Via email

June 21, 2024

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Re: Unlawful Rejection of Ballots in Minnehaha County

Dear Secretary of State Monae Johnson, Minnehaha County Auditor Leah Anderson, Minnehaha County Commissioners, and members of the Minnehaha County Recount Board,

The American Civil Liberties Union of South Dakota and the League of Women Voters of South Dakota (the "League") write to notify you that the rejection of absentee ballots cast in Minnehaha County's June 4, 2024 primary election based on mass eligibility challenges to voters' residency violated state and federal law as well as the South Dakota and United States Constitutions. We urge the Minnehaha County Recount Board to count all unlawfully rejected ballots. We further seek confirmation that no voters will be removed from voter-registration rolls based on these unlawful challenges and that no improper challenges will be entertained during the November 5 general election.

I. Factual Background

On June 4, 2024, South Dakota held a primary election for county, state, and

federal offices. On Election Day, an individual affiliated with a South Dakota "election integrity" group visited two Minnehaha County polling places—Precincts 4-16 and 5-16—and purported to raise mass eligibility challenges.[1] She alleged that hundreds of absentee voters did not meet the state's residency requirements to register to vote.[2] The sole basis for these purported challenges was voters' listing of shared addresses or addresses affiliated with mail forwarding services.[3]

The Director of the Division of Elections for the South Dakota Secretary of State's Office had advised Minnehaha County officials that these residency challenges were not allowed under state law.[4] Nevertheless, the County Auditor permitted the challenges and brought them before the Precinct Boards for Precinct 4-16 and 5-16.[5] During the adjudication process, the Minnehaha County State's Attorney and the Chief Civil Deputy State's Attorney informed both Precinct Boards that the challenges were impermissible under state law.[6] Although the purported challenge was rejected by Precinct Board 5-16, Precinct Board 4-16 upheld it. One hundred thirty-two voters had their ballots set aside and were ultimately disenfranchised as a result. These voters were also deprived of the right to cast a provisional ballot as allowed by state law because, as the County Auditor admitted, "the deadline and challenges in reaching those voters made [casting a provisional ballot] infeasible."[7]

II. The Residency Challenges Sustained by a Minnehaha Precinct Board Were Not Permitted Under State Law.

The challenges brought by an individual affiliated with a South Dakota "election integrity" group—in coordination with the County Auditor—and sustained by Precinct Board 4-16 were both procedurally impermissible and meritless under

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[1] Trevor Mitchell, *Secretary of State's Office: Challenge to Minnehaha County ballots fell outside state law*, Argus Leader (June 14, 2024).

[2] *Id.*

[3] *See* Dominik Dausch, *'It was a bull rush': Minnehaha poll board denies activist's request to toss absentee ballots*, Argus Leader (June 5, 2024).

[4] Trevor Mitchell, *Secretary of State's Office: Challenge to Minnehaha County ballots fell outside state law*, Argus Leader (June 14, 2024).

[5] *See* Dominik Dausch, *'It was a bull rush': Minnehaha poll board denies activist's request to toss absentee ballots*, Argus Leader (June 5, 2024).

[6] Trevor Mitchell, *Secretary of State's Office: Challenge to Minnehaha County ballots fell outside state law*, Argus Leader (June 14, 2024).

[7] Joe Sneve, *165 absentee ballots cast in Minnehaha County primary election not included in vote tally*, The Dakota Scout (June 5, 2024).

South Dakota Law.

A. The voter challenges were not permitted under state law and should have been denied.

State law does not allow polling place challenges based on residency. Section 12-18-10 of the South Dakota Codified Laws sets out the procedure for challenging a "person's right to vote at [a] poll and election"—including when "an absentee ballot has been cast." It states that a voter's right to cast a ballot "may be challenged *only* as to the person's identity as the person registered whom the person claims to be or on grounds that within fifteen days preceding the election the person has been convicted of a felony or declared by proper authority to be mentally incompetent." S.D.C.L. § 12-18-10 (emphasis added). Thus, challenges can only be made for three reasons: (1) false identity, (2) a felony conviction within fifteen days of an election, or (3) a formal declaration of mental incompetence within fifteen days of an election.[8]

As described, state attorneys and election officials warned the Precinct Boards and the County Auditor that these challenges violated state law. The County Auditor's authorization of the challenges and the Precinct Board's upholding of the challenges violated state law and unlawfully disenfranchised at least 132 voters. These residency challenges were not permissible "identity" challenges, *i.e.*, whether an individual lists a mail forwarding service address on their voter registration form has no bearing on their identity as "the person registered whom the [voter] claims to be." S.D.C.L. § 12-18-10.

