

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Robert LaRose, Teresa Maples, Mary
Sansom, Gary Severson, and Minnesota
Alliance for Retired Americans,

Case Type: Civil Other/Misc.
Case No. 62-cv-20-3149
Judge Sara R. Grewing

Plaintiffs,

v.

**REPUBLICAN COMMITTEES’
MEMORANDUM IN SUPPORT OF
MOTION TO VACATE
CONSENT DECREE**

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

Defendant,

Republican Party of Minnesota, Republican
National Committee, and National
Republican Congressional Committee,

Intervenor-Defendants.

INTRODUCTION

This Court “may look to see that the settlement is fair” before entering a consent decree proposed by litigants before it. *Hafner v. Hafner*, 54 N.W.2d 854, 857 (Minn. 1952). Indeed, every consent decree must be “examine[d] carefully” to ensure that its terms are “fair, adequate, and reasonable,” *United States v. City of Miami*, 664 F.2d 435, 440-41 (5th Cir. 1981) (en banc) (Rubin, J., concurring), as well as consistent with “the public interest,” *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991). This judicial gatekeeping function is of critical import where a government official is the named defendant in the case: after all, it unfortunately “is not uncommon for consent decrees to be entered into on terms favorable to those challenging governmental action because of rifts within the bureaucracy or between the executive and legislative branches.” *Ragsdale v. Turnock*, 941 F.2d 501, 517 (7th Cir. 1991) (Flaum, J., concurring in part and dissenting in part). Given those rifts, courts must “be on the lookout for

attempts to use consent decrees to make end runs around the legislature.” *Kasper v. Bd. of Election Comm’rs of the City of Chi.*, 814 F.2d 332, 340 (7th Cir. 1987).

Just yesterday, the U.S. District Court for the District of Minnesota declined to enter a proposed consent decree in a parallel case that—in the words of Defendant Secretary Simon—“provides identical relief” to a significant portion of the consent decree in this case. *See* Defs.’ Mem. of Law In Resp. To Proposed Intervenor’s Objections to Proposed Consent Decree at 9, *League of Women Voters of Minn. v. Simon*, No. 20-cv-1205 (D. Minn. June 22, 2020) (“Defs.’ *LWV* Mem.”) (Ellison Decl.¹ Ex. A). In particular, the proposed consent decree in *League of Women Voters* and the consent decree in this case both prevent the Secretary from enforcing Minnesota’s Witness Requirement for absentee ballots in the upcoming primary election. *See id.* at 9-10; *see also* Consent Decree (Index #23). The federal district court, however, determined that such relief is not fair or reasonable because it sweeps aside the Witness Requirement for *all* absentee voters and is not tailored to any proven constitutional violation. Entry, *League of Women Voters v. Simon*, No. 20-cv-1205 (D. Minn. June 23, 2020) (Tostrud, J.) (“Entry”) (Ellison Decl. Ex. B).²

The federal district court’s ruling thus underscores that the consent decree in this case is not fair. In fact, the consent decree here is even *less* fair than the proposed consent decree in *League of Women Voters*: it enjoins not just one, *but two*, commonsense measures that the Legislature has enacted to protect the integrity of Minnesota’s elections. It prevents the State from enforcing against *all registered voters* in the primary election *both* the Witness Requirement and

¹ Declaration of Benjamin L. Ellison, filed contemporaneously herewith.

² The Entry recounts that the federal court declined to enter the proposed consent decree “for the reasons stated on the record during the hearing.” Entry at 2. The Republican Committees have ordered an expedited transcript of the hearing and will provide it to the Court as soon as it becomes available.

the Election Day Receipt Deadline for voters to return their absentee ballots to election officials—all without any evidence of any constitutional violation in this case. *See* Consent Decree ¶¶ VI.A-B.

Indeed, Defendant initially filed an Answer disputing Plaintiffs’ claims and indicating that he would vigorously defend the laws challenged in this case. *See* Answer (Index #19). But without explanation, Defendant pulled an about-face from opposing Plaintiffs’ claims in the Answer to embracing those claims in the consent decree. Plaintiffs and Defendant, moreover, did not submit to the Court *any* evidence or legal argument demonstrating that the Witness Requirement or the Election Day Receipt Deadline violates any individual’s right to vote, let alone justifying the overbroad relief of statewide invalidation of those rules for *all* Minnesota voters.

