

STATE OF MINNESOTA  
COUNTY OF RAMSEY

DISTRICT COURT  
SECOND JUDICIAL DISTRICT  
Case Type: Civil

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

Plaintiffs,

v.

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

Defendant.

**PLAINTIFFS' MEMORANDUM OF  
LAW IN SUPPORT OF MOTION  
FOR TEMPORARY INJUNCTION**

Court File No: 62-CV-20-3149

Assigned Judge: Hon. Sara Grewing

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## INTRODUCTION

The Minnesota Supreme Court has made clear that “[t]he purpose of the absentee ballot is to enfranchise those voters who cannot vote in person.” *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 734 (Minn. 2003). Nevertheless, each year Minnesota disenfranchises thousands of voters who cannot vote in person simply because (1) they are unable to find a witness to sign their absentee or designated mail ballots (the “Witness Requirement”), or (2) their completed ballot arrives after 8 p.m. on election day (the “Election Day Receipt Deadline”). In November 2020, as Minnesotans increasingly turn to absentee voting to ensure their health and safety during the coronavirus pandemic, the risks of disenfranchisement posed by these two provisions threatens substantially more voters than ever before.

The Witness Requirement mandates that nearly all absentee and designated mail voters obtain the signature of a registered voter, notary, or person otherwise authorized to administer oaths to cast their absentee and designated mail ballots (together, “mail ballots”). Minn. Stat. §§ 203B.07 subd. 3, 203B.121 subd. 2(b)(5). It thus forces voters to find and, in some cases, *pay* someone to witness their ballot. During the pandemic—when absentee voting is crucial for countless vulnerable Minnesotans (and their family members) to access the franchise—the Witness Requirement poses its own health risks, and requires voters to make the unconscionable choice between their health and safety and their right to vote.

Voters who successfully navigate the Witness Requirement are still threatened with disenfranchisement by the Election Day Receipt Deadline, which requires the rejection of mail ballots received after 8 p.m. on election day, even when the voter mailed it long before the deadline and the delay in delivery is entirely beyond their control. Minn. Stat. §§ 203B.08 subd. 3, 204B.45 subd. 2. In 2018 alone, when barely 11.5 percent of voters voted by mail, over 3,500 Minnesota voters were disenfranchised by the Deadline. In every election held across the country since the

onset of the pandemic, the demand for absentee voting has skyrocketed. At the same time, budget cuts and increased pressure on the United States Postal Service (the “USPS” or “postal service”) are causing significant mail delays. Together, these facts make it far more likely that significant numbers of Minnesota’s voters will be disenfranchised by the Deadline in the coming general election. These risks are not theoretical: in the recent Wisconsin primary, nearly 80,000 ballots that would have been rejected under that state’s virtually identical receipt deadline were counted because of a judicially imposed postmark deadline endorsed by the U.S. Supreme Court.

In the midst of the coronavirus pandemic, Defendant Secretary of State Steve Simon (the “Secretary”) has “challeng[ed] all eligible Minnesota voters to cast their vote from the safety of their home.” If the Witness Requirement and Election Day Receipt Deadline are left in place, a challenge that will be. The burdens imposed by these provisions are constitutionally problematic under any circumstances. But during the ongoing public health crisis, their severity—and the consequent risks of disenfranchisement—are at an apex, in violation of Minnesota and federal constitutional guarantees. The Court should grant Plaintiffs’ motion for a temporary injunction.

## FACTUAL BACKGROUND

### **I. The novel coronavirus pandemic has upended daily life and threatens Minnesota elections.**

A novel coronavirus has killed more than 127,000 Americans and continues to spread. Declaration of Dr. Catherine L. Troisi (“Troisi Expert Decl.”) ¶ 9; Declaration of Abha Khanna, Ex. 1 at 1.<sup>1</sup> As of this filing, more than 37,210 Minnesotans have been infected, and nearly 1,500 people in the State have died from the disease. Troisi Expert Decl. ¶ 27; Ex. 2, at 2. The virus, which is transmitted through respiratory droplets produced by coughing, sneezing, or talking, or

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<sup>1</sup> All “Ex.” citations herein refer to exhibits attached to the Declaration of Abha Khanna.

through touching virus-contaminated surfaces, *see* Troisi Expert Decl. ¶¶ 10, 17–19, is highly contagious, and these numbers likely underrepresent the virus’s spread. Ex. 3.

