Chapter 24. Judicial Review of Rules

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24.1 Challenging a Rule's Validity

There are two ways to challenge a rule's validity. First, a party may challenge a rule's validity by petitioning for declaratory judgment on the rule. The petition, also called a pre-enforcement challenge (§§ 24.2-.11),[1] is filed after the rule has been adopted but before an agency has enforced the rule against the party.

Second, a party may challenge a rule's validity when an agency is enforcing the rule against the party. As with the pre-enforcement challenge, the party files a petition for declaratory judgment; this petition is known as a collateral rule challenge (§ 24.12).

Both a pre-enforcement challenge and a collateral challenge are prescribed under Minnesota Statutes, section 14.44, and both challenges are started by filing a petition with the Minnesota Court of Appeals.

24.2 Bringing a Pre-enforcement Challenge

24.2.1 Time limit to Bring Challenge

A party may bring a pre-enforcement challenge at any time by filing a petition with the Minnesota Court of Appeals, but the party should first check the statutory authority under which the agency adopted its rule to see if there are any time limits for bringing a challenge.[2]

When a party brings a challenge, an exhaustion-of-remedies requirement doesn't apply, as the APA expressly provides that a declaratory judgment may be rendered whether or not (1) the petitioner has first requested the agency to pass on the rule's validity, and (2) the agency has started an enforcement action against the petitioner.[3]

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[1] *See, e.g., Save Mille Lacs Sportfishing, Inc. v. Minn. Dep't of Nat. Res.*, 859 N.W.2d 845, 847 (Minn. Ct. App. 2015).

[2] While time limits are rare in Minnesota, some federal acts set time limits for judicial review of rulemaking. *Compare Adamo Wrecking Co. v. United States*, 98 S. Ct. 566, 569-70 (1978) (reviewing judicial-review standards issued under the Clean Air Act), *with Fryberger v. Township of Fredenberg*, 428 N.W.2d 601, 605 (Minn. Ct. App. 1988) ("We conclude that because a declaratory judgment action is an original action, it is not subject to the time limits placed on appeals from, for example, final orders of contested case hearings.").

[3] Minn. Stat. § 14.44 (2022); Duncan Baird, *Remedies by Judicial Review of Agency Action in Minnesota*, 4 Wm. Mitchell L. Rev. 277, 279-85 (1978) (dealing generally with ripeness, exhaustion, and primary jurisdiction); *Minn. Educ. Ass'n v. Minn. State Bd. of Educ.*, 499 N.W.2d 846, 849 (Minn. Ct. App. 1993) (distinguishing between a rule's threatened application and its proposed interpretation).

24.2.2 Filing Petition with the Court

Because a petition for declaratory judgment is filed with the court of appeals, the petition should be considered as somewhat analogous to a petition for a writ of certiorari, whereby the agency's action is brought before the court for judicial review.[4]

Although a petition is first filed with the court of appeals, the supreme court has prescribed what the petition must contain—for example, it must describe the specific rule to be reviewed and the errors claimed by the petitioner.[5] The supreme court has also prescribed that the court's review of the rule's validity is on the official rulemaking record.[6]

24.2.3 What Can Be Challenged

Since review through the court of appeals became available in 1984, various parties have challenged a rule's validity.[7]

Important to note, however, is that the court of appeals has held that only formally adopted rules—not proposed rules[8]—may be challenged; an unadopted rule should be challenged in a contested-case action[9] or, more commonly since 2001, by petitioning OAH for an order that "an agency is enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule."[10]

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[4] *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 247 (Minn. 1984) (quoting *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 n.5 (Minn. 1981)) (stating declaratory judgment action "has become, in many ways, 'an all-purpose writ'"); *see also* Minn. Stat. § 480A.06, subd. 3 (2022) ("The Court of Appeals shall have jurisdiction to issue writs of certiorari to all agencies . . . ."); *cf.* Minn. Stat. § 14.63 (2022) (judicial review in contested cases is by certiorari).

[5] Minn. R. Civ. App. P. 114.02, form 114.

[6] *Id*. 114.03, subd. 1; *see also* § 24.6.

[7] *E.g.*, *Handle With Care v. Dep't of Human Servs.*, 406 N.W.2d 518 (Minn. 1987); *Stasny by Stasny v. Minn. Dep't of Commerce*, 474 N.W.2d 195 (Minn. Ct. App. 1991); *Minn. Ctr. for Env't Advocacy v. Minn. Dep't of Nat. Res.*, 2019 WL 3545839 (Minn. Ct. App. Aug. 5, 2019) (weighing pre-enforcement challenge to proposed copper-nickel mine).

[8] *Minn. Auto Dealers Ass'n v. Minn. Pollution Control Agency*, 520 F. Supp. 3d 1126 (D. Minn. 2021); *L.K. v. Gregg*, 380 N.W.2d 145, 149 (Minn. Ct. App. 1986) (finding declaratory-judgment action premature because no rule yet adopted).

[9] *Minn. Ass'n of Homes for the Aging v. Dep't of Human Servs.*, 385 N.W.2d 65, 67-68 (Minn. Ct. App. 1986), *cited in Jewish Cmty. Action v. Comm'r of Pub. Safety*, 657 N.W.2d 604, 607 (Minn. Ct. App. 2003); *see also Minn. Educ. Ass'n*, 499 N.W.2d at 848-49 (holding that a declaratory-judgment petition wasn't the proper method to review a proposed interpretation of an adopted rule when the proposed interpretation wasn't part of the adopted rule).

[10] Minn. Stat. § 14.381 (2022); *see also Waste Mgmt. of Minn., Inc. v. Minn. Pollution Control Agency,* 2014 WL 3892576, at *1 (Minn. Ct. App. Aug. 11, 2014) (holding court has jurisdiction like in a declaratory-judgment action); *Water in Motion, Inc. v. Minn. Dep't of Labor & Industry*, 2016 WL 7041978, at *4 (Minn. Ct. App. Dec. 5, 2016) ("The proper procedure to challenge the alleged enforcement of an unpromulgated rule is to file a petition with the Office of Administrative Hearings (OAH) for decision by an ALJ that can then be appealed to this court.").