Plaintiffs and Defendant therefore failed to establish that the consent decree is fair, and the federal court’s decision has now shown that it is not. Minnesota Rule of Civil Procedure 60.02 authorizes this Court, “[o]n motion and upon such terms as are just,” to vacate an “order” on a variety of grounds, including “[m]istake,” “inadvertence,” circumstances rendering prospective application of the order “no longer equitable,” and “[a]ny other basis justifying relief from the operation of” the order. Minn. R. Civ. P. 60.02(a), (f). It is also “within the inherent power of the court to set aside consent decrees . . . for fraud, mistake, or absence of real consent.” *Hafner*, 54 N.W.2d at 857. The Court should exercise this authority and vacate the consent decree because it is unfair, rests on mistakes of fact and law, and is inequitable and inconsistent with the public interest.

BACKGROUND

This case is one of three parallel actions challenging Minnesota’s Witness Requirement, Minn. Stat. §§ 203B.7, 204B.45, for the upcoming primary election. Two of those actions—this case and *NAACP v. Simon*, No. 62-cv-20-3625—are pending before this Court. The third, *League*

of Women Voters, remains pending in federal court. While the *League of Women Voters* plaintiffs challenge only the Witness Requirement, the challenges in this case and *NAACP* are broader. In particular, Plaintiffs also challenge the Election Day Receipt Deadline for voters to return their absentee ballots to election officials, *see* Compl. ¶ 7, and the *NAACP* plaintiffs seek an order requiring the election officials to mail an absentee ballot automatically to every registered voter, regardless of whether the voter requests such a ballot, *see NAACP* Compl. ¶ 14.

All three cases invoke the COVID-19 pandemic as a basis for granting relief. *See* Compl. ¶ 6; *NAACP* Compl. ¶ 14. All three cases name Secretary Simon as the defendant. *See, e.g.,* Compl. ¶ 15; *NAACP* Compl. ¶ 24. The Secretary filed an Answer disputing Plaintiffs' claims in this case and indicating that he would vigorously defend the challenged laws. *See* Index #17.

Thereafter, the Secretary entered into proposed consent decrees with both Plaintiffs in this case and the *League of Women Voters* plaintiffs. Both consent decrees purport to be “premised upon the current public health crisis facing Minnesota caused by the ongoing spread of the novel coronavirus.” Consent Decree at 1; *League of Women Voters* Proposed Consent Decree (Ellison Decl. Ex. C). They also contain “identical” relief prohibiting the Secretary from enforcing the Witness Requirement in the August primary election. Defs.’ *LWV* Mem. at 9.

Plaintiffs and Defendant submitted the consent decree in this case to the Court on June 16. Defendant, however, offered no explanation for his change of position from disputing Plaintiffs' claims in the Answer to embracing them in the proposed consent decree. Plaintiffs and Defendant also did not submit any evidence or legal briefing to support entry of the consent decree. They therefore did not submit any evidence that enforcement of the Witness Requirement or the Election Day Receipt Deadline will violate any individual's right to vote in the upcoming primary election, let alone that such enforcement would violate all Minnesotans' right to vote. The Court entered

the consent decree the next day, June 17. The Republican Committees filed their Notice of Intervention and Proposed Answer on June 18.

Republican entities including the Republican Party of Minnesota and Republican National Committee objected to the proposed consent decree in *League of Women Voters* and moved to intervene in that case. At a hearing yesterday, June 23, the federal district court granted the motion to intervene and declined to enter the proposed consent decree. The federal court concluded that the decree is not fair or reasonable because it enjoins the Witness Requirement statewide and is not tailored to any proven constitutional violation. *See* Entry at 2.

ARGUMENT

Plaintiffs and Defendant failed to submit any evidence or argument to the Court demonstrating that “the settlement” in their consent decree “is fair.” *Hafner*, 54 N.W.2d at 857. Nor could they have: while purporting to rest on the current COVID-19 pandemic, the consent decree is not limited to voters who have shown a constitutional violation during the pandemic. Instead, the consent decree sweeps aside the Witness Requirement and the Election Day Receipt Deadline for *all* registered Minnesota voters in the upcoming primary election. As the federal court concluded yesterday, such overbroad relief renders the consent decree not fair or reasonable. *See* Entry at 2. This failure is particularly acute because Plaintiffs and Defendants did not submit any evidence or argument in support of the consent decree, and Plaintiffs cannot establish that the commonsense Witness Requirement or the Election Day Receipt Deadline—which the Legislature enacted to uphold the integrity of Minnesota’s election—violates the Constitution.

