

**State of Minnesota
In Supreme Court**

A18-1140

Andrew Cilek and Minnesota Voters Alliance,

Plaintiffs/Respondents,

v.

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

Defendants/Appellants.

**RESPONDENTS ANDREW CILEK AND MINNESOTA VOTERS
ALLIANCE'S RESPONSIVE BRIEF**

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QUESTION PRESENTED

Whether a voter's data found within the Statewide Voter Registration System are public data under the Minnesota Government Data Practices Act, Chapter 13, and subject to a Data Practices Act request to the Secretary of State unless statutorily and expressly reclassified as nonpublic, notwithstanding Minnesota Statutes § 201.091 governing what data county auditors may disclose through either a master list or a public information list.

Issue Raised:

Respondents Andrew Cilek and Minnesota Voters Alliance response to Appellants Office of the Minnesota Secretary of State and Steve Simon motion to dismiss (Nov. 27, 2017); Respondents' motion for summary judgment (May 25, 2018); Respondents' reply memorandum (June 19, 2018); Respondents' response memorandum to Appellants' motion for summary judgment (June 13, 2018); district court order (July 11, 2018); appellate decision (Apr. 15, 2019), *Cilek v. Off. of Minnesota Sec. of State*, 927 N.W.2d 327 (Minn. App. 2019), *review granted* (June 18, 2019).

Rulings:

Cilek v. Off. of Minnesota Sec. of State, 927 N.W.2d 327 (Minn. App. 2019), *review granted* (June 18, 2019) affirming the district court order granting Respondents' summary judgment (July 11, 2018); district court order denying Appellants motion to dismiss (Dec. 18, 2017).

Apposite Constitutional Provisions, Statutes, Cases:

Minnesota Statutes § 13.01, *et seq.* (Minnesota Government Data Practices Act); § 201.091, *et seq.*; *KSTP TV v. Metropolitan Council*, 884 N.W.2d 342 (Minn. 2016).

STATEMENT OF THE CASE

The Minnesota Secretary of State maintains a single database of voter records consisting of numerous individual data fields, both public and nonpublic data, referred to as the Statewide Voter Registration System (“SVRS”). County officials update the data of each voter retained in the SVRS, but does not have unfettered access to retrieve the data from the SVRS. The Legislature created a statutory scheme limiting county auditors’ authority regarding the disclosure of specific types of SVRS data through statutorily defined “lists” under Minnesota Statutes §§ 201.01–.09. The Secretary contends that the same provisions reclassified all SVRS data as nonpublic, but for that data on a public information list, and granted him discretion to reject Data Practice’s Act requests for public voter data from the SVRS. Minn. Stat. 201.091, subd. 4.

Yet, the Minnesota Legislature has declared under Minnesota’s Government Data Practices Act, Minnesota Chapter 13 that all government data are presumed public unless a federal law, a state statute, or a temporary classification of data provides that the data are not public. The Legislature knows how and has specifically declared by statute what data are not public. Hence, when data are presumed public as the Secretary publicly has admitted

and are not classified otherwise, he is legally obligated to disclose public data as requested under the Data Practices Act.

Andrew Cilek and the Minnesota Voters Alliance sought only public data of all voters from the SVRS directly through the Secretary under the Data Practices Act. They did not seek any “list” of “registered voters” from any county official; yet, the Secretary denied most of the public data requested.

Meanwhile, even if county auditors are limited by law to disclose public data under § 201.091 that *they can* directly disclose from the SVRS, any public data beyond the county public information lists under § 201.091, subdivision 4, remain available through the Secretary and must be disclosed under Chapter 13. Moreover, both statutes are mutually inclusive regarding public voter data.

The district court decisions and the appellate court opinion recognized the statutory consistency, wisdom, and policies of the Legislature between what the Secretary is obligated to do regarding public voter data and the limitations of county officials when voter registration lists are requested. For the Secretary, government public data is to be disclosed unless specifically declared nonpublic.

STATEMENT OF FACTS

- I. **Cilek and the Minnesota Voters Alliance sought public voter data for the independent analysis of voting processes for the benefit of the public and Legislature.**

The Legislative Audit Report affirms concerns regarding state voting processes.

Cilek is an eligible Minnesota voter.¹ The Minnesota Voters Alliance is a member organization that seeks to ensure, as part of its association objectives, public confidence in the integrity of Minnesota's elections, election results, and election systems, processes, procedures, and enforcement.² It also seeks to ensure public officials act in accordance with the law in exercising their obligations to the public.³ Cilek and his organization act as do other similar organizations.

For instance, Cilek's assessment of the election process is little different than organizations such as Citizens for Election Integrity Minnesota (CEIMN) which conducts nonpartisan observations of the post-election audits in Minnesota as a nonprofit⁴

¹ Doc. No. 1, Plts. Compl. ¶1. Under Minnesota law to be eligible to vote, a person must register to vote. *See* Minnesota Statutes §§ 201.018; 201.054 (method of voting); 201.014 (criteria of eligibility); and 201.071 (registration application).

² *Id.* ¶2.

³ *Id.*

⁴ Doc. No. 57 at 31–32 *citing* <https://ceimn.org/about-us> (last visited Apr. 27, 2018).

that advocates for verifiable, transparent, and accurate elections in Minnesota and across the country...to improve our democracy by...promoting effective post-election audits... educating others by developing best practices, model legislation and databases of state laws...promoting the accurate recording, counting, and reporting of all votes properly cast; and public oversight of our voting systems and infrastructure.⁵

Like CEIMN that produces audit reports with recommendations for improvements in the election process,⁶ the Minnesota Voters Alliance plays a significant public role in the “public oversight of our voting systems and infrastructure.”⁷

The need of Cilek and his organization’s public role was recently affirmed by the Minnesota Office of the Legislative Auditor. The Auditor published a report identifying anomalies regarding election-day processes, the SVRS, and referenced that some ineligible voters were allowed to vote.⁸ The Auditor’s report found that more than 26,000 persons marked “challenged” in the SVRS voted in the 2016 general election. The Auditor then examined a small subset of those 26,000, namely, 612 who were challenged due to a felony conviction, concluding that a few of the 612 may have been eligible to vote but that the

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Doc. No. 80; Kaardal Sec. Decl. Ex. 6. (“Voter Registration” 2018 Evaluation Report, Office of the Legislative Auditor (Mar. 2018) (SJ-149–278)).

vast majority “may have been ineligible to vote.”⁹ The Legislative Auditor’s findings revealed (1) a large number of “challenged” individuals actually voted, (2) when a small sample was examined, a large percentage was found to be likely ineligible when permitted to vote; and, (3) the Secretary does no analysis or reporting on voting by individuals who have failed eligibility testing.¹⁰

As Cilek noted to the district court, in a similar vein of public interest, recent examination of available data supported the concerns of the Legislative Auditor’s report. One review found more than 2,800 persons may have voted twice in the same election and significant verification of eligibility issues.¹¹ The verification issue was only recently confirmed by a supplemental review of the Legislative Auditor released on July 22, 2019, albeit a smaller sampling, that found “approximately 39 percent (44 of 112) of the persons...examined who were listed on a voter roster in 2016 did not have the correct notation in their voter record regarding their verification failure.”¹² This affirms the important

⁹ *Id.* at 61 (SJ-221).

¹⁰ *Id.*

¹¹ Second and Third Hoff Aff. ¶17 (May 15, 2018); Doc. No. 91. Hoff Decl. ¶¶ 4 and 14.

¹² Legislative Auditor resp. to Rep. Quam’s inquiry (July 22, 2019); [https://www.facebook.com/RepDuaneQuam/posts/447505132504779?__xts__\[0\]=68.ARBKpjBfqvYJCPM7dMAB7KnEDgkqDfp1pQcuIaEQyxeR99Eeu16uFnS-MDOlQlIfR0rAu8LyI9K4w_E9mvg5yYaeHBid0yWY-a60nAN-ZbtV6StHbh0JdQ9KwvADIj0BTn3JFiVEPbNiTEbgpPtqQ_kLauo7e4JhL4rOapRmmTyapH-N6gqP2CNetJYRixVWXkrxs8hGKH4Oxa4038lvc2XfFD8LNfU3721UK1wgp2](https://www.facebook.com/RepDuaneQuam/posts/447505132504779?__xts__[0]=68.ARBKpjBfqvYJCPM7dMAB7KnEDgkqDfp1pQcuIaEQyxeR99Eeu16uFnS-MDOlQlIfR0rAu8LyI9K4w_E9mvg5yYaeHBid0yWY-a60nAN-ZbtV6StHbh0JdQ9KwvADIj0BTn3JFiVEPbNiTEbgpPtqQ_kLauo7e4JhL4rOapRmmTyapH-N6gqP2CNetJYRixVWXkrxs8hGKH4Oxa4038lvc2XfFD8LNfU3721UK1wgp2)

public role Cilek and the Minnesota Voters Alliance can play in the analysis of public data from the SVRS regarding the scrutiny of the integrity and creditability of Minnesota's election processes for later recommendations of course corrections through the legislative enactments of law or administrative rules.¹³

II. The Secretary denied Cilek requested public data under the Data Practices Act.

Cilek and the Minnesota Voters Alliance requested from the Secretary under the Data Practices Act¹⁴ only public voter data found within the SVRS.¹⁵ The SVRS is a computerized central statewide voter registration system database:

The secretary of state shall maintain a statewide voter registration system to facilitate voter registration and to provide a central database containing voter registration information from around the state. ...¹⁶

In his request, Cilek delineated the public data sought:

- Voter ID #;
- First middle and last names and any suffix;
- Address;
- Phone number (if available);
- Voter history indicating ballot type (e.g., in-person or absentee);
- Voter status: (e.g., active, inactive, deleted, challenged, etc.)
- Reason for challenge or other status (e.g., felon, address, deceased, etc.)

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¹³ Motion to Amend Record of Public Documents.

¹⁴ Minn. Stat. ch. 13.

¹⁵ Doc. No. 1, Plts. Compl. Ex. A.

¹⁶ Minn. Stat. § 201.022, subd. 1 (2015).