B. Voters do not lose residency based on using a mail forwarding service.

In addition to being procedurally improper, the challenges were also meritless. The South Dakota Constitution establishes that "[a]n elector shall never lose his residency for voting solely by reason of his absence from the state." S.D. Const. art. VII, § 2. South Dakota has defined the term "residence" for voting purposes to include, among other things, "any . . . abode to which [a] person returns after a period of absence." S.D.C.L. § 12-1-4; *see also* S.D. Const. art. VII, § 3 (reserving for the Legislature the duty to "define residence for voting purposes"). South Dakota's voter residency statute reiterates this guarantee. It states that "[a] person who leaves the residence and goes into another county of this state or another state or territory for a temporary purpose has not changed residence" and establishes that "[a] person retains residence in this state until another residence has been gained." S.D.C.L. §

[8] For at least the last half century, official opinions issued by the Attorney General have reaffirmed these narrow grounds. *See, e.g.*, Official No. 74-45, 1974 WL 336531, at *2 (S.D.A.G. Oct. 24, 1974) (asserting that "[o]n election day, a challenge to a person's right to vote is permitted only under the provisions of SDCL 12-18-10," and clarifying that the provision only offers these "three grounds" for a challenge).

12-1-4. Thus, once residency is established in South Dakota, it cannot be lost merely by nature of absence from the jurisdiction.

The sole basis for these challenges was voters' listing of shared addresses affiliated with mail forwarding services. But there are numerous reasons why a qualified resident would use a mail forwarding service that ought not strip them of their voting residency. For example, as the state's attorney office explained to the Precinct Boards, temporarily unhoused South Dakota residents and those who regularly travel by RV rely on such forwarding services.[9] In either example, reliance on a mail forwarding service address is not enough to prove lack of residence. At most it could suggest that a person may not be reachable at a fixed address. But by law, an individual does not lose voting residence by "leav[ing] the[ir] residence . . . for a temporary purpose"; rather, they "retain[] residency in this state until another residence has been gained." S.D.C.L. § 12-1-4; *see also* S.D.C.L. § 12-19-2 (permitting the mailing of an absentee ballot to "any temporary residence address designated in writing by the voter").

Accordingly, even if the challenges were permitted, they should have been rejected and the 132 ballots should have been counted.

III. Federal Law Violations

By indiscriminately disenfranchising voters in response to improper and meritless challenges, Minnehaha election officials also violated federal constitutional and statutory law.

A. The Precinct Board's Rejection of Absentee Ballots Violated the U.S. Constitution.

Minnehaha County's rejection of at least 132 absentee ballots violated the voters' constitutional right to vote and their right to due process of law.

First, Minnehaha County's rejection of at least 132 absentee ballots based on impermissible and meritless mass residency challenges violates those individuals' constitutionally protected right to vote. Under the First and Fourteenth Amendments, government officials cannot employ election practices that unduly burden the right to vote. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The fact that "would-be-voters" have been "disenfranchised in this case provides a concrete evidentiary basis to find" that the precinct board's actions imposed "a significant burden" on these individuals' rights. *Fish v. Schwab*, 957 F.3d 1105, 1130 (10th Cir. 2020). On the other hand, only "relevant and legitimate state interests" can justify any burden on voting rights,

[9] *See* Dominik Dausch, *'It was a bull rush': Minnehaha poll board denies activist's request to toss absentee ballots*, Argus Leader (June 5, 2024).

Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008), and the county surely lacks an interest in violating state law. Whatever "abstract" interests the government may have in election integrity or voter roll accuracy, *see Fish*, 957 F.3d at 1133, those interests cannot not justify disenfranchising voters in response to unlawful challenges raising insufficient allegations.