Americans will need to take extensive precautions to protect themselves, including by continuing social distancing, until a vaccine is developed and made available for mass distribution, which will not be until 2021 at the earliest. Troisi Expert Decl. ¶¶ 22–26; Ex. 4, at 4. In the meantime, the CDC estimates 92 to 95 percent of Americans remain susceptible to the virus. Ex. 5; *see also* Troisi Expert Decl. ¶¶ 12–13. The CDC Director predicts that this fall—right when Americans start heading to the polls to vote in the general election—is likely to see another wave of infections “even more difficult than the one we just went through.” Ex. 6, at 1; *see also* Troisi Expert Decl. ¶¶ 22, 28. And Governor Tim Walz anticipates that Minnesota might be one of the last states to reach a peak, expected to come at the same time other states begin to see a second wave of illnesses this fall. Ex. 7, at 3. In the meantime, 34 states—including Minnesota—are currently experiencing an increase in cases as states begin to reopen from shelter-in-place orders, and the U.S. as a whole has experienced a 41 percent increase in cases just over the last week. Troisi Expert Decl. ¶¶ 9, 21–22.

The pandemic has upended elections across the country. Declaration of Dr. Kenneth R. Mayer (“Mayer Expert Decl.”) ¶¶ 23–36; Exs. 8–11. In Wisconsin, Georgia, Kentucky, and Florida, for example, voters clad in masks and gloves waited for hours to cast their ballots due to pandemic-related poll worker shortages and location closures that required election officials to consolidate polling places, cramming thousands of voters into woefully inadequate sites. Mayer Expert Decl. ¶¶ 30–31, 35; Ex. 9. In New York, polls opened late, public transportation was closed, and poll sites were moved at the last minute. Ex. 11. Nationwide, election officials have reported

inadequate supplies of personal protective equipment at polling locations. Exs. 12 at 2, 13 at 5, 14 at 4.

At the same time, absentee ballot requests have surged. *See, e.g.*, Mayer Expert Decl. ¶¶ 25 (Wisconsin: 62 percent of voters voted absentee as compared to 5.5 percent in 2018 general election; Georgia: 57 percent, as compared to 5.6 percent in 2018 general; Nebraska: 84 percent, as compared to 24 percent in 2018 general; Kentucky: 80 percent, as compared to 1.5 percent in 2018 general). This is hardly surprising; evidence is mounting that voting in person increases the risk of contracting COVID-19. *See People First of Ala. v. Sec’y of State*, No. 20-12184, 2020 WL 3478093, at \*3 (11th Cir. June 25, 2020) (citing death and infection of poll workers and voters who voted in person in elections across the country since pandemic began); *see also* Troisi Expert Decl. ¶¶ 18–20, 29–31. The CDC recommends that voters minimize contact with others when casting their ballots. Ex. 15, at 4; Troisi Expert Decl. ¶ 20. Voting by mail will do precisely that. Troisi Expert Decl. ¶¶ 20, 29–31.

But the rise of absentee voting has not been without issue. As election officials have quickly become overwhelmed, late-processed absentee ballot requests and slow mail delivery have meant that many voters have received their ballots too late or not at all. Mayer Expert Decl. ¶¶ 28, 31, 33; Ex. 11, at 1. In Ohio, for example, the Secretary of State reported that postal delays “as long as 7–9 days” for first class mail jeopardized absentee voting. Mayer Expert Decl. ¶ 32. In Wisconsin, if not for a federal court ruling extending the receipt deadline for ballots postmarked by election day—a remedy endorsed by the Supreme Court—nearly 80,000 ballots would have been rejected and the voters disenfranchised. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1208 (2020); Ex. 16, at 2.