On the other end of the spectrum, mandamus relief—requested to compel an agency to adopt a rule—has been denied when an agency's statutory authority to adopt rules was discretionary and the agency's commissioner had exercised discretion to not adopt a rule.[11]

But instead of first going to the courts, a party may choose a less-expensive option by directly petitioning an agency to adopt a rule.[12]

24.3 Standing Needed to Challenge Rule

24.3.1 When Sufficient

Unless otherwise prescribed by statute, a party has standing if it shows "injury in fact."[13] For example, the Minnesota Supreme Court has held that a taxpayer's status may be sufficient to provide standing by showing injury in fact.[14]

In 2021, the Minnesota Court of Appeals solidified the conditions sufficient to confer standing under a pre-enforcement challenge.[15] In this case, three categories of petitioners[16] challenged a secretary of state's rule on absentee ballots that are reviewed by local ballot boards. The court ruled that none of the petitioners had standing, finding that under a pre-enforcement challenge, "a petitioner must demonstrate (1) a direct interest in the rule that is different in character from that of the citizenry in general; (2) the alleged harm is not speculative or hypothetical; and (3) the alleged harm is uniquely attributable to the rule."[17]

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[11] *Friends of Animals & Their Env't v. Nichols*, 350 N.W.2d 489, 491 (Minn. Ct. App. 1984), *cited in Sylstad v. Johnson*, 1999 WL 314883, at *1 (Minn. Ct. App. May 18, 1999).

[12] Minn. Stat. § 14.09 (2022); *see also* Minn. Stat. § 14.091 (2022); *Minn. Agric. Aircraft Ass'n v. Township of Mantrap*, 498 N.W.2d 40, 43 (Minn. Ct. App. 1993) (striking down township's ordinance as preempted by statute and holding that "the proper remedy, provided by statute, is to petition the department to adopt a rule").

[13] *McKee v. Likins*, 261 N.W.2d 566, 570-71 (Minn. 1977); *see also Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 221 N.W.2d 162, 165 (Minn. 1974); *In re Crown CoCo, Inc.*, 458 N.W.2d 132, 135-36 (Minn. Ct. App. 1990) (finding standing for owner of a petroleum-service station to appeal a decision from Petroleum Tank Release Compensation Board when the owner showed that it would suffer sufficient economic injury because of the board's decision); *Olson v. State*, 742 N.W.2d 681 (Minn. Ct. App. 2007) (finding that taxpayers lacked injury in fact sufficient to support their standing solely as taxpayers); *Coal. of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765 N.W.2d 159, 163-64 (Minn. Ct. App. 2009) ("There must be a showing that the rule is or is about to be applied to the petitioner's disadvantage. A mere possibility of an injury or mere interest in a problem does not render the petitioner aggrieved or adversely affected so that standing exists.") (citation omitted); *Builders Ass'n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 177 (Minn. Ct. App. 2012) ("An organization can assert standing if its members' interests are directly at stake or if its members have suffered an injury-in-fact.") (citation omitted).

[14] *McKee*, 261 N.W.2d at 570-71; *cf. Friends of Animals & Their Env't*, 350 N.W.2d at 491-92 (affirming petitioner lacked standing in mandamus action to compel agency to adopt rules because petitioner wouldn't necessarily benefit from order compelling performance, as statute required).

[15] *Minn. Voters All. v. State*, 955 N.W.2d 638 (Minn. Ct. App. 2021).

[16] The three petitioner categories consisted of the Minnesota Voters Alliance, three Minnesota House members, and several prospective election judges.

[17] *Minn. Voters All.*, 955 N.W.2d at 642.

24.3.2 When Insufficient

Courts have determined insufficient standing such as when a hair salon challenged a Department of Commerce cosmetology rule.[18] Here, the court found that the challenged rule didn't harm the salon; consequently, the salon lacked standing.

Minnesota courts, however, don't always adhere to the same test for standing that federal courts use. For example, under the federal test, taxpayer status alone is insufficient to provide standing.[19]

24.4 Parties to a Pre-enforcement Challenge

In a pre-enforcement challenge, the agency whose rule is being challenged is made a party to the proceeding.[20] Although the APA doesn't say who else may or should be respondents, the Minnesota Rules of Civil Appellate Procedure states that persons—other than the petitioner, agency, and attorney general—may participate in the action with leave of the court of appeals.[21]

The procedural rules require that the petition be served on the attorney general and the agency whose rule is being challenged.[22] Usually, the agency's commissioner is also named (for boards, the board itself would be named).

24.5 Petition Requirements

A petition must comply with the Minnesota Rules of Civil Appellate Procedure.[23] Some of the most important requirements state:

1) for the petition to be in a specific format[24] and to "briefly describe the specific rule to be reviewed and the errors claimed by petitioner";[25]
2) that a copy of the challenged rule be attached to the petition; [26] and

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[18] *Rocco Altobelli, Inc., v. Minn. Dep't of Commerce*, 524 N.W.2d 30 (Minn. Ct. App. 1994); *cf. Minn. Educ. Ass'n*, 499 N.W.2d 846 (teachers' union failed to provide sufficient evidence of a threatened application of a rule that interfered with or impaired the union's rights or privileges); *see also Minn. Env't Science & Econ. Review Bd. v. Minn. Pollution Control Agency*, 870 N.W.2d 97 (Minn. Ct. App. 2015) (discussing pre-enforcement standing).

[19] *See, e.g.*, *Sierra Club v. Morton*, 92 S. Ct. 1361, 1369 (1972) (affirming plaintiff must have "direct stake" in outcome), *cited in Lujan v. Defs. of Wildlife*, 112 S. Ct. 2130, 2134 (1992); *Ass'n of Data Processing Serv. Orgs. v. Camp*, 90 S. Ct. 827, 829-30 (1970) (stating federal test requires, in addition to injury in fact, showing that plaintiff is arguably within zone of interest sought to be protected by statute or constitutional provision involved), *cited in Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1298 (2017).

[20] Minn. Stat. § 14.44.

[21] Minn. R. Civ. App. P. 114.05.