Further, Minnehaha County officials violated the Fourteenth Amendment's Due Process Clause, which prohibits them from depriving any person of their fundamental right to vote without adequate process. Due process requires that every individual deprived of a protected interest is afforded "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted). The right to vote is "a fundamental political right, . . . preservative of all rights." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)). It is decidedly protected. And disenfranchising voters based on unlawful challenges poses an uncommonly heightened risk of erroneous deprivation of fundamental rights.

The procedure Minnehaha election officials followed did not afford impacted voters the process due to them. It offered neither notice of the challenge, nor meaningful opportunity to cure or appeal their disenfranchisement. Although state law allowed the challenged absentee voters to cast provisional ballots before the polls closed, the County Auditor admitted that "the deadline and challenges in reaching those voters made [casting a provisional ballot] infeasible."[10] And even if voters could have been reached, it is substantially unlikely they would have been able to get to the polls to cast a provisional ballot in time—every challenged voter was, by definition, absentee.

Accordingly, the disenfranchisement of challenged voters unconstitutionally burdened their right to vote and failed to afford them due process of law.

B. Sustaining Mass Voter Eligibility Challenges Violated Section 8 of the National Voter Registration Act.

The National Voter Registration Act of 1993 ("NVRA") provides that: (1) U.S. citizens' right to vote is fundamental; (2) it is the duty of Federal, state, and local governments to promote the exercise of that right; and (3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections and disproportionately harm voter participation. 52 U.S.C. § 20501.

Section 8 of the NVRA requires that list maintenance programs to remove

[10] Joe Sneve, *165 absentee ballots cast in Minnehaha County primary election not included in vote tally*, The Dakota Scout (June 5, 2024).

ineligible voters occur only in specific, enumerated scenarios and that such systematic programs incorporate other safeguards. *See generally* 52 U.S.C. § 20507. List maintenance activity must be uniform and nondiscriminatory, and any systematic program to remove ineligible voters must be completed "not later than 90 days prior to the date of a primary or general election for Federal office." 52 U.S.C. §§ 20507(b)(1), (c)(2)(A).[11] Critically, this 90-day period extends to election officials' consideration of mass voter eligibility challenges. *See, e.g.*, *Majority Forward v. Ben Hill Cnty. Bd. of Elections*, 509 F. Supp. 3d 1348, 1355 (M.D. Ga. 2020) (finding "a substantial likelihood of success on the merits regarding Plaintiffs' Section 8(c) claim" against mass residency challenge because "the challenge to thousands of voters less than a month prior to the Runoff Elections—after in person early voting had begun in the state—appears to be the type of 'systematic' removal prohibited by the NVRA"*)*; *N. Carolina State Conf. of NAACP v. Bipartisan Bd. of Elections & Ethics Enf't*, No. 1:16CV1274, 2018 WL 3748172, at *5–7, 8, 9–10 (M.D.N.C. Aug. 7, 2018) (finding violations of the 90-day prohibition where hundreds of voter residency challenges resulted in voter registrations being cancelled without "individualized inquiry").

Here, Minnehaha election officials violated NVRA Section 8 by deeming at least 132 individuals ineligible to vote on Election Day in response to a generalized, mass challenge to their residency qualifications. Minnehaha County officials unlawfully performed this systematic disqualification of registrants within 90 days of a federal election and did so in a non-uniform manner across precincts.

Moreover, Section 8 further dictates that officials "shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence" unless the government follows strict procedures spanning over two consecutive general election cycles. 52 U.S.C. § 20507(d)(1); *see id.* § 20507(c)(1)(B)(ii). Here, the challenger's allegations did not even purport to show a changed residence for the challenged voters—it was based solely on voters' affiliation with two South Dakota mailing addresses—yet no additional safeguards or procedures were employed prior to declaring voters ineligible and rejecting their absentee ballots.

Thus, by authorizing and sustaining a mass residency challenge against more than a hundred voters on the day of the primary election, Minnehaha election officials violated Section 8 of the NVRA.

IV. Minnehaha County and the Secretary of State's Office must remedy

[11] The only exceptions to this 90-day prohibition are for removals made at the request of the registrant or removals based on criminal conviction, mental incapacity, or death, or "correction of registration records" as outlined in the NVRA (such as instances where voters inform the registrar that their registration information should be corrected). *See* 52 U.S.C. § 20507(c)(2)(B). However, the 90-day prohibition governs systematic removals based on change or lack of residence.

these disenfranchisements to the extent possible and safeguard against further violations of state and federal law.