All signs indicate that Minnesota is on a collision course with these same issues. Many election judges, the majority of whom are over 65 and in an at-risk category if exposed to COVID-19, are opting against working the polls due to safety concerns. *See, e.g.*, Declaration of Nancy Thorson (“Thorson Decl.”) ¶¶ 3, 16; Ex. 17 (Letter from Minn. Assoc. of County Officers describing difficulties of COVID-19 and voting); Troisi Expert Decl. ¶¶ 12, 29–30; Mayer Expert Decl. ¶¶ 34–35. Available and adequate polling locations are becoming increasingly hard to find, as fewer senior centers, churches, and schools are willing to open their doors to voters out of fear of the virus. Exs. 17–20; *see also* Thorson Decl. ¶¶ 9–10, 17. As a result, more voters will be packed into fewer venues and lines and wait times will be long—significant deterrents to voting in person. *See* Exs. 9, 17, 19, 20; *see also* Thorson Decl. ¶¶ 9–11; Declaration of Mary Sansom (“Sansom Decl.”) ¶¶ 7–9; Declaration of Gary Severson (“Severson Decl.”) ¶¶ 4–6.

Accordingly, state and local officials are “challeng[ing]” voters to vote absentee. Ex. 21; Ex. 22 (encouraging voters to vote in person only if “necessary”); *see also* Ex. 23 (the Secretary describing an all-mail election as “the safest solution”). Voters are responding in kind. As of June 26, the first day of absentee ballot delivery for the August primary, “23 times as many voters had requested absentee ballots (207,835) than had requested them at the equivalent date in 2016 (only 8,964 voters had requested a mail absentee ballot).” Mayer Expert Decl. ¶ 40; *see also* Exs. 18, 37. This number is certain to rise over the next several weeks and is projected to be even greater in November. Mayer Expert Decl. ¶¶ 3, 40.

In anticipation of the rise in voting by mail, the State recently passed a bill that extends the period before and after election day during which election administrators may process absentee ballots. Minn. HF 3429 § 1 subd. 2(3), subd. 3. But the bill does not address the period during

which ballots can be received or relax the rigid Witness Requirement, even for voters who are especially vulnerable to COVID-19.

**II. The Witness Requirement and Election Day Receipt Deadline threaten to disenfranchise thousands of voters in the November election.**

All Minnesota voters have the right to vote absentee. Minn. Stat. § 203B.02 subd. 1. Voters may request an absentee ballot for any particular election and also may request “permanent absentee voter status” to receive an absentee ballot application in each election automatically. *Id.* § 203B.04 subd. 5. In addition, outside of metropolitan counties, Minnesota authorizes towns of any size and cities having fewer than 400 registered voters to elect to vote entirely by mail, providing voters in those towns a designated mail ballot. *Id.* § 204B.45.

Under normal circumstances, mail voting is essential for voters whose disabilities, work schedules, family care responsibilities, health conditions, lack of access to transportation or polling places, or temporary absences from the state make in-person voting difficult or impossible. *See* Mayer Expert Decl. ¶¶ 21, 56–63; Sansom Decl. ¶¶ 4, 6–9; Declaration of Robert LaRose (“LaRose Decl.”) ¶¶ 3, 5–6; Declaration of Teresa Maples (“Maples Decl.”) ¶¶ 4–6, 9–10; Declaration of Muriel Carpenter (“Carpenter Decl.”) ¶ 5. Despite the availability of no-excuse absentee voting, historically most Minnesotans have voted in-person. “Between 2012 and 2018 in Minnesota, mail absentee votes constituted 9.2% of votes cast in general elections, and varied within a narrow range, from a low of 6.9% in 2014 to 11.5% in 2018.” Mayer Expert Decl. ¶ 40. Thus, the vast majority of Minnesota voters have never voted by mail. *Id.* ¶ 41. As a result of the pandemic and the encouragement of Minnesota’s elections officials urging voters to avail themselves of absentee voting, the number of voters utilizing mail ballots is expected to increase exponentially during the August primary and November election. Mayer Expert Decl. ¶ 40; *see*

also Exs. 18, 21, 23, 37. Those voters will encounter at least two procedural hurdles to casting their ballots and having them counted.