[22] *Id*. 114.01(c).

[23] *See* Minn. R. Civ. App. P. 114.01.

[24] *See id.*, form 114.

[25] *Id*. 114.02.

[26] *Id*.

3) the petition be served on all parties and then filed with the clerk of appellate courts, along with proof of service, the requisite filing fees and bond, an original statement of the case, and a copy of the statement.[27]

24.6 Record for Judicial Review

Once a petition is served, the agency—within 30 days—must produce the rulemaking record and an itemized list of its contents.[28]

The content of the official rulemaking record is prescribed under Minnesota Statutes, section 14.365. Ordinarily, the record may not be supplemented with new material on appeal. The Minnesota Supreme Court has noted, however, that "[c]onceivably, instances might arise where an irregularity might, in fairness, require supplementation or clarification of the rulemaking record . . . ."[29] And in appropriate cases, the parties may stipulate to an abbreviated, more manageable record.

24.7 Discovery Procedures

A rare instance may occur in which a petitioner, seeking to establish procedural irregularities in the agency's rulemaking process, needs to develop evidence outside the record. While the Minnesota Supreme Court has—for contested cases—authorized a limited form of discovery,[30] a similar use of discovery might be applicable in a pre-enforcement challenge. At least in a contested case, it appears that limited written interrogatories may be directed to

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[27] *Id*. 114.01-.02.

[28] Minn. R. Civ. App. P. 114.03, subd. 2; *see also Manufactured Hous. Inst.*, 347 N.W.2d at 239-41; *Minn. League of Credit Unions v. Minn. Dep't of Commerce*, 486 N.W.2d 399, 407 (Minn. 1992) (finding late submissions should not have been made part of the record, but since the memorandum didn't raise any new issues, there was no prejudice to the parties); *Mammenga v. Dep't of Human Servs.*, 442 N.W.2d 786, 791 (Minn. 1989) ("The rulemaking record varies with the nature of the rule."); *Rocco Altobelli, Inc.*, 524 N.W.2d at 36 (holding review of rule's validity must be confined to "the record made in the agency proceeding"); *Minn. Educ. Ass'n*, 499 N.W.2d at 849 (limiting court's review in a pre-enforcement action to the administrative record); *City of Morton v. Minn. Pollution Control Agency*, 437 N.W.2d 741, 748 (Minn. Ct. App. 1989) (finding written handout available at public hearing was part of rulemaking record); *Minn. Ass'n of Homes for the Aging*, 385 N.W.2d at 69 (finding discussion noted in the posthearing comment was part of the rulemaking record).

[29] *Manufactured Hous. Inst.*, 347 N.W.2d at 241 n.1.

[30] *In re Lecy*, 304 N.W.2d 894, 899-900 (Minn. 1981) (allowing for some discovery but expressing "deep concern over the inordinate length of time this matter has been in the court system . . . occasioned by an inappropriate application of the rule [allowing discovery]"), *cited in In re Dakota Cty. Mixed Muni. Solid Waste Incinerator*, 483 N.W.2d 105, 106 (Minn. Ct. App. 1992); *Mampel v. Eastern Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1977) (permitting limited discovery "of the mental processes by which an administrative decision is made," including inquiry into procedural matters and agency adherence to statutory rulemaking requirements); *see also United States v. Morgan*, 61 S. Ct. 999, 1004-05 (1941) (finding inappropriate the extensive discovery and questioning of the secretary of agriculture in dispute over validity of the secretary's order), *quoted in Ballard v. Comm'r of Internal Revenue*, 125 S. Ct. 1270, 1283 (2005).

agency officials, but agency officials cannot be deposed orally, nor may their mental processes be explored.[31]

24.8 Grounds for Judicial Review

A rule may be found invalid on three grounds:[32]

1) the rule violates constitutional provisions;
2) the rule exceeds an agency's statutory authority; or
3) the rule was adopted without compliance with statutory rulemaking procedures.

24.8.1 Constitutional Violations

The usual constitutional challenges allege that the rule does one of the following:

- unconstitutionally delegates legislative power to an agency
- violates the Commerce Clause of the U.S. Constitution
- violates the Equal Protection Clauses of the U.S. and Minnesota Constitutions
- violates the Due Process Clauses of the U.S. and Minnesota Constitutions
- unconstitutionally takes property.

In other words, the same claims of constitutional invalidity that may be asserted against a statute may be asserted against a rule.[33]

24.8.1(1) Unlawful-delegation-of-powers clause[34]

Owing to the increased complexity of matters subject to agency regulation, the Minnesota Supreme Court has frequently been willing to find a permissible delegation of rulemaking power to an agency under general legislative policy directives.[35] But a rule may be challenged if it delegates the agency's authority to a private or public body.[36]

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[31] *In re Lecy*, 304 N.W.2d at 900 (setting forth precise questions that may be submitted to agency official in written interrogatory form).

[32] Minn. Stat. § 14.45 (2022); *Minn. Educ. Ass'n*, 499 N.W.2d at 848; *Builders Ass'n of Twin Cities v. Bd. of Elec.*, 965 N.W.2d 350, 356 (Minn. Ct. App. 2021) (citing *Minn. Voters All.*, 955 N.W.2d at 641) (explaining the court's review is restricted to these three bases for invalidation). Questions of legality over adopting rules are discussed in chapter 23.

[33] *See, e.g.*, *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985) (applying constitutional analysis to validity of a rule, "like a statute"), *quoted in In re Appeal of Rocheleau*, 686 N.W.2d 882, 894 (Minn. Ct. App. 2004); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980) (applying constitutional analysis to rule under which employee was disciplined).

[34] Minn. Const. art. III, § 1.

[35] *E.g.*, *Manufactured Hous. Inst.*, 347 N.W.2d at 242-43; *Anderson v. Comm'r of Highways*, 126 N.W.2d 778, 780-81 (Minn. 1964); *Lee v. Delmont*, 36 N.W.2d 530, 539 (Minn. 1949). *See also* § 23.5.