As of now, affected voters have been disenfranchised in every race that appeared on their ballots. Unfortunately, now that the primary election has passed, the prospects of meaningfully remedying the county's violations of constitutional and statutory rights appear substantially limited. However, a contest for at least one office—the Republican primary for a seat on the Minnehaha County Commission—will be the subject of a recount on June 24, 2024. The candidates for that election are separated by merely 83 votes, fewer than the number of voters wrongfully disenfranchised by the county.[12]

The Recount Board must count the ballots of absentee voters that were rejected due to impermissible challenges. The County Auditor has publicly insisted that the unlawfully rejected ballots will not be included in the recounted races.[13] But that is not her decision to make. Under state law, "[t]he county auditor shall provide . . . any uncounted provisional ballots[] and any unopened absentee ballot envelopes to the recount board." S.D.C.L. § 12-21-24. In turn, "[t]he recount board is authorized to make a determination whether any provisional ballots or absentee ballots which were determined not to be countable, shall be counted, and those votes shall be added to the recount tally." *Id.*

The Secretary of State also has an obligation to ensure that violations of these voters' rights are remedied to any extent possible. "South Dakota law provides that the Secretary of State is 'the chief state election official,'" and "[t]hus, the Secretary of State is the person in charge of administering the election laws within South Dakota . . . ." *Walker v. Barnett*, No. CIV 18-4015, 2019 WL 1428723, at *6 (D.S.D. Mar. 29, 2019) (quoting S.D.C.L. § 12-4-33). Additionally, we urge the Secretary of State to instruct election officials in all counties that any voter challenges not contemplated under state law must be denied in future elections, including the 2024 general election.

Further, the Secretary of State and Minnehaha County must ensure that all unlawfully challenged voters across the state will be reinstated to the registration rolls, including any beyond the 132 Minnehaha voters that have been described in public reports. The Secretary of State should also ensure that no Counties—including

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[12] Trevor Mitchell, *Secretary of State's Office: Challenge to Minnehaha County ballots fell outside state law*, Argus Leader (June 14, 2024).

[13] *See* Makenzie Huber, *Minnehaha auditor plans recount of two elections; commissioner calls timing 'irresponsible,'* S.D. Searchlight (June 18, 2024), https://southdakotasearchlight.com/2024/06/18/minnehaha-auditor-plans-recount-of-two-elections-commissioner-calls-timing-irresponsible/.

Minnehaha County—unlawfully deny prospective voter registrants for the reasons raised in this improper challenge.[14]

V. Conclusion

"The priceless right to select those officials who will both govern and serve us at the local, state and national levels has been a treasured element of our form of government for nearly two hundred years." *Thoms v. Andersen*, 235 N.W.2d 898, 898 (S.D. 1975). The South Dakota Supreme Court has expressed that it is deeply "disturbed" when election officials "who are sworn to abide by our laws and whose duty it is to safeguard the ballots of the electorate" fail to perform "their obligations to a point where the people's will might seriously be thwarted and an elective office might be awarded to one not selected for it by the voters." *Id.*

Minnehaha officials upheld mass residency challenges and, in doing so, disenfranchised over a hundred primary voters, despite warnings that those challenges were not permitted under state law. Their actions further violated the U.S. Constitution and federal statutory law.

Accordingly, we urge you to (1) ensure all affected absentee ballots are counted in the upcoming June 24 recount; (2) instruct election officials in all counties that any voter challenges not contemplated under state law must be denied in future elections, including the 2024 general election; (3) ensure all unlawfully challenged voters are reinstated to the registration rolls; and (4) ensure no prospective registrants are unlawfully denied registration for the reasons raised in these improper challenges.

We hope that you will take appropriate action. To discuss resolution of this matter, please contact the ACLU of South Dakota at eskarin@aclu.org, amalone@aclu.org, schapman@aclu.org and the League of Women Voters of South Dakota at amyscottstoltz@gmail.com.

Thank you for your attention and anticipated cooperation.

Respectfully,

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[14] On information and belief, Minnehaha County has already been arbitrarily denying voter registration to some individuals on the insufficient grounds that were raised in this mass residency challenge.

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Date: June 21, 2024

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