The consent decree thus is not fair, rests on a “mistake[n]” view of the facts and law, and is inequitable and inconsistent with the public interest. Minn. R. Civ. P. 60.02(a), (f); *Hafner*, 54 N.W.2d at 857. The Court should vacate the consent decree and permit the primary election to proceed in a free and fair manner under the rules enacted by the Minnesota Legislature.

I. THE CONSENT DECREE IS NOT FAIR AND RESTS ON MISTAKES OF FACT AND LAW

The “most important factor” in determining whether a consent decree is fair is whether the plaintiff has made an adequate showing of a likelihood of success on the merits of the claim. *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975). Courts can gauge “the fairness of a proposed compromise” only by “weighing the plaintiff’s likelihood of success on the merits against the amount and form of the relief offered.” *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). Plaintiffs and Defendant, however, submitted *no* evidence or legal briefing to support the consent decree, much less to prove Plaintiffs’ “likelihood of success on the merits.” *Id.* They therefore failed to demonstrate that the consent decree is “fair.” *Hafner*, 54 N.W.2d at 857. In fact, the consent decree is unfair and overbroad, invalidating the Witness Requirement and Election Day Receipt Deadline in *all* applications for the primary election, even though Plaintiffs cannot establish that either rule violates the Constitution. The Court should vacate the consent decree. *See* Minn. R. Civ. P. 60.02; *Hafner*, 54 N.W.2d at 857.

A. The Consent Decree Is Unfair And Overbroad

The consent decree fails out of the gate because the record contains no evidence that either the Witness Requirement or the Election Day Receipt Deadline violates any individual’s right to vote. That is because neither Plaintiffs nor Defendant submitted any such evidence. Moreover, while the consent decree purports to be “premised upon the current public health crisis facing Minnesota caused by the ongoing spread of novel coronavirus,” Consent Decree at 1, the relief it grants is not limited to individuals with a special medical need who can show that their constitutional right to vote is violated during the COVID-19 pandemic. Instead, the consent decree enjoins Defendant Secretary Simon from enforcing the Witness Requirement or the Election Day Receipt Deadline against *all* Minnesotan registered voters in the August primary election. *See id.*

¶¶ VI.A-B. And it requires Defendant to take additional steps, such as issuing instructions to election officials, requiring issuance of notices to all absentee voters in the State, and informing the public that the Witness Requirement and Election Day Receipt Deadline have been invalidated for the primary election. *See id.* ¶¶ VI.C-H.

Just yesterday, the federal district court concluded in *League of Women Voters* that restrictions on the Witness Requirement identical to the restrictions in the consent decree in this case are not fair or reasonable. *See* Entry at 2. In particular, the federal court concluded that the proposed consent decree in *League of Women Voters* could not stand because it sweeps aside the Witness Requirement for *all* absentee voters and is not tailored to any proven constitutional violation. *See* Entry at 2. That reasoning demonstrates that the consent decree in this case likewise is not fair: the consent decree invalidates *both* the Witness Requirement and the Election Day Receipt Deadline, without any evidence, much less showing, of any constitutional violation in this case.

The federal court's ruling comports with the rulings of courts across the country that have declined to enjoin, or have stayed injunctions against, witness requirements for absentee ballots submitted during the COVID-19 pandemic. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-1538 (7th Cir. Apr. 3, 2020) (Ellison Decl. Ex. D); *Miller v. Thurston*, No. 20-2095, Text Order (8th Cir. June 15, 2020); *Clark v. Edwards*, No. 20-cv-308-SDD-RLB (M.D. La. June 22, 2020) (Ellison Decl. Ex. E); *Nielsen v. DeSantis*, No. 4:20-cv-236 (N.D. Fla. June 24, 2020) (Ellison Decl. Ex. F).³ It also comports with court rulings declining to enjoin other election-integrity rules

³ One federal district court has entered a consent decree, and another has entered a preliminary injunction, enjoining witness requirements during the COVID-19 pandemic. Both cases were wrongly decided and, in any event, neither involved provisions that another court had declared unfair. *See, e.g., League of Women Voters of Va. v. Va. State Bd. of Elecs.*, No. 6:20-cv-00024, 2020 WL 2158249 (W.D. Va. May 5, 2020); *Thomas v. Andino*, No. 3:20-cv-01552, 2020

due to the pandemic. *See, e.g., Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020); *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 2982937 (5th Cir. June 4, 2020).