- Year of birth;
- All other data routinely provided on the public information CD (“detailed history for all elections”).¹⁷

Cilek asked for public data of *all voters* with a voter identification number—a unique number given to every voter which never changes.¹⁸ The request neither asked for “registered voters” nor distinguished between any specific “type” of voter, but simply for all voters. No lists were requested—neither a “master list” nor “public information list” as delineated under Minnesota Statutes §§ 201.091, subdivisions 1 and 4.¹⁹

Notably, Cilek *did not* ask for:

- social security numbers;²⁰
- driver’s license numbers;²¹ nor
- any data classified as nonpublic or private by law.²²

The Secretary responded to Cilek’s request, but agreed to disclose only part of the data Cilek requested.²³ In his denial, the Secretary restricted the public voter data requested to a certain “class” of voters—“registered voters”—and refused to provide all of the requested public data, citing Minnesota

¹⁷ Doc. No. 1, ¶12; Ex. A.

¹⁸ Doc. No. 43, Ex. 8, Posner Transcr. 33:8–10; (SJ261).

¹⁹ Doc. No. 1, ¶12; Ex. A.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* Ex. B.

Statute § 201.091, subdivisions 4 and 5 as his justification.²⁴ Subdivision 4 identifies public information lists *provided by the county auditor*:

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 telephone number must be included on the list if provided by the voter. The public information list may also include information on voting districts.

Notably, the same subdivision provision expands the disclosure of public data vis-à-vis the Secretary:

The *secretary of state* may provide copies of the *public information lists and other information* from the statewide registration system for uses related to elections, political activities, or in response to a law enforcement inquiry from a public official concerning a failure to comply with any criminal statute or any state or local tax statute.²⁵

However, the Secretary wrote that “the other information you requested is not part of the Public Information List, and is therefore unavailable to you.”²⁶

Subdivision 5 governs how and when the lists are to be provided.

The Secretary excluded, for example, the complete voting history of each voter, the voter’s status, and the reason for a voter being identified as

²⁴ *Id.*

²⁵ Emphasis added.

²⁶ Doc. No. 1, Ex. B.

“challenged” as well as other public data previously provided in earlier requests to the Secretary.²⁷

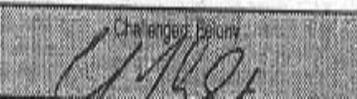
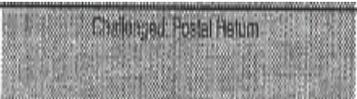
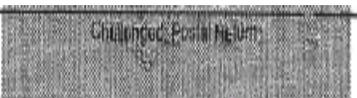
III. Cilek sues the Secretary.

The Secretary’s own Data Practices Act public policy declarations contradicted his denial of public data to Cilek.

As a result of the Secretary’s failure to provide the public data requested, Cilek sued the Secretary under the Data Practices Act. The Secretary immediately moved to dismiss under Rule 12.02(e) of the Minnesota Rules of Civil Procedure or in the alternative for summary judgment under Rule 56.01.

In response to the Secretary’s motion, Cilek identified factual anomalies the Secretary did not refute. For instance, consistent with the Secretary’s Minnesota Rule 8200.9120 (allowing county auditors to provide copies of polling place rosters), Cilek argued that counties provided copies of polling rosters immediately following an election that contain the same public data regarding a voter’s “voting history” the Secretary refused to provide. The polling rosters identified voters who had been “challenged” and the reason for the “challenged” designation, such as “felon” or “postal return.”

²⁷ See e.g. Doc. No. 98, Fourth Kaardal Decl.-Aff. (June 13, 2018); Ex. CC (SJ-500-01).

Voter Name and Address	Voter Signature	District/Precinct	ID Number
1. ARNOLD, CHRISTOPHER JOHN 4408 VICTORY AVE	Challenged: Felony 	1-2 MINNEAPOLIS 152D MINNEAPOLIS W-4 P-04	0003499162 
28			
3. WALSTROM, EDWARD ROBERT 4000 EMERSON AVE N	Challenged: Postal Return 	1-2 MINNEAPOLIS 153D MINNEAPOLIS W-4 P-06	0004727894 
29			
7. HEFLIN, FREDERICK DEVON 3018 MORGAN AVE N	Challenged: Felony 	1-2 MINNEAPOLIS 156D MINNEAPOLIS W-5 P-02	0003981410 
30			
10. TUCKER, JAMIE LYNN 2929 EMERSON AVE N APT 310	Challenged: Postal Return 	1-2 MINNEAPOLIS 156D MINNEAPOLIS W-5 P-02	0004340583 

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

²⁸ Doc. No. 12, Cilek Decl. (Nov. 21, 2017); Ex. A-1:1.

²⁹ *Id.* Ex. A-3:3.

³⁰ *Id.* Ex. A-5:7.

³¹ *Id.* Ex. A-6:10.

From the Secretary's own website, his adopted public Data Practices policy expressly admits his obligation to provide public data to anyone who asks:

The Government Data Practices Act presumes that all government data is public unless a state or federal law says that the data are not public. Data about you are classified by state law as public, private, or confidential:

1. Public data: We *must give public data* to anyone who asks; it does not matter who is asking for the data or why....³²

Nevertheless, the Secretary argued that contrary to the Data Practices Act, § 201.091, subdivision 4, limited access to public voter data from the SVRS database.³³ But, the district court disagreed.

IV. The district court denies the Secretary's motion to dismiss finding his reliance on § 201.091 to deny access to public data unsound.

The district court denied the Secretary's motion to dismiss.³⁴ The district court ruled on several key points to deny the motion:

- The Secretary could not point to any state statute, federal law, or temporary classification that provided the public data requested as not public.³⁵

³² Emphasis added. Sec. of State Data Practices Policy for Data Subjects (Oct. 1, 2014) (Original emphasis); <https://www.sos.state.mn.us/media/1530/data-practices-policy-for-data-subjects.pdf> (last visited Sept. 18, 2018). *See also* §13.025, subd. 2.

³³ Sec. Princ. Br. 5.

³⁴ Doc. No. 18, Or. Denying Mot. to Dismiss.

³⁵ *Id.* 6.

- The statute that the Secretary relied upon, Minnesota Statutes § 201.091, “expressly distinguishes between the production of *lists* and *data*. Access to *registered voter lists* is governed by Section 201.091. See Minn. Stat. § 13.607, subd. 6. Access to *data* is governed by the presumption of accessibility set forth in the Data Practices Act....” citing *KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 349 n.5 (Minn. 2016).³⁶
- “That nothing in Section 201.091 prohibits access to the *data* requested by [Cilek].³⁷

However, in rendering its decision, the district court identified a genuine and material fact regarding the form of the requested data within the SVRS, particularly data that existed independent of any list.³⁸ The court wrote that “the record shows that the SVRS also consists of what [the Secretary] describe as ‘records,’ and those ‘records’ appear to contain the very data at issue in this action.”

Each SVRS *record* includes a “status” field that records the current state of the subject person’s registration, which includes the challenged, active and inactive status of the voter.³⁹

The court concluded that, because “the location, classification and manner of maintenance of these records is unknown; whether these ‘records’

³⁶ *Id.* (original emphasis).

³⁷ *Id.*

³⁸ *Id.* 7 n.3

³⁹ *Id.* Doc. No. 8 Gary Poser’s Aff. ¶10 (Nov. 6, 2017).

exist exclusively on a *list* or whether those ‘records’ exist elsewhere within the control of the secretary,” this line of inquiry was a proper subject of discovery.⁴⁰

V. The SVRS voter records contain data from voter registration applications and government created data fields.

To support his anticipated summary judgment motion, Cilek deposed Gary Poser, the Secretary’s Director of Elections. Poser affirmed that the SVRS,⁴¹ created in 2004, is a database as required under federal and state law:⁴²

The secretary of state shall maintain a statewide voter registration system to facilitate voter registration and to provide a central database containing voter registration information from around the state....⁴³

Poser testified that the database contained approximately 5.42 million voter records⁴⁴ and that a voter’s record contained approximately 19 data fields. He also defined a “record” as “a compilation of data that exists in the database [the SVRS] that can be attributed to an individual voter.”⁴⁵ And, the records do not exist elsewhere other than with the Secretary’s Office.⁴⁶

⁴⁰ *Id.*

⁴¹ Doc. No. 54, Kaardal Sec. Aff., Poser Depo. Transcr. 19:19–20. (SJ-258.)

⁴² *Id.* Transcr. 6:2–4, 13:22–25. (SJ-255.)

⁴³ Minn. Stat. § 201.022, subd. 1 (2015). *See also* the Help America Vote Act of 2002, Pub. L. 107–252, 116 Stat. 1666, 42 U.S.C. §§ 15301–15545; and 42 U.S.C. § 15483.

⁴⁴ Doc. No. 54, Transcr. 5:20. (SJ254.)

⁴⁵ *Id.* 6:2–4. (SJ-255.)

⁴⁶ *Id.* 6:17-19. (SJ-255.)

The data fields referred to, according to Poser, include:

Voter ID number; voter’s name, residential address, date of birth, phone number, email address, driver’s license number, county of residence, election-district information; registration status (such as “challenged,” “active,” “inactive,” or “deceased”), registration submission method, original registration date; dates of updated registration; voter history; status as a protected voter; status as a recurring absentee voter; previous name if any; and out-of-state previous address, if any.⁴⁷

In the Secretary’s Supreme Court principal brief, he further clarifies “challenged” as questioning the voter’s eligibility to vote as it relates to a (1) criminal conviction, (2) current address, (3) competency, or (4) citizenship.⁴⁸

Two other data fields identified include “Failed Verification” and “Challenged–Unverifiable.”⁴⁹

Poser also defined the role of the county auditor as the chief custodian of voter registration records. The reference to “voter registration records” means

⁴⁷ *Id.*

⁴⁸ Sec. Princ. Br. 4.