First, the Witness Requirement requires voters who complete a designated mail ballot or absentee ballot to obtain a signature from a registered Minnesota voter, notary, or other person authorized to administer oaths on the eligibility certificate contained on the return envelope. Minn. Stat. § 203B.07 subd. 3. The witness must specifically attest that: (1) the absentee ballot was displayed to the witness unmarked, (2) the voter marked the ballot in the witness's presence, and (3) if the voter was not previously registered, the voter provided the witness with proof of residence. *Id.* An absentee or designated mail ballot submitted under these rules must be rejected if the witness has not signed the certificate. *Id.* § 203B.121 subd. 2(b)(5), (c)(1). For those voters to whom it applies, there are no exceptions. However, the Witness Requirement does not apply at all to voters who cast ballots under the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 52 U.S.C. §§ 20301–20311, or voters who have recently moved from Minnesota and vote “presidential-only” ballots, Minn. R. 8210.0100. In the 2018 general election, more than 2,300 ballots were discarded for failure to comply with the Witness Requirement. Mayer Expert Decl. ¶ 46 (Table 1).

Second, the Election Day Receipt Deadline requires that election officials reject all mail ballots (including from out-of-state and overseas voters) unless they are received by 8:00 p.m. on election day. Minn. Stat. §§ 203B.08 subd. 3, 204B.45 subd. 2; Minn. R. 8210.2200 subp. 1, 8210.3000 subp. 8. State and local officials can provide no uniform (or accurate) guidance to voters about when they must mail their ballot in order to ensure it arrives by the Deadline. The Secretary of State's website does not even hazard a guess as to when a ballot should be placed in the mail to be received by election day, advising only that ballots will not count if they arrive late. Declaration



of Dr. Daniel C. McCool (“McCool Expert Decl.”) ¶ 37. Some county officials suggest allowing ten days between requesting an absentee ballot and completing the voting process. Ex. 24. Others direct voters to submit an *application* by mail “at least four days before the election.” Ex. 25. The USPS, meanwhile, recommends that voters mail their completed ballots “at least 1 week” before election day to ensure timely arrival. Ex. 26 at 2. In the 2018 general election, Minnesota discarded over 3,500 absentee ballots—accounting for a full 47 percent of all rejected mail ballots—simply because they arrived after the Deadline. Mayer Expert Decl. ¶ 46 (Table 1).

The surge of mail ballots not only threatens to increase the number of voters who are disenfranchised by either the Witness Requirement or the Election Day Receipt Deadline, but also threatens to overwhelm the USPS, which is suffering from severe budgetary shortfalls, staffing shortages, and reduced capacity. *See* Exs. 27–28.

### **III. Procedural Background**

Plaintiffs include the Minnesota Alliance for Retired Americans Educational Fund (the “Alliance”), a nonprofit that seeks to ensure social and economic justice and full civil rights for its more than 84,000 members, *see* Declaration of Michael Madden (“Madden Decl.”) ¶¶ 4–5; individual voters who are at an increased risk of severe illness or death if exposed to COVID-19, *see* Maples Decl. ¶¶ 4–6, 9–10; Sansom Decl. ¶¶ 6, 8–9; and voters whose ballots have been—or are likely to be—rejected as a result of the Election Day Receipt Deadline, *see* LaRose Decl. ¶¶ 3–6; Maples Decl. ¶ 8; Severson Decl. ¶ 7. Plaintiffs filed their Complaint on May 13, 2020, challenging (1) the Witness Requirement and Election Day Receipt Deadline (together, the “challenged provisions”) as unconstitutional burdens on the right to vote under the Minnesota and U.S. Constitutions, and (2) the Election Day Receipt Deadline as a violation of due process under both Constitutions. Compl. ¶¶ 98–142.