Moreover, the federal court's ruling comports with rulings of the Pennsylvania Supreme Court, which twice rejected requests to postpone the election day receipt deadline for mail-in and absentee ballots submitted in Pennsylvania's June primary. *See, e.g., Dis. Rights Pa. v. Boockvar*, No. 83 MM 2020 (May 15, 2020) (per curiam) (Ellison Decl. Ex. G); *Dis. Rights Pa. v. Boockvar*, No. 83 MM 2020 (May 15, 2020) (Wecht, J., concurring) (Ellison Decl. Ex. H); *Delisle v. Boockvar*, No. 95 MM 2020 (May 29, 2020) (Ellison Decl. Ex. I); *Delisle v. Boockvar*, No. 95 MM 2020 (May 29, 2020) (Wecht, J., concurring) (Ellison Decl. Ex. J). As Justice Wecht explained in his concurring statement on both occasions, the claims in those cases failed because they rested on "speculation" regarding harm to voters during the COVID-19 pandemic rather than actual evidence of any constitutional violation. *See Dis. Rights Pa. Concurring Stmt.* at 1; *Delisle Concurring Stmt.* at 2.

Plaintiffs and Defendant may point out that the election day receipt deadline for Wisconsin's April primary election was extended due to the COVID-19 pandemic. But unlike in this case, the district court that entered the injunction in the Wisconsin case had before it a factual record tested by an adversarial process. *See Dem. Nat'l Comm. v. Bostelmann*, No. 20-cv-249, 2020 WL 1638374 (W.D. Wis. Apr. 2, 2020). Moreover, the U.S. Supreme Court was not asked to review the legality of that aspect of the district court's injunction. *See Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205, 1206 (2020). Instead, the Supreme Court faced only "a narrow, technical question" about the district court's extension of the postmarked-by deadline for absentee ballots. *See id.* The Supreme Court reversed that

WL 2617329 (D.S.C. May 25, 2020).

extension, and took pains to explain that its “decision on the narrow question before the Court should not be viewed as expressing an opinion on the broader question of . . . whether other reforms or modifications in election procedures in light of COVID-19 are appropriate.” *Id.* at 1207. “That point cannot be stressed enough.” *Id.*

Because the consent decree sweeps aside the Witness Requirement and Election Day Receipt Deadline for all registered voters on a record devoid of evidence, it is not “fair,” rests on a “mistake[n]” view of the law and facts, and is not “equitable” or consistent with the public interest. *See Hafner*, 54 N.W.2d at 857; Minn. R. Civ. P. 60.02; Entry (Ellison Ex. B). The Court should vacate the consent decree.

B. Plaintiffs And Defendant Cannot Establish That The Witness Requirement Or Election Day Receipt Deadline Is Unconstitutional

The consent decree also is unfair because Plaintiffs and Defendant did not—and cannot—establish a likelihood of success on the merits of their claims that the Witness Requirement or the Election Day Receipt Deadline violate the Constitution. *See Carson*, 450 U.S. at 88 n.14; *see also Flinn*, 528 F.2d at 1172. “Given the fact that [Plaintiffs] have advanced a broad attack on the constitutionality of [the challenged rules], seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion.” *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 200 (2008) (op. of Stevens, J.). Plaintiffs cannot satisfy that burden in this case.

First, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730 (1974). Mine-run election laws that “impose only reasonable, nondiscriminatory restrictions” are “generally” justified by “the State’s important regulatory interests.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). After all, there is no constitutional right to be free from “the usual burdens of voting.” *Crawford*, 553 U.S. at 198.