⁴⁹ Legislative Auditor resp. to Rep. Quam’s inquiry (July 22, 2019); [https://www.facebook.com/RepDuaneQuam/posts/447505132504779?__xts__\[0\]=68.ARBKpjBfqvYJCPM7dMAB7KnEDgkqDfp1pQcuIaEQyxeR99Eeu16uFnS-MDOIQIIfR0rAu8LyI9K4w_E9mvg5yYaeHBid0yWY-a60nAN-ZbtV6StHbh0JdQ9KwvADIj0BTn3JFiVEPbNiTEbgpPtqQ_kLauo7e4JhL4rOapRmmTyapH-N6gqP2CNetJYRixVWXkrxs8hGKH4Oxa4038lvc2XfFD8LNfU3721UK1wgp2KlipouK92ffLhhC1C8iLJ8l6u_Q5mzoJpkQE22QhqCCcoC6wXy7UdkyAiU3UBjUQ-ktXxC0v_XIoIL4SOAtwehSbVGAe4kR9h6mpmz9g&__tn__=-R](https://www.facebook.com/RepDuaneQuam/posts/447505132504779?__xts__[0]=68.ARBKpjBfqvYJCPM7dMAB7KnEDgkqDfp1pQcuIaEQyxeR99Eeu16uFnS-MDOIQIIfR0rAu8LyI9K4w_E9mvg5yYaeHBid0yWY-a60nAN-ZbtV6StHbh0JdQ9KwvADIj0BTn3JFiVEPbNiTEbgpPtqQ_kLauo7e4JhL4rOapRmmTyapH-N6gqP2CNetJYRixVWXkrxs8hGKH4Oxa4038lvc2XfFD8LNfU3721UK1wgp2KlipouK92ffLhhC1C8iLJ8l6u_Q5mzoJpkQE22QhqCCcoC6wXy7UdkyAiU3UBjUQ-ktXxC0v_XIoIL4SOAtwehSbVGAe4kR9h6mpmz9g&__tn__=-R).

the voter registration applications from which data are obtained and entered into the SVRS and into specific data fields:⁵⁰

The county auditor is the chief registrar of voters and the chief custodian of the official voter registration records in each county. In this capacity, the county auditor may be the source of voter registration materials and is the recipient of completed voter registration applications (VRAs). SVRS, accessible to all county auditors, facilitates voter registration and provides a central database of voter registration information from around the state.⁵¹

While the Secretary controls the SVRS electronic database “on servers within the Secretary of State’s Office”⁵²—the data fields are maintained by the counties:⁵³ “the county auditors are responsible for maintaining the data within the fields.”⁵⁴

VI. Cilek argues in his summary judgment motion that § 201.091 is a limitation upon Minnesota’s 87 county auditors.

Soon after Poser’s deposition, each party moved for summary judgment. Cilek argued that the Secretary pointed to no state statute, federal law, or temporary classification that the public data requested of voters was nonpublic.⁵⁵ Cilek noted that Minnesota Statutes § 201.091, of which the

⁵⁰ Doc. No. 54; Poser Depo. Transcr. 7:1–19. (SJ-255.)

⁵¹ Doc. 14, Kaardal Aff. Ex. C. 2016 Cty. Auditors Elec. Guide 35, SJ-65.

⁵² *Id.* 6:15–16. (SJ-255.)

⁵³ *Id.* 6:22–25; 7:6–7. (SJ-255.)

⁵⁴ *Id.* 8:6–7. (SJ-255.)

⁵⁵ Doc. No. 96; Cilek S.J. Memo. (June 1, 2018).

Secretary then argued reclassified public data to nonpublic data,⁵⁶ was a statute limiting the authority of county auditors regarding the dissemination of SVRS data; the statute defined certain lists and their content. Thus, Minnesota’s 87 independent county auditors could disseminate certain data through a statutorily defined “master list” (originally referred to as a “precinct list” for each of Minnesota’s 87 counties) of registered voters rendered to public officials, or a “public information list” to others.⁵⁷

But, Cilek did not seek data from any county auditor or requested any “list” of “registered voters.” He sought public data directly from the Secretary of all voters from the SVRS. Cilek argued to the district court that the statutory interpretation of § 201.091 and applicability of the Data Practices Act to conclude that he should have access to the public data of every voter in the SVRS.⁵⁸

In contrast, the Secretary argued once again that the data sought was not public data. The Secretary contended that § 201.091 defined the “master list” as the SVRS and that the Data Practices Act did not classify SVRS data as public because § 201.091 “explicitly classifies it as not public.”⁵⁹

⁵⁶ Doc. No. 75; Sec. S.J. Memo. 5 (May 25, 2018).

⁵⁷ Doc. No. 97; Cilek S.J. Resp. Memo. 8 (June 13, 2018).

⁵⁸ Doc. Nos. 96 and 97; Cilek S.J. Memo. and S.J. Resp. Memo.

⁵⁹ Doc. Nos. 75 and 115; Sec. S.J. Memo. and S.J. Reply Memo (June 19, 2018).

VII. The district court grants Cilek’s summary judgment finding the public data requested as accessible under the Data Practices Act.

The district court granted Cilek’s motion for summary judgment.⁶⁰ The court concluded that nothing in § 201.091, subdivision 4 (governing public information lists) provided that the data Cilek requested are not public.⁶¹ The court opined that

If the Legislature intended to cloak the Secretary with...untethered discretion to choose the circumstances of data disclosure beyond the information in the Public Information List, it would have said so. It did not.”⁶²

The district court cited that “the Secretary at oral argument *agreed* that he lacks the discretion to classify data as not public and instead alleges that the statute itself reclassifies data as not public”:⁶³

But the Legislature did not in Section 201.091 or elsewhere expressly classify as private data not on the Public Information List. Both the Court *and the Secretary* are unaware of any Minnesota statute classifying data as not public without explicitly so stating.⁶⁴

The Secretary appealed.

⁶⁰ Doc. No. 118; Or. Granting S.J. (July 11, 2018). A granted stay has delayed the data disclosure pending appeal. Doc. No. 130; Or. Granting Stay (July 17, 2018).

⁶¹ Doc. No. 118.

⁶² *Id.* at 22.

⁶³ *Id.* (Original emphasis).

⁶⁴ *Id.* at 10.

VIII. The appellate court opined that (1) the legislature did not expressly state the SVRS data as nonpublic, and (2) §201.091 expressly contemplated the dissemination of data beyond that on the public information list.

Consistent with established principles of statutory interpretation and this Court’s precedent regarding legislative data classification, the appellate court opined that the Secretary incorrectly denied Cilek voter public data from the SVRS based upon the Secretary’s reliance on § 201.091. “If the secretary of state has unfettered discretion to disclose the contested data, which we need not decide, it would be nonsensical to conclude that the legislature has classified that data on individuals as private or confidential data.”⁶⁵ The appellate court went on to state that the “legislative branch is tasked with classifying government data.....The secretary of state may not assume a function of our legislature and classify data as not public when the legislature has not made that determination.”⁶⁶

While the appellate court wavered in its decision that the “legislature has not expressly stated that the data in the SVRS is not public”⁶⁷ and that “section 201.091, subdivision 4, expressly contemplates dissemination of data

⁶⁵ *Cilek v. Off. of Minnesota Sec. of State*, 927 N.W.2d 327, 332 (Minn. App. 2019), *review granted* (June 18, 2019) and *id.* at 332 *citing KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 789 (Minn. 2011).

⁶⁶ *Id.*

⁶⁷ *Id.*

beyond that included on the public information list,”⁶⁸ the court opined that “reading section 201.091 in conjunction with related statutory sections, an argument can be made that the legislature did not intend the bulk of the SVRS database to be accessible to the public”⁶⁹—no doubt prompting this Supreme Court review. Indeed, as Cilek had argued, the SVRS contains both public and nonpublic data, but he only sought what was and is public data. Regardless, the appellate court did rule that “construing the statute [§201.091] as a whole, [it] could not conclude that the legislature intended to classify the requested data [by Cilek and the Minnesota Voters Alliance] as not public.”⁷⁰

RELIEF REQUESTED

This Court should affirm the appellate court decision and declare that the public voter government data maintained in the SVRS are public data, unless and until the public data is legislatively expressly declared nonpublic.

SUMMARY OF ARGUMENT

There is no clash of interests between the operation of the Minnesota Government Data Practices Act, Chapter 13, and Minnesota Statutes §201.091 regarding the disclosure of public voter data from the Statewide Voter Registration System (SVRS) database. The SRVS is a single-purpose

⁶⁸ *Id.*

⁶⁹ *Id.* at 333.

⁷⁰ *Id.*

database—to retain Minnesota voter’s records as required under federal and state law. Each SVRS voter record contains 19 or more data fields. The data fields not only include information from voter registration applications, but government generated data and “values” such as a voter’s “status”—that is, identifying whether a voter is “active” or “inactive.”

While the Secretary controls the SVRS database, the 19 or more data fields contained within the voter’s record are updated by and are the responsibility of the counties. The “record” is *not* a separate entry but the compilation of the data fields of a single voter. The “record” is not classified as nonpublic. Only the separate and distinguishable data fields are classified as public or nonpublic.

The Secretary points to no state statute, federal law, or temporary classification that provides that the public voter data Cilek requested are nonpublic. Section 201.091, governing county auditor authority which the Secretary relies upon, distinguishes between registered voter lists and voter data. Cilek *did not* seek a “list” under § 201.091 from a county auditor. Cilek *did not* seek public data of just “registered voters” as the Secretary has defined “registered voters” (as only “active” and “challenged” voters)—he sought data for *all voters* with voter identification numbers from the SVRS. While *access* to voter lists is governed under § 201.091, the public data Cilek sought is governed by the presumption of accessibility under the Data Practices Act.

Under the Data Practices Act, all government data are presumed public. In contrast, § 201.091 is a statute of imposed limitations upon the 87 Minnesota county auditors governing the disclosure of certain SVRS data fields from lists only the auditors are statutorily allowed to disclose and to whom. For instance, the so-called “master list,” defined under § 201.091 subdivision 1 (once referred to as precinct lists), contains only limited data of county voters. In other words, there are 87 separate and distinct “master lists.” And the master lists are only available to public officials.

Likewise, a county auditor can provide “public information lists” under § 201.091 subdivision 4 which contains another set of limited public data of each voter *within their respective county*. The same subdivision allows the Secretary to provide the same public data as well as other public data from the SVRS for specific uses “related to elections, political activities, or in response to a law enforcement inquiry from a public official concerning a failure to comply with any criminal statute or any state or local tax statute.”

Under § 201.091, as limitations to county official authority, neither county list—the master list, which is unavailable to Cilek since he is not a public official, or the public information list, which Cilek did not request—contains the essential public data fields in dispute, such as, voter status, the reason for the status, voter status history, voter status changes, and the reasons for the changes. Hence, a Data Practices Act request *to the Secretary*

for public data of voters from the SVRS—*not the county auditor*—obligates him to provide the public voter data.

Section 201.091 is not a recodification of presumed government public data to non-public data. If it were, the Legislature would have expressly stated so. It is, however, expressed restrictions of authority regarding SVRS data imposed upon county officials.