[36] *Wallace v. Comm'r of Taxation*, 184 N.W.2d 588, 591-92 (Minn. 1971). *See also* § 23.5. *But cf. In re Hansen*, 275 N.W.2d 790, 796-97 (Minn. 1978) (finding court deference to ABA education standards in

24.8.1(2) Commerce-Clause Violations

Whether a rule places an unreasonable burden on interstate commerce requires a court to analyze the evenhandedness of the rule's impact on the affected parties and the legitimacy of the state interest sought to be promoted.[37] For instance, in *Minnesota League of Credit Unions v. Minnesota Department of Commerce*,[38] the Minnesota Supreme Court held that a rule prohibiting a credit union from soliciting individuals to join an affiliated group was valid, determining that the rule was a permissible regulation of commercial speech and gave fair warning to an individual of the conduct prohibited.

24.8.1(3) Equal-protection and Due-process Violations

A third common constitutional challenge is that a rule purports to classify affected parties without a rational basis for the classification, thereby raising an equal-protection claim.[39]

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denying admission to bar applicant wasn't a delegation of authority but rather the utilization of legal-education industry standards).

[37] *Kassel v. Consol. Freightways Corp. of Del.*, 101 S. Ct. 1309, 1316-17 (1981) (weighing with "sensitive consideration" burden to interstate commerce against state's interest in maintaining truck-length limitations); *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. 715, 727-28 (1981) (finding state's environmental-protection statute "evenhanded" and "not 'clearly excessive' in light of the substantial state interest in promoting conservation of energy and other natural resources"), *cited in United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1797 n.7 (2007).

[38] *Minn. League of Credit Unions*, 486 N.W.2d 399.

[39] *E.g.*, *Draganosky v. Minn. Bd. of Psychology*, 367 N.W.2d 521, 524-25 (Minn. 1985) (contesting distinction between accredited and nonaccredited schools for licensing purposes); *State v. Hopf*, 323 N.W.2d 746, 753 (Minn. 1982) (contesting on-premise/off-premise distinction for advertising devices); *Welsand v. State of Minn. R.R. & Warehouse Comm'n*, 88 N.W.2d 834, 838-39 (Minn. 1958) (contesting classification as a contract carrier for motor-vehicle licensing); *Rocco Altobelli, Inc.*, 524 N.W.2d at 37-38 (rejecting equal-protection argument advanced by petitioner; the state's exemption of independent contractors from certain tax payments could be rationally justified by administrative convenience and expense); *In re Crown CoCo, Inc.*, 458 N.W.2d at 138 (contesting board's distinction between previously insured and noninsured claimants in reimbursing eligible costs); *REM, Inc. v. Dep't of Human Servs.*, 382 N.W.2d 539, 542 (Minn. Ct. App. 1986) (contesting distinction between new care facilities for persons with disabilities and older facilities for determining entitlement to occupancy incentives linked to per diem reimbursement rates).

But the most common constitutional challenge is that a rule violates due process because the rule is arbitrary and capricious[40] or vague or overbroad.[41] To survive a substantive due-process challenge, the rule need only bear some rational relation to accomplishing a legitimate public interest.[42]

Another common due-process challenge occurs when the rule violates the guarantee for a person to have proper notice and an opportunity to be heard.[43]

24.8.1(4) Property Violations

A rule may be challenged constitutionally on the grounds that it takes property without just compensation.[44]

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[40] *E.g.*, *Manufactured Hous. Inst.*, 347 N.W.2d at 243 (finding the rationality of a pollution-control rule "appears to be lacking"); *Contos v. Herbst*, 278 N.W.2d 732, 741 (Minn. 1979) ("Where an economic regulation is involved, due process requires that legislative enactments not be arbitrary or capricious."); *Juster Bros. v. Christgau*, 7 N.W.2d 501, 507-08 (Minn. 1943) (finding the case "an excellent illustration of the arbitrariness and oppressiveness which invalidates any administrative rule or proceeding"); *Peterson v. Minn. Dep't of Labor & Indus.*, 591 N.W.2d 76, 79 (Minn. Ct. App. 1999); *In re Lawful Gambling License of Thief River Falls Amateur Hockey Ass'n*, 515 N.W.2d 604, 606 (Minn. Ct. App. 1994); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991) (applying "arbitrary and capricious" test to agency's rulemaking proceedings); *In re Eigenheer*, 453 N.W.2d 349, 354 (Minn. Ct. App. 1990) (finding commissioner of natural resources' findings on the application of wetland rules "neither arbitrary nor capricious" and supported by substantial evidence); *In re Appeal of Jongquist*, 460 N.W.2d 915, 917 (Minn. Ct. App. 1990) (striking down agency's case-by-case decision process for allocating certain resources to the disabled where agency hadn't adopted any rule or broad policy to govern the case-by-case decision process).

[41] *E.g.*, *Minn. League of Credit Unions*, 486 N.W.2d at 405 (upholding lower court's ruling that the term "solicit" in department's rule regulating credit unions wasn't unconstitutionally vague); *Thompson*, 300 N.W.2d at 768 (finding the phrase "wantonly offensive" in public-employment standard "not so uncertain in meaning as to deprive appellant of fair warning of the conduct or speech which is subject to disciplinary action"); *Minn. Chamber of Commerce*, 469 N.W.2d at 106-07 (finding Minnesota Pollution Control Agency rule on nonpoint dischargers to not be unconstitutionally vague).

[42] *Manufactured Hous. Inst.*, 347 N.W.2d at 243; *Minn. Chamber of Commerce*, 469 N.W.2d at 104-05.

[43] *In re Proposal by Lakedale Tel. Co.*, 561 N.W.2d 550, 555 (Minn. Ct. App. 1997) (finding Minnesota Public Utilities Commission not in violation of procedural due process because contested decision requiring telephone-tracing activation fee didn't require formal rulemaking under the APA); *In re Alleged Labor Law Violation of Chafoulias Mgmt. Co.*, 572 N.W.2d 326, 332-33 (Minn. Ct. App. 1997) (finding commissioner's failure to adopt procedural rules didn't violate relator's right to due process where relator's claim rejected on substantive, not procedural grounds).