Plaintiffs concede that their *Anderson-Burdick* claims (counts I and III) require them to put forth evidence from which the Court can “weigh[] the character and the magnitude of the burden imposed on voters’ rights” by the challenged rule “against the interests the state contends justify that burden.” Compl. ¶ 102 (quoting *Kahn v. Griffin*, 701 N.W.2d 815, 833 (Minn. 2005)). But Plaintiffs have not adduced any evidence from which the court could quantify the alleged “burden” imposed by the Witness Requirement or the Election Day Receipt Deadline—and they cannot show that any such burden sinks to the level of a constitutional violation. In the first place, the Witness Requirement and the Election Day Receipt Deadline are wholly inapplicable to individuals who choose to vote in person under Minnesota’s generous in-person voting scheme—who, as Plaintiffs concede, encompass the lion’s share of Minnesota voters. *See* Compl. ¶ 4.

Even with respect to voters who choose to vote by absentee ballot, the Witness Requirement and the Election Day Receipt Deadline impose *lower* burdens than burdens the Supreme Court has upheld as constitutional. In *Crawford*, the Supreme Court held that burdens associated with obtaining or renewing a photo ID—such as “the inconvenience of making the trip to the” Bureau of Motor Vehicles, “gathering the required documents, and posing for a photograph”—“surely do[] not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” 553 U.S. at 198. The burdens imposed by the Witness Requirement and the Election Day Receipt Deadline—such as locating a witness and mailing an absentee ballot on time—are less onerous than the burdens at issue in *Crawford* and, therefore, are constitutional. *See id.*; *Burdick*, 504 U.S. at 434 (“reasonable, nondiscriminatory restrictions” are generally constitutional).

Nor does the current COVID-19 pandemic affect, much less alter, that result. In fact, the political branches of Minnesota’s government already have determined that in-person voting and

interacting with a witness to an absentee ballot during the pandemic are safe and not burdensome. The Minnesota Legislature considered and rejected plans to cancel in-person voting and to adopt all-mail elections due to the pandemic, opting instead to make in-person voting easier and safer. *See A DLF Push To Move Minnesota To Entirely Vote-By-Mail Is Complicating Bipartisan Efforts Around Other COVID-Related Election Changes*, Minn. Post (Apr. 27, 2020), <https://www.minnpost.com/state-government/2020/04/a-dfl-push-to-move-minnesota-to-entirely-vote-by-mail-is-complicating-bipartisan-efforts-around-other-covid-related-election-changes/>.

The Governor likewise exempted voting from his stay-at-home order; and the Secretary of State has issued guidance on “social distancing . . . , equipment sanitization, and hygiene for polling places,” and has made “[c]urbside voting available for anyone who cannot enter the polling place for any reason, including concerns for their health.” *2012 Elections and COVID-19*, Minn. Sec’y of State, <https://www.sos.state.mn.us/election-administration-campaigns/elections-calendar/2020-elections-and-covid-19/>. Meanwhile, Minnesota has moved into “Phase III” of its reopening plan, deeming it safe for Minnesotans (with social-distancing precautions) to go to stores, gyms, salons, restaurants, bars, swimming pools, daycare, school, and church, and to attend indoor gatherings of up to 10 people. *See* Safely Reopening Minnesota, Stay Safe MN, staysafe.mn.gov.

Plaintiffs offer no basis in fact or law for this Court to reject these determinations of Minnesota’s political branches. Moreover, on the other side of the scale, Plaintiffs have provided no evidence to calibrate the state’s interests in upholding the Witness Requirement and the Election Day Receipt Deadline—and, in any event, cannot show that those interests do not amply justify any burdens imposed by those rules. *See Kahn*, 701 N.W.2d at 833. The Witness Requirement and the Election Day Receipt Deadline are commonsense rules that the Minnesota Legislature has

adopted to protect the integrity of Minnesota’s elections. They therefore are amply justified by the State’s interests in curbing “voter fraud” and ballot tampering, preventing undue influence in voting, and “safeguarding voter confidence” in the State’s elections. *Crawford*, 553 U.S. at 191–200. “These interests are not only legitimate, they are compelling.” *Thompson*, 959 F.3d at 811.