Moreover, if this Court accepts the Secretary’s notion that all data other than that found in a county’s public information list is nonpublic, then why would the Legislature provide a list of restricted—non-public data—under § 201.091, subdivision 9? Under § 201.091, subdivision 9, the Legislature identified six data fields as nonpublic that must not be part of any list provided: “a voter’s date of birth, or any part of a voter’s Social Security number, driver’s license number, identification card number, military identification card number, or passport number.” Hence, unless otherwise expressly stated by law, all other data fields in the SVRS are public.

Nevertheless, even under § 201.091, subdivision 4, in lieu of a county providing the limited data fields found in a public information list, the statute allows for the Secretary to provide all other public data not explicitly listed in the public information list from the SVRS when requested. The word “may” found under subdivision 4 is the legislative authority to the Secretary to disclose data which county officials cannot: “The secretary of state may provide

copies of the public information lists and other information from the statewide registration system for uses related to elections, political activities....” Moreover, while a county may “adopt reasonable rules governing access to the list,” the same authority is not given to the Secretary. That authority is already governed by the Data Practices Act because he is to provide public data from the SVRS for “uses related to elections, political activities....”

In other words, a Data Practices Act request made directly to the Secretary allows for the disclosure of more than what the county auditor may disclose even under § 201.091, subdivision 4. Regardless, the Secretary is subject to the Data Practices Act’s presumption of government data being public unless expressly statutorily reclassified as nonpublic. The suggestion that, by operation of § 201.091, subdivision 1 and, particularly, subdivision 4 (citing that the Secretary “may” disclose other information from the SVRS), the Legislature reclassified all SVRS public data as nonpublic, contradicts the intent of the Legislature and would render the Data Practices Act meaningless.⁷¹

⁷¹ When the Secretary refuses to disclose public data he is necessarily reclassifying the data as nonpublic.

I. De novo review of the Data Practices Act and § 201.091 will find that Cilek is entitled to public data of voters held within the SVRS database.

The interpretation of a statute is a question of law that this Court will review de novo.⁷²

The “goal of all statutory interpretation is to ‘ascertain and effectuate the intention of the legislature.’”⁷³ The first step in statutory interpretation is to “determine whether the statute's language, on its face, is ambiguous.”⁷⁴ In determining whether a statute is ambiguous, the court will “construe the statute's words and phrases according to their plain and ordinary meaning.”⁷⁵ A statute is only ambiguous if its language is subject to more than one reasonable interpretation.⁷⁶ Multiple parts of a statute may be read together so as to ascertain whether the statute is ambiguous.⁷⁷

When the Court concludes that a statute is unambiguous, the Court’s “role is to enforce the language of the statute and not explore the spirit or

⁷² *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016) *citing In re Welfare of J.J.P.*, 831 N.W.2d 260, 264 (Minn. 2013).

⁷³ *Christianson v. Henke*, 831 N.W.2d 532, 536–37 (Minn. 2013) quoting *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 836 (Minn. 2012) (quoting Minn. Stat. § 645.16 (2012)).

⁷⁴ *Larson v. State*, 790 N.W.2d 700, 703 (Minn. 2010) (*quoting Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001)).

⁷⁵ *In re the Fin. Responsibility for the Out-of-Home Placement Costs for S.M.*, 812 N.W.2d 826, 829 (Minn.2012) quoted in *Martin v. Dicklich*, 823 N.W.2d 336, 342 (Minn. 2012).

⁷⁶ *Id.*

⁷⁷ *Dicklich*, 823 N.W.2d at 344.

purpose of the law.”⁷⁸ Alternatively, if the court concludes that the language in a statute is ambiguous, then “[the court] may consider the factors set forth” by the Legislature for interpreting a statute.⁷⁹

Likewise, a statute must be construed in accordance with the statutory definition of the included term.⁸⁰ Where the legislature has defined a term, the court “may not look at the term’s common or trade usage to determine its meaning within the statute.”⁸¹

Legislatures have the power to define terms used in statutes. Those definition clauses are binding on the courts.⁸² Those statutory definitions of words furnish official and authoritative evidence of legislative intent and meaning; and, therefore, they should be given controlling effect⁸³ as our courts have recognized. “Statutory definitions of words used elsewhere in the statute furnish authoritative evidence of the legislature’s intent and meaning.”⁸⁴

⁷⁸ *Caldas*, 820 N.W.2d at 836.

⁷⁹ *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009); *see also* Minn. Stat. § 645.16 (1)–(8) (setting out factors for statutory interpretation).

⁸⁰ *St. George v. St. George*, 304 N.W.2d 640, 643 (Minn. 1981).

⁸¹ *Cease and Desist Order Issued to D. Loyd*, 557 N.W.2d 209, 212 (Minn. App. 1996), *citing* Minn. Stat. § 645.08 (1) (“requiring that words defined in chapter be construed according to such definition”).

⁸² *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947) *Von Weise v. Comm’r*, 69 F.2d 439 (8th Cir.) *cert. denied*, 292 U.S. 655 (1934); *see also In re Monrovia Evening Post*, 199 Cal. 263, 248 Pac. 1017 (1926).

⁸³ *Id.*

⁸⁴ *All Parks Alliance for Change v. Uniprop Manufactured Hous. Communities Income Fund*, 732 N.W.2d 189, 194 (Minn. 2007) *citing Bd. of Ed. of Minneapolis v. Sand*, 227 Minn. 202, 210, 34 N.W.2d 689, 694 (1948).

Thus, “[s]uch internal legislative construction is of the highest value and prevails over executive or administrative construction and other extrinsic aids.”⁸⁵

II. All state government data is presumed public under Minnesota’s Data Practices Act.

The Secretary seeks to create authority to withhold public data contained within the SVRS database, which he does not possess.⁸⁶ Furthermore, the SVRS public data sought does not lie outside the scope of the Data Practices Act. The Secretary’s core argument lies within his proposition that all voter data fields are nonpublic as reclassified “by section 201.091 as a matter of law”⁸⁷ unless available through a defined *county auditor* public information list identifying only certain data fields within the SVRS. They are not.

Minnesota Statutes § 13.01, as amended in 1991, established the legislature’s manifest intent that the presumption of government data is classified as public:

This chapter regulates the collection, creation, storage, maintenance, dissemination, and access to government data
....*It establishes a presumption that government data are*

⁸⁵ Norman J. Singer and J.D. Shambie Singer, *Statutes and Statutory Construction* (Sutherland Statutory Construction) Vol.1A, 607-09 § 27:2 (7th ed. West 2009). *State v. Peck*, 773 N.W.2d 768, 772 (Minn. 2009); *see also* Minn. Stat. § 645.16 (1)–(8) (setting out factors for statutory interpretation).

⁸⁶ Sec. Princ. Br. 8.

⁸⁷ *Id.*

public and are accessible by the public for both inspection and copying unless there is a federal law, a state statute, or a temporary classification of data that provides that certain data is *not public*.

Minnesota Statutes § 13.03 reiterates the legislative public policy to government data as mandatory:

All government data collected, created, received, maintained or disseminated by a government entity *shall be public* unless classified by statute, or temporary classification pursuant to section 13.06, or federal law, as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential.⁸⁸

As previously noted, the SVRS is a federal-mandated and state-mandated collection of data maintained by the Secretary (through the assistance of county auditors) that are derived from voter registration applications and that contain government created data of every registered voter within that database. The public data fields found within each voter record *does not* include any data relating to a person's ballot. It does not and cannot contain any sacracant information of whom the person voted for or decisions on ballot questions. It contains over 5.5 million records of voters, each with a one-of-a-kind unique identification number.

⁸⁸ Emphasis added; Doc. 12, Ex. A; (SJ-3.)

Each SVRS voter record contains no less than 19 data fields relating to a person who registered to vote.⁸⁹ The data fields include public and nonpublic data.⁹⁰ A “record” within the SVRS “is a compilation of data that exists in the database [the SVRS] that can be attributed to an individual voter.”⁹¹ The record is *not* maintained as a “list.”⁹² And, the records do not exist elsewhere other than with the Secretary’s Office.⁹³

Nothing denotes an individual voter’s SVRS “record”⁹⁴ as a compilation of data as one “field” or classified as a “nonpublic record.”⁹⁵ In other words, it is not the “record” that is classified, but the separate data fields within;⁹⁶ some data fields are public and others non-public⁹⁷ such as the voter’s full date of birth, driver’s license, or social security numbers.⁹⁸

⁸⁹ Doc. No. 8; Poser Aff. ¶¶7 and 10; (SJ-280–83); Doc. No. 54, Transcr. 7:4–15. (SJ-255.)

⁹⁰ Doc. No. 54, Transcr. 10:23–25; 11:1–7. (SJ-256.) “Not public data” is defined as “any government data classified by statute or federal law, or temporary classification as confidential, private, nonpublic, or protected nonpublic.” Minn. Stat. § 13.02, subd. 8a. “Nonpublic” data is defined as “data not on individuals made by statute or federal law applicable to the data: (a) not accessible to the public; and (b) accessible to the subject, if any, of the data.” *Id.* subd. 9.

⁹¹ Doc. No. 54, Transcr. 6:2–4. (SJ-255.)

⁹² *Id.* 6:9–19. (SJ-255.)

⁹³ *Id.* 6:17–19. (SJ -255.)

⁹⁴ *Id.* 8:6–7. (SJ-255). “The county auditors are responsible for maintaining the data within the fields.”

⁹⁵ *Id.*

⁹⁶ *Id.* 7:16–19 (data within a record is referred to as a “data field”). (SJ-255.)

⁹⁷ *Id.* 10:23–25; 11:1–7. (SJ-256.)

⁹⁸ *Id.* 11:1–7. (SJ-256.)

Because the government-created data is presumed public under the Act, it necessarily includes other created data SVRS fields such as the current voter’s “status” as “inactive,”⁹⁹ “active,” “deceased,” “deleted,” “challenge felony,” “challenge citizenship,” “challenge guardianship,” “challenge address,” or “postal verification card returned.”¹⁰⁰ The voter status data field affects whether the voter is permitted to cast a ballot.¹⁰¹ While the Secretary created these data fields—government data—they are maintained by the counties.¹⁰² But, there is no basis in law to declare them nonpublic under either Chapter 13 or §201.091.¹⁰³

Under the Data Practices Act, there are restricted data fields—nonpublic—such as found under Minnesota Statutes §§13.355 (Social Security numbers), 13.356 (data considered as “private data” on an individual “collected, maintained, or received by a government entity for notification purposes or as part of a subscription list for an entity's electronic periodic publications”), and 13.37 (general nonpublic data identified as “security information”). This includes “the disclosure of which the responsible authority determines would be likely to substantially jeopardize the security of information, possessions,

⁹⁹ Doc. No. 8, Poser Aff. ¶ 10.