On June 16, Plaintiffs and the Secretary signed and submitted a consent decree, stipulating that, for the August primary, the Secretary shall not enforce either of the challenged provisions and shall issue guidance and instructions to local officials and voters on how to comply with the effects of the decree. Dkt. Index #22 The Court subsequently entered judgment in accordance with the decree. Dkt Index #23. Absentee voting began on June 26.

Plaintiffs now seek to enjoin enforcement of the challenged provisions in the November election as well.

### LEGAL STANDARD

The Court has broad discretion to grant a temporary injunction. *Eakman v. Brutger*, 285 N.W.2d 95, 97 (Minn. 1979). Five factors, known as the *Dahlberg* Factors, are generally weighed in considering such a motion: (1) the moving party's likelihood of success on the merits; (2) the nature and background of the relationship between the parties before the dispute; (3) the harm to be suffered by the moving party if the temporary injunction is denied compared to that inflicted on the nonmoving party if it is granted; (4) the public policy interests involved; and (5) the administrative burdens imposed on the court in supervising and enforcing the order. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321–22 (Minn. 1965). The party seeking an injunction must establish that a legal remedy is inadequate and an injunction is necessary to prevent great and irreparable injury. *Shakopee Mdewakanton Sioux (Dakota) Cmty. v. Minn. Campaign Fin. & Pub. Disclosure Bd.*, 586 N.W.2d 406, 409 (Minn. Ct. App. 1998).

### ARGUMENT

Plaintiffs are entitled to a temporary injunction because they meet all the *Dahlberg* Factors, a legal remedy is inadequate, and an injunction is necessary to prevent great and irreparable injury—namely, the likely disenfranchisement of thousands of lawful Minnesota voters. If an injunction is not issued, Plaintiffs, the Alliance's membership, and countless other Minnesota

voters will face an “excruciating dilemma”: “either venture into public spaces, contrary to public directives and health guidelines or stay at home and lose the opportunity to vote.” *Democratic Nat’l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1320819, at \*5 (W.D. Wis. Mar. 20, 2020). Because neither option is acceptable under the Minnesota or U.S. Constitution, injunctive relief is appropriate.

**I. Plaintiffs are likely to succeed on their right to vote claims.**

Both challenged provisions severely burden Plaintiffs’ fundamental right to vote, in violation of state and federal constitutional guarantees. *See Kahn v. Griffin*, 701 N.W.2d 815, 832 (Minn. 2005) (“It is undisputed that the right to vote is a fundamental right under both the federal and state constitutions.”). Minnesota courts follow the federal *Anderson-Burdick* standard when evaluating whether state election laws unconstitutionally infringe on the right to vote. *Id.* at 832–33. Under this framework, courts must “weigh the character and magnitude of the burden imposed on voters’ rights against the interests the state contends justify that burden, . . . consider[ing] the extent to which the state’s concerns make the burden necessary.” *Id.* at 833; *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The *Anderson-Burdick* standard is a sliding scale, where “the rigorousness of [the court’s] inquiry . . . depends upon the extent to which a challenged regulation burdens [voting] rights.” *Burdick*, 504 U.S. at 434. Thus, when voting rights are subject to a “severe” restriction or burden, the challenged restriction must be “narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 289 (1992). Less severe burdens remain subject to balancing; “[h]owever slight” the burden on voting rights “may appear,” “it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.) (quoting *Norman*, 502 U.S. at 288–89).

In evaluating the burden the law imposes, a court must focus on both the burden on the general electorate and on the individuals actually impacted by the law. *See id.* at 201–02.

The challenged provisions significantly burden Minnesota voters who vote by mail. During the pandemic, those burdens are even more severe and impose a heightened risk of disenfranchisement on particular groups such as elderly voters, voters with disabilities, and minority voters. Those same groups are among those with a heightened risk of serious illness or death from COVID-19. Even under ordinary circumstances, the State would be hard-pressed to justify the burdens imposed by the challenged provisions; but in the current public health crisis, there are no state interests that can justify the risk of disenfranchisement of thousands of Minnesotans as a result of these provisions.