It is no answer to say that Minnesota has other methods to deter fraud, like criminal penalties. Minnesota does not have to satisfy strict scrutiny or prove narrow tailoring. *See Burdick*, 504 U.S. at 432-433. It is also no answer to say, as Plaintiffs do, that “[v]oter fraud is virtually nonexistent in Minnesota.” Compl. ¶ 90. Voter fraud is not nonexistent enough—and, of course, is notoriously “difficult to detect and prosecute.” *Tex. Democratic Party*, 2020 WL 2982937, at *3. The whole reason it is rare, moreover, is precisely because states have in place integrity measures like the Witness Requirement and the Election Day Receipt Deadline.

Regardless, *Anderson-Burdick* treats the State’s interest as a “legislative fact,” accepted as true so long as it is reasonable. *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014). States are not required to submit “any record evidence in support of [their] stated interests.” *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009); *accord ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008) (city need not “present evidence of past instances of voting fraud”). In fact, when responding to an *Anderson-Burdick* challenge, States can rely on “post hoc rationalizations,” can “come up with [their] justifications at any time,” and have no “limit[s]” on the type of “record [they] can build in order to justify a burden placed on the right to vote.” *Mays v. LaRose*, 951 F.3d 775, 789 (6th Cir. 2020). States can rely on examples from other jurisdictions, court decisions, general history, or sheer logic. *Common Cause/Ga.*, 554 F.3d at 1353. In *Crawford*, for example, the Supreme Court found Indiana’s interest in preventing in-person voter fraud compelling even though “[t]he record contain[ed] no evidence of any such fraud actually

occurring in Indiana at any time in its history.” 553 U.S. at 194.

Second, Plaintiffs acknowledge that their Due Process challenges to the Election Day Receipt Deadline (counts II and IV) require a balancing of multiple factors, *see* Compl. ¶ 113, but they have provided no evidence on which the Court can conduct such a balancing. Plaintiffs, moreover, cite no authority holding that an election day receipt deadline violates procedural due process. Quite to the contrary: *Plaintiffs also advocate for a deadline* for voters to submit their absentee ballots, albeit it a different deadline than the Legislature has adopted. *See* Compl. ¶ 119. They therefore cannot establish that a deadline like Minnesota’s Election Day Receipt Deadline effectuates “patent and fundamental unfairness” on Minnesota voters. *Id.* ¶ 114. And, of course, given that Minnesota’s Election Day Receipt Deadline does not impose an unconstitutional burden on voters, Plaintiffs cannot show that any “marginal benefit” from their proposed postmark deadline justifies “the administrative burden” on the State of counting late ballots, administering different deadlines for in-person and absentee voting, and delaying final election results. *Lemons v. Bradbury*, 538 F.3d 1098, 1105 (9th Cir. 2008). Plaintiffs cannot establish a Due Process violation, and the Court should vacate the consent decree on that basis as well.

II. THE PUBLIC INTEREST AND THE RIGHTS OF THIRD PARTIES WARRANT VACATUR OF THE CONSENT DECREE

Finally, the Court should vacate the consent decree because “the public interest” favors vacatur. *Colorado*, 937 F.2d at 509. In reviewing a consent decree, the Court “has obligations to other litigants . . . and to members of the public whose interests may not be represented.” *Kasper*, 814 F.2d at 338.

Here, the consent decree barring the State “from conducting this year’s elections pursuant to” the Witness Requirement and Election Day Receipt Deadline “enacted by the Legislature”—where no party has proven that either rule “is unconstitutional”—“would seriously and irreparably

harm” the State, its voters, and the Republican Committees. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). The Republican Committees have a substantial and particularized interest in ensuring that Minnesota carries out free and fair elections. *See* Intervenor-Defendants’ Proposed Answer, Basis for Intervention ¶¶ 2–4. Specifically, on behalf of their supported candidates, voters, and own institutional interests, the Republican Committees have a substantial and particularized interest in preserving the state laws challenged in this action, which the Legislature has enacted to ensure the structure and integrity of elections in Minnesota. *Id.* ¶ 6. This lawsuit threatens to interfere with the structure of the competitive environment the Republican Committees’ supported candidates participate, and the disposition of Plaintiffs’ lawsuit may impair the Republican Committees’ interest in demanding adherence to those requirements. *Id.* ¶ 7–8. Given the Secretary of State’s sudden capitulation to Plaintiffs’ demands, the existing parties do not adequately represent the Republican Committees’ interests. *Id.* ¶ 9.