¹⁰⁰ Doc. No. 54, Transcr. 9:1–2, 7–13. (SJ-255.)

¹⁰¹ *Id.* 19:6–11. (SJ-258.)

¹⁰² *Id.* 8:6–7, 15–16, 17–25; 9:1–14. (SJ-255.)

¹⁰³ *See, id.* 14:13–16. SJ-257; 25: 6–11. (SJ-259.)

individuals or property against theft, tampering, improper use, attempted escape, illegal disclosure, trespass, or physical injury.”¹⁰⁴

Thus, harm could come to a voter if the person’s private data such as date of birth, driver’s license, military identification card number, or passport number was disclosed; consider identity theft for instance. Yet, the Secretary seeks to reclassify all SVRS public data without specifically expressed cited state or federal authority and without explaining how the public data sought would pose a security issue.

There is nothing in the record to support any allegation of harm to voters. The public data are “facts.” The Secretary is be unable to directly connect any disclosure to any specific harm to any specific voter specifically associated with disclosing public data.¹⁰⁵ The fact that the Secretary admits to any inaccuracies in the SVRS is purely that of his or the counties’ own doing and *should not* be facts or issues to block public scrutiny as the Legislative Auditor’s reports reflect the need for scrutiny of our election processes.

Further, if harm could be found in the disclosure of public data the course of action is for the Legislature to decide, as a matter of public policy, to reclassify the public data to non public.

¹⁰⁴ Minn. Stat. §13.37. *See also e.g.* Minn. Stat. §13.69.

¹⁰⁵ *See* Minn. Stat. §13.37.

III. Sections 201.091.01 through .09 provides for limited county auditor authority regarding the distribution of lists regarding registered voters.

There is no expressed provision in §201.091 reclassifying all SVRS data fields. The Secretary presumes an intent of law where none has been expressed. Instead, §201.091 governs what *county auditors* may do in providing lists to certain people—public officials and Minnesota voters—and that which the Secretary may do under the same statute:

Each *county auditor* shall prepare and maintain a current list...known as the master list ...made only available to public officials....¹⁰⁶

...

The *county auditor* shall make available for inspection a public information list¹⁰⁷ [compare]

The secretary of state may provide copies of public information lists and other information from the [SVRS]....¹⁰⁸

Cilek's request was made to the Secretary, not a county auditor, and under the Data Practices Act, not under §201.091.

Even if Cilek's request fell under §201.091, subdivision 4, he is entitled to *all* public information, *but for* which the Legislature expressly and specifically identified as nonpublic under Chapter 13 (which also encompasses

¹⁰⁶ Minn. Stat. §201.091, subd. 1.

¹⁰⁷ *Id.*, subd. 4.

¹⁰⁸ *Id.*

data found under subdivision 9 as previously noted): “a voter’s date of birth, or any part of voter’s Social Security number, driver’s license number, identification card number, military identification card number, or passport number.” Cilek did not request any of these nonpublic data or any other nonpublic data protected by the current law.

Here, the Secretary cannot and has not identified *any other statute*—federal or state—that expressly states that *all* other public data within the SVRS are or have been reclassified as nonpublic. Moreover, if the legislature had wished to reclassify all public data in the SVRS as nonpublic it would have had to expressly so state and could have under §201.091, but *did not*. The Secretary cannot prohibit the release of the public data requested unless the data are classified or reclassified as not-public or nonpublic.¹⁰⁹

As this Court found in *Harlow v. State Dept. of Human Services*, if there is no federal law or temporary classification that provides that the data is not public, then the data remains public.¹¹⁰ The Data Practices Act requires that public data Cilek requested be released.

In 2018, the Legislature *did* change the classification of a voter’s political party selection who voted in a presidential primary election and expressly

¹⁰⁹ *Harlow v. State Dept. of Human Services*, 883 N.W.2d 561, 568 (Minn. 2016) (rejecting classification of data as private in absence of federal law or temporary classification providing that data is not-public.)

¹¹⁰ *Id.*

classified it as “private data ...as defined under section 13.201, subdivision 12....”¹¹¹ Thus, the public information lists from county auditors and the Secretary are prohibited from this data’s disclosure (but, oddly, are available to chairs of major political parties). This affirms that the Legislature has retained the sole authority to convert former public data to nonpublic data. The state of the law at the time of Cilek’s Data Practices Act request requires the Secretary to disclose the public data of the voters as requested.¹¹² As this Court opined, “[w]e interpret the phrase ‘law applicable to the data at the time’ a request is made as requiring the government entity to examine whatever provision within the Data Practices Act is applicable to the data at the time the request is made....” *Id.*

IV. If Cilek’s Data request fell under the provisions of § 201.091 he remains entitled to the public data sought under Chapter 13.

A. The Secretary does not have discretion to deny access to public SVRS data.

Sections 201.091.01 through .09 are not ambiguous. The provisions proscribe the limited *county auditor* authority regarding the dissemination of

¹¹¹ Minn. Stats. 2018, § 201.091, subd. 4a.

¹¹² *Harlow*, 883 N.W.2d at 350.

data either through a defined “master list” (originally referred to as a “precinct list”)¹¹³ to public officials or a “public information list” to others.

“I request access to ...data contained in the Statewide Voter Registration System...The information requested includes, but is not limited to the following *voter data*...”¹¹⁴

So wrote Cilek to the Secretary of State. Although the request was made under Chapter 13, even if subject to §201.091 provisions, Cilek is entitled to the public data sought by operation of Chapter 13.

Minnesota Statutes § 13.607, subdivision 6, provides that §201.091 governs “access to registered voter lists”—contrary to the Secretary’s *summary* of the same provision “that voter registration data ‘[are] governed by section 201.091.’”¹¹⁵ The Data Practices Act controls the classification of data.

Section 13.01, subdivision 5(b) states that “[t]hose sections [as identified in 5(a)] are governed by the definitions and general provisions in section 13.01 to 13.07 and the remedies and penalties provided in sections 13.08 and 13.09, except...(2) as specifically provided otherwise by law.” But, §201.091 does *not reclassify all SVRS* public voter data fields as nonpublic.

¹¹³ Doc. No. 98, Ex. BB, Laws of Minnesota for 1973, Chap. 676 at 1794. (SJ-484.)

¹¹⁴ Doc. No. 1, Ex. A (Cilek letter to the Secretary of State (July 21, 2017)).

¹¹⁵ Sec. Princ. Br. 8.

A reading of the statute’s language shows first, that “other information” from the SVRS is available to the public through the Secretary, and second, other public voter data are available despite county auditor restricted *list availability*.

For instance, the master list, identified under § 201.091, subdivision. 1, contains registered voters in “each precinct in the county,” which must show “the name, residence address, and date of birth....” Because there are 87 Minnesota counties, there are 87 “master lists.” A master list is only available for “purposes related to election administration, jury selection, and in response to law enforcement inquir[ies] concerning a violation of ... any criminal statute” Notably, the list contains at least one category that is otherwise restricted under §201.091, subdivision 9—date of birth. Because this defined “master list” is “only available to public officials,” it is not available to a registered Minnesota voter.

Under 201.091, subdivision 4, a county auditor must make available for “inspection” a public information list. This list differs from the master list as it provides for the name, address, year of birth, and voting history of each registered voter in the county.” However, subdivision 4 also states that the Secretary “may provide copies of the public information lists:

The secretary of state may provide copies of the public information lists

This demonstrates a concurrent authority between the Secretary and county auditors regarding public information lists which makes sense. Note the plural “lists” in the phrase “public information lists” as compared above to the county auditor’s singular “public information list.” Minnesota has 87 counties and a request for an information list from all counties through the Secretary is more efficient than for the public making 87 individual requests to the counties.

In other words, while the data fields for each county are the same within the SVRS, the data of one county are independent from other counties. The “may” allows the Secretary to aggregate the data requested from multiple counties into a single list. As the Legislature found, the 1990 law making changes to § 201.091 now in dispute, was a “housekeeping bill” to “make it easier to do a lot of the work that is required for the Secretary of State’s office and the County Auditors.”¹¹⁶

Hence, the permissive “may” the Secretary speaks of is not language of *unfettered discretion* to deny public data from the SVRS¹¹⁷ but of concurrent authority to disclose data within the statutorily defined public information list *including* other public voter data from the SVRS.

¹¹⁶ Doc. No. 95; Second Cilek Aff. (May 25, 2018) (Senate Elections and Ethics Comm. (Mar. 6, 1990).

¹¹⁷ Sec. Princ. Br. 20–22.

“May” means “expressing permission.”¹¹⁸ “May” cannot be construed to grant absolute discretion to ignore the force of the Data Practices Act. If the Legislature had intended to provide the Secretary with the unfettered discretion to deny access to public SVRS data, the statute would have read “the Secretary, notwithstanding any other statute, may or may not provide copies of information from the SVRS.” The Legislature did not do so. To endorse the Secretary’s position would undermine the Legislature’s intent as expressed under § 13.01, subdivision 3 of the Act.¹¹⁹

Notably, the Secretary ignores the legislative intent under the Data Practices Act enabling the Secretary to engage in discriminatory decision-making regarding public SVRS voter data—as a possible political weapon—providing data to one party over that of another. This type of behavior, albeit in a different context, was exhibited by the Secretary with the Presidential Advisory Commission on Election Integrity refusing to provide to the Commission the requested data.¹²⁰

¹¹⁸ *New Oxford American Dictionary* 1082 (Angus Stevenson and Christine A. Lindberg eds, Brd. Ed. 2010, Oxford University Press).

¹¹⁹ Doc. No. 80; Ex. 4. (SJ-142.)

¹²⁰ Although the Presidential Commission did not ask for the data under Minnesota’s Government Data Practices Act (nor could it), the Secretary specifically cited to Minnesota Statutes § 201.091, subdivision 4 as the source of his authority. Doc. No. 54, Ex. 4.

B. Subdivision 4 specifically grants authority to the Secretary to provide SVRS public voter data and he must do so under Chapter 13.