[44] *E.g.*, *DeCook v. Rochester Int'l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 308-09 (Minn. 2011) (finding land-use regulations near airport constituted compensable regulatory taking); *McShane v. City of Faribault*, 292 N.W.2d 253, 258-59 (Minn. 1980) (same); *In re Mapleton Cmty. Home*, 373 N.W.2d 815, 820 (Minn. Ct. App. 1985) (rejecting nursing home's argument that contested rule could cut property-related payments to below property-cost rates and was, therefore, confiscatory).

24.8.2 What Constitutes *Reasonableness*

In rulemaking, the term *reasonable* is an important term of art for the agencies, OAH, and the courts. The concept of reasonableness was set forth in *Mammenga v. Department of Human Services*,[45] a 1989 case in which the supreme court clarified the important distinction between **constitutional unreasonableness** of a rule and **administrative unreasonableness** of an agency action.[46]

A rule is constitutionally unreasonable if, on its face or as revealed by the record, it violates substantive due process by not being rationally related to the statutory objective sought to be achieved. An administrative decision, on the other hand, may be unreasonable—that is, arbitrary and capricious—in how it resolves a dispute, but this kind of unreasonableness doesn't implicate the constitution or make the underlying rule itself invalid. As a term, *unreasonable* has caused confusion, as seen in *Christian Nursing Center v. Department of Human Services*.[47]

Other examples of challenges over constitutional unreasonableness include *Vang v. Commissioner of Public Safety*[48] and *Good Neighbor Care Centers v. Minnesota Department of Human Services*.[49]

The upshot: a rule is unreasonable if it lacks a rational constitutional basis.

24.8.3 Nonconstitutional Challenges

In addition to constitutional challenges, a rule may be challenged on nonconstitutional grounds. For example, a rule may be declared invalid if it exceeds an agency's statutory authority.[50]

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[45] *Mammenga*, 442 N.W.2d 786.

[46] *Id.* at 789-90; *see also Jacka v. Coca-Cola Bottling Co.*, 580 N.W.2d 27, 35 (Minn. 1998) (finding rules governing the extent of chiropractic treatment for lower back pain covered by workers' compensation were rationally related to the goal of regulatory health care because they provided a yardstick to measure treatment).

[47] *Christian Nursing Ctr. v. Dep't of Human Servs.*, 419 N.W.2d 86 (Minn. Ct. App. 1988).

[48] *Vang v. Comm'r of Pub. Safety*, 432 N.W.2d 203 (Minn. Ct. App. 1988).

[49] *In re Good Neighbor Care Ctrs., Inc. v. Minn. Dep't of Human Servs.*, 428 N.W.2d 397 (Minn. Ct. App. 1988).

[50] Minn. Stat. § 14.45; *see also* §§ 23.2-.3. This is a common nonconstitutional challenge raised in court. *E.g., In re Application of Minn. Power for Auth. to Increase Rates for Elec. Serv.*, 838 N.W.2d 747, 753-54, 757 (Minn. 2013) (concluding plain language of statute supported commission's consideration of economic conditions in determining timing and size of rate increase and commission didn't exceed statutory authority by considering factors outside those listed in statute); *Jacka*, 580 N.W.2d at 34 (holding that the department didn't exceed its statutory authority in adopting rules on chiropractic treatment allowed for lower back pain because the rules were flexible enough to permit compensation judges to extend medical treatment for as long as medically necessary); *Hirsch v. Bartlett-Lindsay Co.*, 537 N.W.2d 480, 487 (Minn. 1995) (finding department's emergency rules were inconsistent with statute and legislative authorization and therefore invalid); *In re Peace Officer License of Woollett*, 540 N.W.2d 829, 831-34 (Minn. 1995) (finding board's rule didn't conflict with statute); *GH Holdings, LLC v. Minn. Dep't of Commerce*, 840 N.W.2d 838, 843 (Minn. Ct. App. 2013) (concluding board exceeded its statutory authority

When considering whether a rule exceeds an agency's statutory authority, a court must analyze what the legislative enactment, either expressly or impliedly, authorizes the agency to do by rule. For instance, take a case where the statute authorized an agency to issue standards or guidelines for housing products containing formaldehyde. After the agency adopted its rule, an aggrieved party argued that the agency had exceeded its statutory authority by going beyond mere regulation to instead banning products with formaldehyde if they contained a certain level of the chemical. The Minnesota Supreme Court held, however, that the express authority to regulate included, by necessary implication, the power to ban.[51]

The court in another case, however, held that the enabling legislation didn't confer statutory authority on the agency to adopt legislative or substantive rules; but the court nevertheless allowed the rule as a valid exercise of the agency's statutory power to adopt interpretative rules.[52]

24.8.4 Noncompliance with Statutory Rulemaking Procedures

A third way in which a rule may be declared invalid is if it was adopted without compliance with statutory rulemaking procedures under the APA. The APA explicitly states the procedural requirements that an agency must follow, at least substantially, for valid

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by adopting rule limiting evidence in contested cases to previously submitted written record); *Hentges v. Bd. of Water & Soil Res.*, 638 N.W.2d 441, 445-46 (Minn. Ct. App. 2002) (concluding board rule limiting federal exemption didn't exceed statutory authority because it was consistent with legislative intent to achieve no net loss of wetlands); *Drum v. Minn. Bd. of Water & Soil Res.*, 574 N.W.2d 71, 74-75 (Minn. Ct. App. 1998) (concluding the board's interpretation was consistent with the legislative intent to achieve no net loss in wetlands and didn't exceed its statutory authority); *Rocco Altobelli, Inc.*, 524 N.W.2d at 36-37 (finding that the department's rule didn't exceed the scope of the statute); *Stasny by Stasny*, 474 N.W.2d at 199 (invalidating department rule as inconsistent with statutory authority); *Wangen v. Comm'r of Pub. Safety*, 437 N.W.2d 120, 124 (Minn. Ct. App. 1989) (invalidating rule barring consideration of appellant's license reinstatement because the rule exceeded statutory authority); *City of Morton*, 437 N.W.2d at 746 (weighing claim that rule exceeds statutory authority); *Christian Nursing Ctr.*, 419 N.W.2d at 90-91 (same); *Minn. Ass'n of Homes for the Aging*, 385 N.W.2d at 68 (finding rule didn't violate the clear language of the statute).

