office of the Secretary of State has not demonstrated the need for and reasonableness of the proposed rules. Finally, the objection that the proposed rules violate Minnesota's constitutional uniform oath at election provision provides an additional reason that the proposed rules should not be adopted.