Not only can requests be made of the Secretary for public information lists, § 201.091, subdivision 4 specifically states that data requested from the SVRS can also be made through the Secretary:

The secretary of state may provide copies of ... other information *from the statewide registration system...*

Requests to *examine or obtain information* from the public information lists *or the statewide registration system* must be made and processed in the manner provided in the rules of the secretary of the state.¹²¹

Note the “or.” There are two identified types of requests for information—one related to *lists of registered voters* and the second, from the *SVRS*, itself of all other *public data*. The county auditor’s authority is limited to the disclosure of a limited number of data fields. But, when data is requested from the SVRS, the Secretary is not limited, but for nonpublic SVRS data.

There is no ambiguity between or within the Data Practices Act and Minnesota Statute § 201.091, subdivision 4, regarding public data obtained from the SVRS when requested from the Secretary. The county lists and access

¹²¹ Minn. Stat. § 201.091, subd. 4 (emphasis added).

to lists of registered voters serve one purpose.¹²² Access to public data within voter records serves another.

Indeed, the Data Practices Act and § 201.091 are in complete harmony. Section 201.091 authorizes the Secretary to release “other information” from the SVRS and the Data Practices Act requires that “other information” be released unless it is expressly classified as not public or nonpublic data. Even if Cilek sought data through § 201.091, subdivision 4, under the Data Practice Act, he would be entitled to all public voter SVRS data. And, Chapter 13 governs the Secretary as he has admitted as his public policy: “we must give public data to anyone who asks; it does not matter who is asking for the data or why....”¹²³

**C. Subdivision 9 defeats the proposition that §
201.091 reclassified all SVRS data as
nonpublic.**

Moreover, a list provided for public inspection under subdivision 4 of § 201.091, subdivision 9 reveals the Legislature’s declaration of what personal-private data are nonpublic: a voter’s birth date (month and day); social security numbers; driver’s license numbers; identification card numbers; military

¹²² Lists serve for instance, the purpose of facilitating candidate contacts with potential voters. *See* www.sos.state.mn.us/media/2641/registered-voter-list-request-form.pdf, e.g., walking list.

¹²³ Sec. of State Data Practices Policy for Data Subjects, <https://www.sos.state.mn.us/media/1530/data-practices-policy-for-data-subjects.pdf> (last visited Sept. 18, 2018).

identification numbers; or passport numbers. If the Legislature desired any other data field to be nonpublic, it would have said so, but did not. The Legislature could have stated that “all SVRS data are nonpublic *with the exception of;*” but did not.

The Secretary’s so-called “four broad categories...encompassing the entirety of voter registration data within the SVRS”¹²⁴ are “categories” of, at times, overlapping “groups” of data prepared by counties through lists. But, “categories” *are not* individual SVRS data field classifications. Subdivision 9 expressly denotes this concept of individual data field classifications when it identifies certain data as “restricted” or nonpublic data. What we do know is that the SVRS single database consists of individual voter records containing over 19 data fields, including information from voter registration applications and governmental-created data classified as either public or nonpublic data under Chapter 13. There is no state or federal law reclassifying all public data within the SVRS as nonpublic.

When interpreting statutes, courts presume the legislature acts with full knowledge of previous statutes and existing case law.¹²⁵ “The rules of statutory construction provide that where there is irreconcilable conflict between

¹²⁴ Sec. Princ. Br. 8.

¹²⁵ *Pecinovsky v. AMCO Ins. Co.*, 613 N.W.2d 804, 809 (Minn.App.2000), *review denied* (Minn. Sept. 26, 2000).

statutes, one general and the other special or particular in scope, the particular controls over the general ‘unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail.’”¹²⁶ There is no irreconcilable conflict between § 201.091 (controlling county-created lists) and Chapter 13 (governing data classifications, here, SVRS data fields).

V. Subdivision 4 does not exclude all SVRS public data.

The Secretary also relies upon *Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 718 (Minn. 2014) for the proposition of statutory interpretation “‘expressio unius est exclusio alterius’—the expression of one thing is the exclusion of another” to prevent the disclosure of other SVRS public data to Cilek.¹²⁷ The case dealt with the interpretation of §604.02 (joint and several liability) finding that an uncollectible share of liability for a church visitor's damages could not be reallocated to a diocese that was found severally liable for injuries.

The statutory principle is not applicable to §201.091 for at least two reasons. First, the statute does not expressly reclassify all SVRS data as nonpublic with the exception of data on a county auditor’s authorized distribution of data on a public information list under subdivision 4. Second,

¹²⁶ Minn. Stat. 645.26, subd. 1; *Judd v. Landin*, 1 N.W.2d 861, 862 (Minn. 1942); *Rosenquist v. O’Neil & Preston*, 245 N.W. 621 (Minn. 1932).

¹²⁷ Sec. Princ. Br. 13.

subdivision 4 explicitly includes all SVRS data as being available through the Secretary. The Legislature contemplated the further disclosure of public data *beyond* the limitations of the public information list with the phrase “The secretary of state may provide copies of ... other information *from the statewide registration system....*” Hence, subdivision 4 is not an expression of one thing to the exclusion of another. Here, it is inclusive of all public voter data.

VI. “Registered voters” includes all voters within the SVRS.

Cilek did not limit his Data Practices Act request to “registered voters.” He identified voter as those with “voter identification numbers.”¹²⁸ The Secretary asserts that the data is nonpublic and unavailable if a voter’s status is identified as, for example, “inactive.”¹²⁹ Indeed, while § 201.091, subdivision 4, defines a public information list to include “each registered voter in the county,” nowhere can the Secretary point to the data of an “inactive” as nonpublic data. We contend he cannot under the Data Practices Act.

A person applies to register to vote only one time: “An individual may use a voter registration application to apply to register to vote in Minnesota or to change information on an existing registration.”¹³⁰ Under Minnesota

¹²⁸ See Doc. No. 1, Ex. A.

¹²⁹ Sec. Princ. Br. 16.

¹³⁰ Minn. Stat. § 201.071, subd. 1(8).

Statutes §201.022 (statewide registration system), for every person who is legally registered, the Secretary's office assigns a unique identifier number: "[The SVRS must] assign a unique identifier to each legally registered voter in the state."

As the Secretary's Voter Guide to county auditors explains:

Voter registration begins when an individual submits a completed voter registration application. "Applications" for new registration or to update one's registration information might be received by the county auditor in paper or electronic format. Voters may register anytime up to the 20 days before the next election or at their polling place during Election Day.

A voter becomes "inactive" under certain circumstances, such as failing eligibility test, he or she is *never removed* from the SVRS. When a person becomes "inactive," it becomes part of a person's "voting history." As the Secretary denotes, a person is inactive if he or she has not cast a vote in the last four years or moved.¹³¹ Moreover, to become active, the inactive voter merely follows the procedure to *change his or her status*. There is a *change in information* by the registrant through another application form. In other words, the registrant's data and status is merely *updated*. No new unique voter identification number is assigned:

A voter's registration remains current until their name changes or address changes, or they have not voted in the past four years. Each registered voter has a single voter

¹³¹ Doc. No. 8, Posner Aff. ¶10.

record in SVRS and this record is updated after the voter submits a new VRA with updated information or the record is updated through the COA process. Doing so ensures that a voter only has one active voter registration record in SVRS.¹³²

There is no rule or regulation or other statute that defines “voting histories” or “registered voter” under Minnesota Statutes § 201.091, subdivision 4. Because the data is also part of the SVRS, the meaning of each is addressed here.

The SVRS is a “large collection ofdata.”¹³³ Minnesota Statutes § 201.021 shows that the Secretary is responsible for this statewide system of data collection on every legally registered voter in the state:

A permanent system of voter registration by county is established, with a single, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the state level that contains the name and registration information of every legally registered voter in the state, and assigns a unique identifier to each legally registered voter in the state. The interactive computerized statewide voter registration list constitutes the official list of every legally registered voter in the state. The county auditor shall be chief registrar of voters and the chief custodian of the official registration records in each county. The secretary of state is responsible for defining, maintaining, and administering the centralized system.

¹³² 2016 County Auditor Voter Election Guide 32 at 7.3; Doc. No. 14, Kaardal Decl. Ex. C; *see also* Minn. Stat. §201.071.

¹³³ Doc. No. 7, Sec. of State Memo. to Dismiss 6.

The Secretary has also defined section 7.5 of the County Auditor’s Election Guide, the role of the county auditor as the chief custodian of the voter registration records in the SVRS:

The county auditor is the chief registrar of voters and the chief custodian of the official voter registration records in each county. In this capacity, the county auditor may be the source of voter registration materials and is the recipient of completed voter registration applications (VRAs). SVRS, accessible to all county auditors, facilitates voter registration and provides a central database of voter registration information from around the state.¹³⁴

Based on this scheme of statutory and regulatory mandates, there should be little question that the public data accumulated is subject to Chapter 13.

VII. Non-disclosure of SVRS public data is inconsistent with this Court’s previous ruling of single purpose databases.

In *KSTP-TV v. Metro. Council*¹³⁵ this Court addressed the Metro Transit’s reason for maintaining certain data (video recordings). Metro Transit argued that the data maintained was for a variety of purposes (referred to as the “multiple-purpose reading”), while *KSTP-TV* argued it was for one purpose (referred to as “single-purpose reading.”)¹³⁶ This Court was concerned that if it adopted the “multiple-purpose reading” it “would allow government

¹³⁴ Doc. No. 14, Ex. C.; 2016 Cty. Auditors Elec. Guide 35, 7.5.

¹³⁵ *KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 343 (Minn. 2016).

¹³⁶ *Id.*

entities to shield data from public view simply by establishing that one of the reasons for preserving the data is or was an employee of”¹³⁷ The Court ruled that the single-purpose reading, under the Data Practices Act, was the better interpretation of the statute and the Data Practices Act’s scope, “making clear that it covers ‘[a]ll government entities,’ [and] contains an explicit statutory ‘presumption that government data are public and are accessible by the public for both inspection and copying.’”¹³⁸ “The single-purpose reading also avoids a conflict among various provisions of the Data Practices Act...it prevents situations in which particular data is simultaneously public and private under different provisions of the ...Act.”¹³⁹ This is exactly what occurs in the present case. There is no question the SVRS records of voters contain both public and nonpublic data fields.

Here, we contend that the SVRS has a single purpose. It is a database of all Minnesota voter records of over 5 million. The governing statute creating the SVRS, Minnesota Statutes § 201.022 subdivision 1, states the purpose: “a statewide voter registration system to facilitate voter registration and to provide a central database containing voter registration information from around the state.”