[51] *Manufactured Hous. Inst.*, 347 N.W.2d at 242 (citing *United States v. Darby*, 61 S. Ct. 451, 456-57 (1941)).

[52] *Minn.-Dakotas Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 364-65 (Minn. 1979); *see also State v. King*, 257 N.W.2d 693, 697 (Minn. 1977) (construing statute to grant the board rulemaking power to designate certain controlled substances); *Francis v. Minn. Bd. of Barber Exam'rs*, 256 N.W.2d 521, 525 (Minn. 1977) (concluding board lacked authority to require by rule public-necessity test for granting barber license); *Guerrero v. Wagner*, 246 N.W.2d 838, 841 (Minn. 1976) (finding no authority to adopt rule delegating duty that statute assigns to someone else).

rulemaking.[53] Although under the federal APA interpretative rules are exempt from the act's notice-and-comment procedures,[54] this is not true under Minnesota's APA.[55]

Whether there has been compliance with the statutory rulemaking requirements assumes, of course, that the rule being challenged is a *rule*, as defined under the APA. Thus it may be necessary to first establish that an agency pronouncement is a rule. In one case, for example, an aggrieved party successfully established that an agency-issued policy bulletin was a rule, and because the agency had not complied with notice-and-hearing requirements when it issued the bulletin, the agency's pronouncement was invalid.[56]

24.9 Scope of Review

24.9.1 Arbitrary-and-Capricious Standard

In a pre-enforcement challenge, the court of appeals determines whether, on the record, the agency acted reasonably or arbitrarily and capriciously; the court also determines if the agency acted in accordance with the U.S. and Minnesota Constitutions and the law.[57] The court is not required, as in a contested case, to use the substantial-evidence standard.[58] In other

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[53] *Johnson Bros. Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238, 241-42 (Minn. 1980) (finding practice of liquor-control commissioner was invalid for lack of compliance with APA rulemaking procedure; choosing not to adopt substantial-compliance test); *see also* Minn. Stat. §§ 14.15, subd. 5, .26, subd. 3(d) (2022) (regarding a finding and treatment of "harmless error" for procedural defects); *Minn. League of Credit Unions*, 486 N.W.2d at 407 (finding rule changes not to be substantial since they only narrowed and clarified the rule); *Handle with Care*, 406 N.W.2d at 520-23 (finding joint commissioner's study and report required by statute not to be a precondition for rulemaking; the adopted rule was therefore valid); *In re Assessment Issued to Leisure Hills Health Care Ctr.*, 518 N.W.2d 71, 74 (Minn. Ct. App. 1994) ("We must declare an agency's action invalid, however, if the agency adopts policy without complying with statutory rulemaking requirements."); *Minn. Ass'n of Homes for the Aging*, 385 N.W.2d at 68-69 (finding no procedural error when modification of proposed rule from statement of need and reasonableness wasn't substantial; the modification was permissible); Carl A. Auerbach, *Administrative Rulemaking*, 63 Minn. L. Rev. 151, 215 (1979).

[54] 5 U.S.C. § 553(b)(A) (2018).

[55] Minn. Stat. §§ 14.02 (defining "rule" as "every agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by that agency . . ."), .05, subd. 1 (2022) (requiring rules to be adopted under APA procedures); *Minn.-Dakotas Retail Hardware Ass'n*, 279 N.W.2d at 364 n.6 (comparing the Minnesota APA to its federal counterpart); *see also McKee*, 261 N.W.2d at 576-78 n.10; *Ebenezer Soc'y v. Minn. Dep't of Human Servs.*, 433 N.W.2d 436, 441 (Minn. Ct. App. 1988) (finding adopted rule was an interpretative rule and, consequently, invalid as not adopted in accordance with rulemaking procedures); Note, *Definition of "Rule" under the Minnesota Administrative Procedure Act*, 7 Wm. Mitchell L. Rev. 665, 683-87 (1981).

[56] *McKee*, 261 N.W.2d at 577-78; *see also* § 16.4.

[57] *Manufactured Hous. Inst.*, 347 N.W.2d at 241-44; *Minn. Chamber of Commerce*, 469 N.W.2d at 102-03.

[58] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

words, a court's standard of review is more restrictive in a pre-enforcement challenge.[59] And because a pre-enforcement challenge tends to consider the rule in an abstract or hypothetical setting, a court would be premature to apply a stricter standard of review.[60]

Under the arbitrary-and-capricious standard, the court makes a "searching and careful" inquiry of the record to determine if the agency action has a rational basis.[61] The court is to show deference to agency expertise, but the agency must explain on what evidence it's relying and how that evidence connects rationally to the rule involved.[62] Requiring the agency to explain its actions ensures that the agency action is not a result of "impermissible whim, improper influence, or misplaced zeal."[63]

At times, the subject matter to be regulated may involve an area in which the technical or scientific knowledge is incomplete or the available data imperfect, yet regulation is needed. A

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[59] *Minn.-Dakotas Retail Hardware Ass'n*, 279 N.W.2d at 363; *see also Rocco Altobelli, Inc.*, 524 N.W.2d at 36 ("In declaratory judgment actions, this court has a limited scope of review.") (citation omitted); *Minn. Educ. Ass'n*, 499 N.W.2d at 849 (in a pre-enforcement challenge, the scope of review is limited); *Minn. Chamber of Commerce*, 469 N.W.2d at 107 ("In a pre-enforcement action the reasonableness of the rule as applied cannot be considered, but the reasonableness of the application may be considered in a contested-case hearing."); *Peterson*, 591 N.W.2d 76.

[60] *Minn.-Dakotas Retail Hardware Ass'n*, 279 N.W.2d at 363*; see also Minn. Chamber of Commerce*, 469 N.W.2d at 107 ("This court should not engage hypothetical applications in a pre-enforcement challenge."); *Save Mille Lacs Sportfishing, Inc.*, 859 N.W.2d 845.