Indeed, because the Minnesota Legislature enacted those rules to curb fraud and safeguard public confidence in the State’s elections, *see Crawford*, 553 U.S. at 191-200, removing these requirements—particularly for an election in which Plaintiffs anticipate an “influx” of absentee voters, *see* Compl. ¶ 5—poses a serious risk that fraudulent or otherwise ineligible votes will be cast and that public confidence in the State’s elections may be eroded. As Justice Stevens stated in *Crawford*, “the risk of voter fraud”—particularly with “absentee ballots”—is “real.” 553 U.S. at 195-96; *accord Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (“Voting fraud is a serious problem in U.S. elections ... and it is facilitated by absentee voting.”); *Veasey v. Perry*, 71 F. Supp. 3d 627, 641 (S.D. Tex. 2014) (finding broad “agreement that voter fraud actually takes place in abundance in connection with absentee balloting”); *Tex. Democratic Party*, 2020 WL 2982937, at *18 (Ho, J., concurring) (“[C]ourts have repeatedly found that mail-in ballots are

particularly susceptible to fraud.”). Groups from across the political spectrum “acknowledge that, when election fraud occurs, it usually arises from absentee ballots.” Morley, Election Emergency Redlines 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3564829. “[E]lection officials can neither exercise control over absentee ballots once they are mailed out to voters, nor ensure that they have been received and cast by the voters entitled to do so.” *Id.* at 5. Stated differently, “absentee voting is to voting in person as a take-home exam is to a proctored one.” *Griffin*, 385 F.3d at 1131.

The 2005 Commission on Federal Election Reform, co-chaired by former President Jimmy Carter and former Secretary of State James Baker, concluded that expanding mail-in voting “increase[s] the risks of fraud.” *Building Confidence in U.S. Elections* 35, <https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf> (“Carter-Baker Report”). True, a few states already have all-mail voting. But those states took years to build the proper infrastructure; they did not “just flip a switch” in the middle of a pandemic and in the days leading up to an election. *Washington: Where Everyone Votes by Mail*, N.Y. Times (Apr. 15, 2020), <https://www.nytimes.com/2020/04/15/us/politics/washington-where-everyone-votes-by-mail.html?searchResultPosition=1>.

Increased fraud and abuse will, in turn, harm the rights of the Republican Committees, their members, and other Minnesotans. The constitutional right to vote includes, not just the right to “cast ... ballots,” but also the right to “have them counted.” *United States v. Classic*, 313 U.S. 299, 315 (1941). An individual’s vote “won’t count if it’s cancelled by a fraudulent vote—as the Supreme Court has made clear in case after case.” *Tex. Democratic Party*, 2020 WL 2982937, at *18 (Ho, J., concurring) (citing, *inter alia*, *Gray v. Sanders*, 372 U.S. 368, 380 (1963)); accord *Reynolds v. Sims*, 77 U.S. 533, 554-55 & n.29 (1964). “Every voter[,] whether he votes for a

candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes.” *Anderson v. United States*, 417 U.S. 211, 227 (1974). Whether the dilution is “in greater or less degree is immaterial.” *Id.* at 226. Because “voting fraud impairs the right of legitimate voters to vote by diluting their votes,” the consent decree is “an impairment of the right to vote.” *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007).

Even if the consent decree would not cause any ineligible ballots or vote dilution—an unlikely prospect given the expected surge in absentee voting and the large number of voters that the Republican Committees represent—removing “safeguards” that help “deter or detect fraud” and “confirm the identity of voters” undermines “public confidence in the integrity of the electoral process.” *Crawford*, 553 U.S. at 197 (quoting Carter-Baker Report 18). So do court orders that are issued close to the election. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). “Voters who fear their legitimate votes will be outweighed by fraudulent ones,” or who are confused by last-minute court orders, “will feel disenfranchised.” *Id.* at 4. That “debasement” denies “the right of suffrage . . . just as effectively as . . . wholly prohibiting the free exercise of the franchise.” *Id.*

CONCLUSION

The Court should vacate the consent decree.

DATED: June 24, 2020

Respectfully submitted,

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*Admitted pro hac vice

ACKNOWLEDGEMENT

The undersigned acknowledges that sanctions may be imposed pursuant to Minn. Stat. § 549.211.

DATED: June 24, 2020

/s/Benjamin L. Ellison

Benjamin L. Ellison (#392777)