**A. The Witness Requirement violates the fundamental right to vote.**

Plaintiffs are highly likely to succeed on their claim that the Witness Requirement burdens the right to vote under the U.S. and Minnesota Constitutions. The Witness Requirement forces thousands of voters to forego their state and medically advised self-isolation practices and increase their risk of contracting COVID-19, or else forfeit their fundamental right to vote. Courts have recognized the great burden that witness and notarization requirements place on voters, striking them down in the wake of COVID-19. *See, e.g., People First of Ala. v. Merrill*, No. 2:20-cv-00619-AKK, 2020 WL 3207824, at \*14–16 (N.D. Ala. June 15, 2020) (enjoining Alabama’s witness requirement because “[e]xposure to a deadly virus is a burden” and requiring someone to sign an envelope “is hardly a foolproof fraud prevention measure”), *appeal docketed*, No. 20-12184 (11th Cir. June 17, 2020); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at \*8 (W.D. Va. May 5, 2020) (“The Constitution does not permit a state to force” voters to choose “between adhering to guidance that is meant to protect not only their own health, but the health of those around them, and undertaking their fundamental right—

and, indeed, their civic duty—to vote in an election.”); *League of Women Voters of Okla. v. Ziriox*, 463 P.3d 524, 524 (Okla. 2020) (“Respondent is barred from issuing ballot forms, instructions, and materials suggesting notarization and/or a notarized affidavit form is the only means through which the requisite affidavit for absentee voting may be accomplished.”); *see also People First of Ala.*, , 2020 WL 3478093, at \*7 (denying motion to stay pending appeal because “when balanced against the potential life-or-death burden placed on high-risk Alabamian voters, the absentee-ballot requirements, which appear to provide little protection against a nearly non-existent problem, simply do not carry the day”).

**1. The severe burdens imposed by the Witness Requirement on all voters—and certain vulnerable groups in particular—are exacerbated during the pandemic.**

Even under ordinary circumstances, the Witness Requirement burdens all Minnesota voters who, for a variety of reasons, must vote by mail, by requiring them to seek out a witness from a limited pool of individuals—registered Minnesota voters or notaries—to cast their mail ballots. Indeed, as of 2018, the citizen voting age population of Minnesota was 4.6 million, but only 3.2 million were registered voters, making it highly likely that a voter will have to contact many people before finding someone who can witness their ballot. Mayer Expert Decl. ¶ 56; *see also* McCool Expert Decl. ¶ 15 (discussing limited number of eligible witnesses on Indian lands); Sansom Decl. ¶ 5, (discussing problems finding a witness for her absentee ballot); Carpenter Decl. ¶ 5 (describing problems finding witness in 2012); Declaration of Keum Hwa Choi (“Choi Decl.”) ¶ 10 (discussing difficulty locating witness). Moreover, using a notary is not a failsafe, as many require payment for their services and often keep limited, appointment-only hours. Mayer Expert Decl. ¶¶ 60–62; *see also* McCool Expert Decl. ¶¶ 15, 16. It is thus unsurprising that, in general elections alone since 2012, Minnesota has discarded over 10,000 mail ballots for failure to comply with the Witness Requirement. Mayer Expert Decl. ¶ 46 (Table 1).

During the pandemic, these burdens only grow more severe as the pool of voters who are now homebound, or must vote by mail to prevent potential exposure to COVID-19, has grown exponentially. Mayer Expert Decl. ¶ 2; Maples Decl. ¶¶ 4–7, 10–12; Sansom Decl. ¶¶ 5–6, 9–10; Severson Decl. ¶ 4; Madden Decl. ¶ 7; Thorson Decl. ¶ 6; Choi Decl. ¶ 11. To comply with the Witness Requirement, voters must not only attempt to locate a qualified witness but also break social distancing guidelines in the process. Troisi Expert Decl. ¶ 31; *see* Mayer Expert Decl. ¶ 62. As voters leave the safety of their homes simply to find a witness or locate a notary, they are likely to touch common objects and potentially breathe air laced with dangerous droplets in the process, largely eliminating the benefits of voting by mail. *See* Troisi Expert Decl. ¶¶ 10, 17–20, 29–31; *see also* Carpenter Decl. ¶ 6 (stating she would not feel safe locating a witness in the pandemic). Once voters locate a witness (if they do), their risk is heightened as they must interact with the witness in close proximity, “touching the same piece of paper (and likely other surfaces such as the same pen or table top),” and breathing the same air as the witness watches the voter complete the ballot and then signs it. Troisi Expert Decl. ¶ 31.