[61] *Manufactured Hous. Inst.*, 347 N.W.2d at 244; *see Bowman Transp., Inc. v. Arkansas-Best Freight Sys.*, 95 S. Ct. 438, 441-42 (1974); *Citizens to Preserve Overton Park v. Volpe*, 91 S. Ct. 814, 823-24 (1971); *see also In re Lawful Gambling License of Thief River Falls Amateur Hockey Ass'n*, 515 N.W.2d at 606 ("An administrative rule violates substantive due process if it is not rationally related to the objective sought to be achieved as enunciated by the legislature.") (citing *Mammenga*, 442 N.W.2d at 789-90); *Minn. Chamber of Commerce*, 469 N.W.2d at 103 (applying "a 'searching and careful' inquiry of the record to ensure that the agency action has a rational basis").

[62] *Manufactured Hous. Inst.*, 347 N.W.2d at 244*; see also Boedingheimer v. Lake Country Transp.*, 485 N.W.2d 917, 922 (Minn. 1992) (noting that the court ordinarily defers to agency expertise when complex matters are involved); *Drum*, 574 N.W.2d at 73 (noting that the court should defer to agency's expertise and special knowledge); *In re Casey*, 540 N.W.2d 854, 859 (Minn. Ct. App. 1995) *rev'd in part on other grounds*, 543 N.W.2d 96 (Minn. 1996) (finding commissioner's rule interpretation "overly narrow and rigid" but deferring to that interpretation as applied to the case's facts); *In re Lawful Gambling License of Thief River Falls Amateur Ass'n*, 515 N.W.2d at 606 (noting that minimal judicial scrutiny is correct standard of review for contested case: "It is not for the courts to question the political wisdom of a regulation."); *Minn. Chamber of Commerce*, 469 N.W.2d at 104 (giving deference to the agency where case "involves technical issues of public health and the environment"); *In re Crown CoCo, Inc.*, 458 N.W.2d at 136 ("Although an agency's decision is entitled to some deference . . . when an agency's authority to act is called into question, . . . we need not defer to agency expertise."); *City of Morton*, 437 N.W.2d at 748 ("The court will defer to the agency's expertise in determining how best to allocate grant resources to achieve optimum pollution control results, and will not substitute its judgment for that of the agency in a pre-enforcement or facial challenge.").

[63] *Manufactured Hous. Inst.*, 347 N.W.2d at 244 n.4 (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977).

rule adopted on the basis of incomplete or tentative information will still be upheld if the agency explains itself adequately and acts reasonably.[64]

As discussed in section 24.8.2, it's important to remember that the kind of unreasonableness that will invalidate a rule (lack of rational basis) is different from the kind of unreasonableness that renders an agency decision arbitrary or capricious.

24.9.2 Presumption of Correctness

Decisions of administrative agencies enjoy a presumption of correctness.[65] Mindful of the constitutional prohibition against delegating to the judiciary duties that are essentially administrative, a court must exercise restraint when reviewing agency action so as not to substitute its own judgment for that of the agency.[66]

24.9.3 Determining a Rule's Validity

A court may, if grounds exist, declare a rule invalid.[67]

When determining a rule's validity, a court may first have to interpret the rule language.[68] Although a reviewing court defers to the practical construction that an agency gives its rules or a statute, even long-standing administrative rules may not be binding if they are erroneous or contrary to law.[69] And courts need not defer to the agency when the rule language or the delineated standard is clear and capable of being understood.[70]

When interpreting a rule, courts must be careful of the separation-of-powers doctrine that prohibits delegating nonjudicial functions to the court. For example, if a court declares an

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[64] *Id.* at 244 (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976)); *see also Amoco Oil Co. v. EPA*, 501 F.2d 722, 739-41 (D.C. Cir. 1974) (demanding "reasons and explanations, but not 'findings'" when regulations turn on choice of policy, assessment of risk, or frontiers of scientific knowledge); *Minn. Env't Science & Econ. Review Bd.*, 870 N.W.2d at 102 ("We will not second-guess the MPCA's use of or reliance on its chosen scientific or technical sources.").

[65] *Crookston Cattle Co. v. Minn. Dep't of Nat. Res.*, 300 N.W.2d 769, 777 (Minn. 1981); *Reserve Mining Co.*, 256 N.W.2d at 824; *In re Eigenheer*, 453 N.W.2d at 352.

[66] *Reserve Mining Co.*, 256 N.W.2d at 825.

[67] Minn. Stat. § 14.45.

[68] The rules of statutory construction are applicable to all rules. See Minn. Stat. § 645.001 (2022).

[69] *Twin Ports Convalescent, Inc. v. Minn. State Bd. of Health*, 257 N.W.2d 343, 348 (Minn. 1977); *Ingebritson v. Tjernlund Mfg. Co.*, 183 N.W.2d 552, 554-55 (Minn. 1971); *see also Mammenga*, 442 N.W.2d at 791 (finding commissioner's interpretation of statutory phrase "completing a secondary education program" to exclude GED courses was reasonable); *Good Neighbor Ctrs., Inc.*, 428 N.W.2d at 401 (stating that the court doesn't defer to an agency on questions of law).

[70] *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 827 (Minn. 2006); *Resident v. Noot*, 305 N.W.2d 311, 312 (Minn. 1981) ("We do not defer when the language employed or the standards delineated are clear and capable of understanding."); *In re Application of Q Petroleum*, 498 N.W.2d 772, 777 (Minn. Ct. App. 1993) ("If the regulation is not ambiguous, no deference is given to the agency interpretation and the court may substitute its own judgment."); *Wenzel v. Meeker Cnty. Welfare Bd.*, 346 N.W.2d 680, 684 (Minn. Ct. App. 1984).

agency action invalid, the declaration doesn't transfer the agency's legislative power to the court.[71]

24.9.4 Remanding Rule

If a court finds an agency's rulemaking process to be defective, it may remand the rulemaking to the agency for further proceedings.[72]

24.10 Review by the Minnesota Supreme Court

A party to a pre-enforcement challenge may appeal an adverse decision to the Minnesota Supreme Court;[73] only someone who was a party to the pre-enforcement challenge is entitled to seek further appellate review, since the statute speaks of an "appeal . . . as in other civil cases."[74] Although the APA could be read to provide an appeal as a matter of right to the supreme court, the appellate rules provide that "[r]eview of any decision of the Court of Appeals is discretionary with the Supreme Court,"[75] so this discretion leaves an aggrieved party with only a right to petition the supreme court for further review.