¹³⁷ *Id.* at 347.

¹³⁸ *Id.*

¹³⁹ *Id.*

The second question this Court addressed was the “when” at what point in time is the data classified.¹⁴⁰ It concluded that because of the statute’s use of the word “maintained,” it referred to the “existing state’ of the data—that is, the form of the data at the time a request to access is made,”¹⁴¹ not the initial classification of the data.¹⁴² The statutory provision in *KSTP-TV* at issue was § 13.43, subdivision 1: “government data on individuals *maintained because* the individual is or was an employee of ... a government entity.”¹⁴³

Similar language is found under § 201.022, subdivision 1 regarding the SVRS:

The secretary of state shall *maintain* a statewide voter registration system to facilitate voter registration and to provide a central database containing voter registration information from around the state.¹⁴⁴

Here, the Secretary cannot identify and has not identified *any other statute*—federal or state—that expressly states that *all* other public data within the SVRS are or have been reclassified as nonpublic. The state of the law at the time of Cilek’s Data Practices Act request requires the Secretary to disclose the public data of the voters as requested. Thus, government created

¹⁴⁰ *Id.* at 348.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 345 (original emphasis).

¹⁴⁴ Emphasis added.

data within the SVRS are subject to disclosure, including voter statuses and voting histories.

Registered individuals are assigned “voter statuses,” that include “Active,” “Inactive,” “Challenged,” and “Deceased.”¹⁴⁵ As noted, when a registered voter *subsequently* completes a voter registration application, their voter status or other information is updated.¹⁴⁶ The person’s unique and permanent identification number does not change. No registered person is ever removed from the SVRS. As the Secretary admits, over 5 million registration records of voters are in the SVRS.¹⁴⁷ Within each of those records at least 19 data fields exist.¹⁴⁸

In short, an update of a voter’s status category—data field—whether active, inactive, challenged, or deceased, does not result in the removal of the voter from the SVRS.¹⁴⁹

VIII. “Voting history” which includes distinct fields such as status, is distinct from a “voter’s history” as it pertains to when a voter has cast a ballot in an election.

The Secretary also failed and refuses to provide the “voting history” of a voter. Voting history is available in a public information list under §201.091,

¹⁴⁵ Doc. No. 8, Poser Aff. ¶10.

¹⁴⁶ Minn. Stat. §201.071, subd. 1(8).

¹⁴⁷ Doc. No. 8, Aff. ¶6.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* ¶7.

subd. 4. Voting history is found as mandatory data information which would include for instance, a voter's status. "Voting history" is not the same as "voter history." In other words, "voting history" means "the past events connected with someone ... a continuous record of past events...."¹⁵⁰ The Secretary cannot cite to any rule, regulation, or statute that excludes voter status as data not within a person's "voting history." Notably, the compilation of data reflecting "voting history" is what election officials have done in the SVRS, not the voter. It is the county auditors who change or update voter status. In contrast, "voter history" is the act of the person casting a vote.

Indeed, the Secretary's list of data items within the SVRS confirms the distinction between "voter history" and "voting history." Posner testified that "voter history" refers to the list of elections in which the registrant has cast a vote: "Voter history (i.e., list of prior elections in which the voter has cast a vote)." In other words, "voter history" is a distinct data field within the voter's record as one of several components of "voting history" which includes data fields such as voter identification and voter status.

In the non-published decision *McGrath v. Minnesota Sec. of State*, A11-613, 2011 WL 5829345, at *2 (Minn. App. Nov. 21, 2011), the appellate court referenced "voting history:"

¹⁵⁰ *New Oxford American Dictionary* 381.

Minnesota law requires that, after every election, the county auditors post the “voting history” within six weeks for every person who voted in the election. Minn. Stat. § 201.171 (2010). A “voting history” is the record of whether a specific voter has voted in specific elections.

But, unpublished decisions of the appellate court are not precedential.¹⁵¹

Looking at § 201.171, voting history is more than whether a voter cast a vote. It is merely a part of the whole, merely an event. For example, as the polling rosters revealed, the county election officials determine the eligibility of voters. This is seen with the crossing off of the demarcation of “Challenged: Felony” and the person voting accordingly.¹⁵² The event, a change in the voter’s status, is a part of that person’s voting history.

Further, the county engages in list maintenance—updating—to ensure registered voters remain on the list regardless of status, reflecting the actions of the county or Secretary, *not* the voter:

After the close of the calendar year, the secretary of state shall determine if any registrants have not voted during the preceding four years. The secretary of state shall perform list maintenance by changing the status of those registrants to "inactive" in the statewide registration system. The list maintenance performed *must be conducted in a manner that ensures that the name of each registered voter appears in the official list of eligible voters in the statewide registration*

¹⁵¹ See Minn. Stat. § 480A.08, subd. 3(c) (1998) (providing unpublished decisions of the Court of Appeals have no precedential value); *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 582 n. 2 (Minn. 2009) (providing that unpublished decisions from this court do not constitute precedent).

¹⁵² Doc. No. 12, Cilek Aff. Ex. A1-10.

system. A voter must not be removed from the official list of eligible voters unless the voter is not eligible or is not registered to vote. List maintenance must include procedures for eliminating duplicate names from the official list of eligible voters.¹⁵³

The registrant remains registered even if found ineligible because of his or her status as a felon. He or she is removed from the eligible listing but not from the SVRS as a voter. It means that the person is no longer *eligible* to vote. As we have found, if a person is marked “challenged,” he or she is not removed from the SVRS, but will be found on the polling roster and can redeem the right of eligibility to cast a ballot at the polling place. An otherwise non-eligible voter, can become eligible to vote. Moreover, even if the Secretary refuses to provide voting history data, as we have found, polling rosters provided by county auditors reflect the status of the voter as public data. Challenged “felon” or challenged “postal return” are two examples.¹⁵⁴ As such, they are part of the voter’s voting history and, under the Data Practices Act, must be released as public data.

Notably, even under the Secretary’s definition of “voting history” he still refuses to release public data of tens of thousands of voters.

¹⁵³ Emphasis added.

¹⁵⁴ Doc. No. 12, Cilek Aff. Ex A1-10.

IX. Non-disclosure of voter statuses or history defies the purpose of the very statutory provisions the Secretary relies upon under 201.091, subdivision 1 and 4.

The Secretary's position that voter statuses or voting histories are not public data¹⁵⁵ is inconsistent with the release of some voter statuses and not others as found in polling place rosters disclosed after an election. Nevertheless, the Secretary has previously admitted that records marked "challenged" relate to registered voters and are included on the public information list along with the records of voters whose status is "active."¹⁵⁶ The Secretary, thus, makes voter statuses public, but not for those voters deemed "inactive."

Troubling is the fact that if a person requested a list on Monday, an "active" "registered voter's" public data would be made available to the requester. But, if requested on Tuesday and the same voter is identified as "inactive," the requester would not obtain the voter's public data. This is illogical and contrary to the intent of the Legislature. For example, under the Secretary's argument, the lists under §201.091, subdivisions 1 and 4 would be incomplete for the purposes set forth in the statute. Under subdivision 1, a public official could not rely on the accuracy of the master list for the purposes of a request and is dependent on what day the person is found "active" or

¹⁵⁵ Sec. Princ. Br. 30.

¹⁵⁶ *E.g.*, Doc. No. 7, at 2.

“inactive.” The same is true under subdivision 4. It serves little purpose to obtain a public information list for election purposes such as for a candidate running for office, if the candidate only receives a partial list of only “active” voters when part of his campaign would want to focus also on getting out-to-vote those persons who were identified as “inactive” for any variety of reasons.

X. The Secretary’s interpretation of the status of the law regarding SVRS public data is misplaced.

The Secretary cannot restrict the flow of public data unless specifically reclassified as not public by state statute or federal law.

The Secretary cannot prohibit the release of the public data requested unless the data are classified or reclassified as not-public or nonpublic.¹⁵⁷ As this Court found in *Harlow v. State Dept. of Human Services*, if there is no federal law or temporary classification that provides that the data is not public, then the data remains public.¹⁵⁸ The Data Practices Act requires that public data Cilek requested be released.

The Secretary has relied on *Carlson v. Ritchie*, 960 F.Supp.2d 943 (Minn. 2013), but any reliance on *Carlson* is misplaced.¹⁵⁹ In *Carlson*, the plaintiff claimed a protected property interest in the sought-after data, namely email

¹⁵⁷ *Harlow*, 883 N.W.2d at 568. (rejecting classification of data as private in absence of federal law or temporary classification providing that data is not-public.).

¹⁵⁸ *Id.*

¹⁵⁹ Sec. Princ. Br. 30.

addresses, through a request of a public information list. The U.S. District Court case did not involve Minnesota Chapter 13 as is the case here. Notably, the *Carlson* court rejected an Information Policy Advisory Opinion (IPAD 12-016) because the data at issue in *Carlson*—email addresses—was not the subject of the IPAD decision. The *Carlson* court decision also ignored the applicability of IPAD decisions to the Secretary.¹⁶⁰ Here, the data in dispute, at least in part, includes that data subject to the IPAD Opinion the federal court rejected.

Moreover, the *Carlson* decision was an incomplete analysis of § 201.091, subdivision 4, as the court analyzed the word “may” in the context of a protected property interest, which is not the issue before this Court.¹⁶¹ It was also dicta: “[s]uch permissive language does not create a property interest.”¹⁶² Regardless, “federal court interpretations of state law are not binding on state courts.”¹⁶³ This statement is critical since on closer examination of the *Carlson* decision, the federal court was wrong. Email addresses are public information.

¹⁶⁰ See e.g., Doc. No. 1, ¶¶24–37; Minn. Stat. § 13.072, subd. 2 (“IPAD opinions must be given deference by a court ... in a proceeding involving data.”).

¹⁶¹ *Carlson*, 960 F.Supp.2d at 955.

¹⁶² *Id.* (citation omitted).