If the supreme court hears an appeal, the court makes its own independent review of the agency's record without particular deference to the decision of the court of appeals.[76]

24.11 Collateral Attacks on Rules

24.11.1 Challenging under an Enforcement Action or Contested Case

So far, this chapter has dealt with a pre-enforcement challenge. But it's established in Minnesota that a rule's validity may also be attacked collaterally in an enforcement or contested-case proceeding.[77]

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[71] *Minn. Distillers v. Novak*, 265 N.W.2d 420, 422 (Minn. 1978).

[72] *Manufactured Hous. Inst.*, 347 N.W.2d at 246; *see also Baird*, supra at 304-07.

[73] Minn. Stat. § 14.45; *Minn. League of Credit Unions*, 486 N.W.2d 399.

[74] Minn. Stat. § 14.45.

[75] Minn. R. Civ. App. P. 117, subd. 2.

[76] *See* Samuel L. Hanson, *The Court of Appeals and Judicial Review of Agency Action*, 10 Wm. Mitchell L. Rev. 645, 660-61 (1984); *cf. Reserve Mining Co.*, 256 N.W.2d at 824.

[77] *E.g.*, *Boedingheimer*, 485 N.W.2d at 921; *State v. Lloyd A. Fry Roofing Co.*, 246 N.W.2d 696, 698 (Minn. 1976); *see also In re Peace Officer License of Woollett*, 540 N.W.2d at 831-32; *State ex rel. Spurck v. Civil Service Bd.*, 32 N.W.2d 583, 586 (Minn. 1948); *Martin v. Wolfson*, 16 N.W.2d 884, 889 (Minn. 1944); *Drum*, 574 N.W.2d at 75; *In re Casey*, 540 N.W.2d 854; *In re Lawful Gambling License of Thief River Falls Amateur Hockey Ass'n*, 515 N.W.2d at 605-07; *In re Eigenheer*, 453 N.W.2d at 353-54; *In re Crown CoCo, Inc.*, 458 N.W.2d at 136; *In re Appeal of Jongquist*, 460 N.W.2d at 916-17. *But see Adamo Wrecking Co.*, 98 S. Ct. at 573 (concluding federal courts in criminal prosecution may inquire whether agency complied with appropriate procedures when adopting a rule under which defendant is charged, but may not in a

A rule may be collaterally attacked in judicial review of a contested-case decision brought under Minnesota Statutes, sections 14.63 to 14.69. In one case, for example, an employee who was disciplined under a rule of a city's civil-service commission sought judicial review of the contested-case decision, alleging that the rule was unconstitutional both on its face and as applied to him.[78] And in the judicial review of a decision of the commissioner of public welfare that fixed a nursing home's rate, the nursing home established that the rate wasn't computed under a permissible interpretation of the agency rule but that the rate was improperly based on factors that should have been adopted in a new rule.[79]

So just as an agency may have authority to enforce a rule by seeking an injunction, a defendant may—as a defense—collaterally attack a rule as being invalid.[80]

On another note, a Minnesota court can rule on the validity of a federal rule: The Minnesota Supreme Court did so in a personal-injury tort action brought in state court based on a defendant's violation of an interpretative rule of the federal Consumer Product Safety Commission.[81]

24.11.2. Record

In a pre-enforcement challenge, the record for judicial review is the record made by the agency during the rulemaking proceeding,[82] and in a contested case, the record is that made before the agency in the contested matter.[83] In contrast, when a rule's validity is attacked collaterally, a party must carefully consider the contents of the record so as to afford a proper evidentiary basis for the grounds to be asserted for invalidating the rule.

24.11.3 Other Considerations

A party must be cognizant of the differences between a pre-enforcement challenge and a collateral attack. In a pre-enforcement challenge, the court is concerned only with the rule's

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criminal case "pursue any of the other familiar inquiries which arise in the course of an administrative review proceeding").

[78] *Thompson*, 300 N.W.2d 763; *cf. Wangen*, 437 N.W.2d at 124; *Vang*, 432 N.W.2d at 207-208 (unsuccessfully challenging driver's-license-reinstatement decision); *Norman v. Comm'r of Pub. Safety*, 404 N.W.2d 315 (Minn. Ct. App. 1987) (same).

[79] *White Bear Lake Care Ctr. v. Minn. Dep't of Pub. Welfare*, 319 N.W.2d 7 (Minn. 1982); *see also Wenzel*, 346 N.W.2d at 684 (finding commissioner erred by relying on invalid interpretive rule for determining welfare assistance).

[80] *E.g., Lloyd A. Fry Roofing Co.*, 246 N.W.2d at 699-700.

[81] *Swanson v. Emerson Elec. Co.*, 374 N.W.2d 690, 701-02 (Minn. 1985).

[82] *See* § 24.6.

[83] Minn. Stat. § 14.66 (2022) (requiring "the entire record of proceeding under review"); *Mammenga*, 442 N.W.2d at 791 (finding portions of rulemaking record made part of record in contested-case proceeding); *Drum*, 574 N.W.2d at 73 (stating on first judicial review that court should independently examine the agency's record without deferring to its legal conclusions).

validity on its face.[84] But in a collateral attack, the court may also be asked to strike down the rule as applied to the challenging party.[85]

[84] *See* § 24.10.

[85] *See, e.g.*, *Broen Mem'l Home v. Minn. Dep't of Human Servs.*, 364 N.W.2d 436, 440 (Minn. Ct. App. 1985) (weighing reasonableness of challenged rule as applied to plaintiff); *Mammenga*, 442 N.W.2d at 789-90 (clarifying misunderstanding of the phrase "invalid as applied" and affirming the approach taken in *Broen Mem'l Home*, 364 N.W.2d at 440).