¹⁶³ *State ex rel. Hatch v. Employers Ins. of Wausau*, 644 N.W.2d 820, 828 (Minn. App. 2002), review denied (Minn. Aug. 6, 2002). *In re Est. of Rutt*, 824 N.W.2d 641, 646 (Minn. App. 2012). See also *State ex rel. Hatch v. Employers Ins. of Wausau*, 644 N.W.2d 820, 828 (Minn. App. 2002) (“As an initial matter, federal court interpretations of state law are not binding on

Disclosure limitations for telephone numbers and email addresses are found only under § 13.356 for notification purposes or a subscription list. However, exceptions are found under subdivisions (b) and (c), including that the “data provided under paragraph (a) may only be used for the specific purpose for which the individual provided the data.” The voter registration application allows a person to add his or her email address. Thus, the specific purpose requirement is met—voter registration to cast a ballot. And as one SVRS field of data within a voter’s record, it is public data, just like the voter’s telephone number, name, and address also found on the voter registration application.

The Secretary lists a number of statutes in which the Legislature specifically identifies under what circumstances the *Legislature* has classified names, addresses, and email addresses as nonpublic.¹⁶⁴ The Secretary’s citations are noteworthy as they show that the Legislature knows how and when to reclassify data as nonpublic. But, in the context of SVRS public voter data, there are no government public data restrictions concerning email addresses. Also, under §201.091, subdivision 9, if the Legislature sought to

state courts. *See Jendro v. Honeywell, Inc.*, 392 N.W.2d 688, 691 n. 1 (Minn.App.1986) (noting that although statutory construction of federal law by federal courts is entitled to due respect, this court is bound only by statutory interpretations of the Minnesota Supreme Court and United States Supreme Court), *review denied* (Minn. Nov. 19, 1986).”).

¹⁶⁴ Sec. Princ. Br. 19.

make email addresses nonpublic, it would have listed it under this provision. It did not. Hence, the data sought destroys nothing with regard to statutory privacy protections.¹⁶⁵

Finally, the *Carlson* decision *did not* state that the Secretary was prohibited from providing copies of other SVRS public data. And, the Secretary's representation of the Eighth Circuit's four-sentence decision in *Carlson v. Ritchie*¹⁶⁶ is misleading.¹⁶⁷ While the appellate court affirmed the district court's decision, it merely agreed that the underlying complaint was properly dismissed. The appellate court offered no opinion on the merits.¹⁶⁸ The court *did not* "hold," as the Secretary asserts, that "section 201.091 protects from public disclosure the exact variety of SVRS data that Plaintiffs seek."¹⁶⁹

In fact, the *Carlson* decision *agreed* with the IPAD opinion as it related to the availability of other public data from the SVRS as accessible to the public.¹⁷⁰ Two advisory opinions issued by IPAD, Opinion 00-38 and 12-016 found that the data Cilek requested are subject to the Data Practices Act. On September 14, 2000, IPAD Opinion 00-38 concluded that a voter's "challenged

¹⁶⁵ Sec. Princ. Br. 18–19.

¹⁶⁶ *Carlson v. Ritchie*, 573 Fed. App'x 608, 609 (8th Cir. 2014).

¹⁶⁷ Sec. Princ. Br. 27 n.3.

¹⁶⁸ *Carlson*, 573 Fed. App'x at 609.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

status” is data accessible to the public. This included data depicting whether the voter was “active” or “challenged felon” or “challenged guardianship” as found in polling rosters. The data was found to be classified as presumptively public.¹⁷¹

Likewise, an October 22, 2012 IPAD Advisory Opinion 12-016, again confirmed the presumption of voter status data as public, finding no statutory reclassification to nonpublic (other than those explicitly expressed as access restrictions under §201.091). Notably, the opinion cited the statute as not restricting all SVRS data as inaccessible to the public.¹⁷² The IPAD analysis found under Opinion 12-016 is consistent with the necessity of making public data available beyond any category of a public information list. Section 201.091, subdivision 4 allows for other public data from the SVRS, consistent with the manifest intent of the legislature under § 13.03 that all government data are presumed public.

The Secretary of State’s refusal to provide the voter statuses, reasons for the challenge or other voter registration data maintained by the Secretary which are not classified as nonpublic or private, does not conform to the written

¹⁷¹ Doc. No. 1, ¶31, Exs E and C; *see also* Minn. R. 8200.9120.

¹⁷² *Id.* Ex. C.

decisions of the Commissioner in IPAD Advisory Opinions 00-038 and 12-016.¹⁷³

XI. The *McGrath* unpublished appellate decision is unhelpful to the Secretary regarding the issues before this Court.

We do not disagree that in the context of § 201.091, subdivision 1, which defines the master list in which certain information is available only to public officials. Therefore, *McGrath v. Minnesota Sec. of State*, relied upon by the Secretary, is not relevant as a holding in this case.¹⁷⁴ First, the quote the Secretary states in his brief—“the only list available for inspection by members of the public is the public information list” is *not* the holding in the *McGrath*.¹⁷⁵ Notably, the appellate court found that the “the public information list is not a complete list of all names in SVRS.”¹⁷⁶ It is not because both a master list under subdivision 1 and a public information list under subdivision 4 for that matter pertains to a specific county. Again, Cilek sought SVRS data of all voters within the database—statewide—from the Secretary, not from one particular county.

¹⁷³ *Id. e.g.*, ¶¶38-47.

¹⁷⁴ Sec. Princ. Br. 27. See *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993) (holding that unpublished opinions offer persuasive value “[a]t best”).

¹⁷⁵ *Id.*

¹⁷⁶ *McGrath v. Minnesota Sec. of State*, A11-613, 2011 WL 5829345, at *5 (Minn. App. Nov. 21, 2011).

Second, the *McGrath* appellate court agreed that the Office of Administrative Hearings did not abuse its discretion in denying McGrath discovery: “[t]he only discovery request relators made was for a complete “master list” of voter histories, which respondent [Secretary of State] was unable to provide. County auditors are required to make “public information lists” available for inspection.¹⁷⁷ There was no issue squarely before the *McGrath* court regarding the statutory interpretation of what constitutes a “master list;” thus, any discussion by the court regarding the master list or information list is dicta. Notably, Cilek *did not request* a “master list” or any other “list.”

XII. Amici curiae fail to substantiate claims of a parade of horribles that can otherwise be addressed by the Legislature.

Amici seek to eliminate public scrutiny despite concerns of election processes failures as identified by the Legislative Auditor.

The amicus curiae briefs of the American Civil Liberties Union of Minnesota and the League of Women Voters Minnesota provide a parade of horribles that, if ever true, could be directly addressed by the Minnesota Legislature as policy issues not before this Court. We ask this Court not to legislate, but to interpret the current state of the law.

¹⁷⁷Minn. Stat. §201.091, subd. 4.

The MnACLU asserts that “information released could unduly subject a subset of Minnesota voters to unwarranted scrutiny for prior crimes and sealed records.”¹⁷⁸ A person’s status as challenged with a felony, meaning the voter cannot cast a ballot, is a data field. The same is true for people who are wards of the state or under guardianship.¹⁷⁹ The League, also asserts that the inaccuracies of the SVRS could hamper a person from voting.¹⁸⁰ In fact, the Secretary admits to SVRS inaccuracies as well.¹⁸¹ But no system is perfect. Nothing in the record suggests Cilek is seeking perfection of the SVRS. However, admitted inaccuracies should not prevent public scrutiny of public government data as it relates to the integrity of election processes and credibility of election results. Neither the MnACLU nor the League take issue with the Legislative Auditor Report(s) findings which raise concerns over our election processes.

For instance, neither amici have correlated the already available public data found within polling place rosters—available under the Secretary’s own Minnesota Rule 8200.9120—identifying “challenged felons” (inclusive of their name and address on the roster) with the parade of horrors they suggest. The data field did not restrict or prevent “challenged felons” from voting if able to

¹⁷⁸ MnACLU Br.14.

¹⁷⁹ *Id.*

¹⁸⁰ League Br. 12.

¹⁸¹ Sec. Princ. Br. 19.

testify on election day that they were no longer felons. The MnACLU, in particular, fails to show how a public data field results in the unsealing of sealed records or scrutiny of prior crimes. Notably, the Secretary is provided with reports from other agencies and departments regarding a voter's respective citizenship status or criminal status (felon or restored civil rights) under Minnesota Statute § 201.145 and the SVRS is updated accordingly. Regardless, the concerns of the amici are *public policy* issues for the Legislature to decide. To date, the designations of “challenged felon” as a voter status data field that questions the eligibility of the person to cast a ballot remains public data.

Moreover, the League is concerned about how public voter data could be used or misused.¹⁸² As they aptly note, civil remedies are available to protect the reputations or other misuses by other groups. If the legislature was concerned, for instance, about telemarketers and stalkers, it would have placed specific restrictions on telemarketers, stalkers, and the like under the Data Practices Act regarding SVRS public data including § 201.091 (see, *e.g.*, § 13.356). It has not, and again this falls within the purview of public policy. Perfidy is an accepted “cost” of an open democratic government in exchange for public scrutiny and accountability under the Data Practices Act.

¹⁸² League Br. 4–5

Nevertheless, when public data is sought from the SVRS, it is a snap-shot of time of data that is always subject to change whether due to a change in a person’s address, voter status as active to inactive or inactive to active and the like. Indeed, it is an imperfect system; but, it is a system which requires government data to be disclosed to allow scrutiny of the Secretary and his handling of elections and data.

The MnACLU also asserts constitutional claims not before this Court. One argument is misplaced in particular because the MnACLU begins with an unsubstantiated and factually incorrect statement that “[r]elease of the information at issue also would violate the Equal Protection Clauses of...by mandating that sealed felony records be revealed...”¹⁸³ There is *nothing* to suggest—either by statute or common law—that a SVRS data field identifying a person as a “challenged felon” results in the unsealing of any criminal record. To be honest, we are at a lost as to how the MnACLU could even suggest such a premise.

CONCLUSION

The Data Practices Act is about government transparency—all government data is presumed public. Cilek and the Minnesota Voters Alliance sought to obtain SVRS public data in a quest to examine election integrity

¹⁸³ MnACLU Br. 16–18.

which is fundamental to the public's confidence toward fair elections and willingness to be governed. What Cilek sought to accomplish embodies the need for information to evaluate the election process like other organizations such as Citizens for Election Integrity Minnesota have done. Certainly, it has been confirmed by none other than the Legislative Auditor what Cilek has advocated for years—our election system is not perfect and there is work to be done.

The appellate decision should be affirmed.

Dated: August 30, 2019

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CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P. 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 13,878 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font. The word count is stated in reliance on Microsoft Word 2013, the word processing system used to prepare this Brief.

/s/Erick G. Kaardal
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