These burdens are not distributed equally, but disproportionately weigh on certain groups, as many of those voting by mail this cycle are doing so precisely because they are over age 65, have disabilities, are immunocompromised, or have other high-risk factors for COVID-19. *See* Maples Decl. ¶¶ 4–7; Sansom Decl. ¶ 8; Severson Decl. ¶ 4; Thorson Decl. ¶ 3; Madden Decl. ¶ 7; *see also* Mayer Expert Decl. ¶ 39; Troisi Expert Decl. ¶¶ 12–13. For instance, the Witness Requirement imposes a severe burden on voters over the age of 65, including the Alliance’s more than 84,000 members whose age places them at a heightened risk of severe illness or death from COVID-19. Troisi Expert Decl. ¶¶ 12, 30; Madden Decl. ¶ 4. Absentee voting has always provided older voters a useful alternative where a lack of transportation or inability to stand in long lines

makes voting in person difficult or impossible; but in the midst of the coronavirus pandemic, the ability to vote safely from home is critical to safeguard elderly voters' right to access the franchise. *See* Thorson Decl. ¶¶ 3, 18–19; Maples Decl. ¶¶ 4–6, 9–12; Sansom Decl. ¶¶ 6–9; Severson Decl. ¶¶ 4–6; *see also* Mayer Expert Decl. ¶¶ 13–22; Troisi Expert Decl. ¶¶ 12, 29–31 (explaining that individuals over 65 are at high risk of complications from COVID-19 and recommending absentee voting).

The Witness Requirement also imposes particularly severe burdens on the approximately 616,00 Minnesotans who live alone, as well as the 175,000 Minnesotans who are single parents living solely with children under age 18. Mayer Expert Decl. ¶ 57. For instance, Plaintiff Maples is an immunocompromised Minnesota voter with significantly reduced mobility who lives alone and has been practicing self-isolation since the pandemic began. Maples Decl. ¶¶ 10–11. For her, securing a witness requires breaking this isolation and risking exposure to a deadly virus that she has hidden from for months. *Id.* Similarly, Plaintiff Sansom also lives alone, and due to her age and health she is also at great risk if exposed to the virus. Sansom Decl. ¶ 6. To find a witness—which she has failed to do in the past, despite her best efforts, even before the threat of COVID-19—she would have to forego her strict social distancing. *Id.* ¶¶ 5, 9. These voters and others like them must not only find someone to witness their ballot, but they must leave their home or invite someone into it to obtain the witness's signature, risking exposure to the virus and diminishing the safety benefits of voting by mail. *See* Troisi Expert Decl. ¶¶ 10, 17–20, 29–31; *see* Mayer Expert Decl. ¶ 62; *see also* Maples Decl. ¶¶ 4–7, 11–13; Sansom Decl. ¶¶ 6, 9–10; Choi Decl. ¶ 11. Worse, voters who live alone disproportionately tend to be from populations at heightened risk from COVID-19. Of those Minnesotans who live alone, nearly 40 percent are age 65 or older. Mayer

Expert Decl. ¶ 57. The individual plaintiffs and the Alliance’s members exemplify the difficulties that these groups face in coordinating a witness for their ballot during a viral pandemic.

The Witness Requirement also imposes severe burdens on Minnesota’s disabled citizens. At least 12.9 percent of the State’s voting age population reportedly have disabilities. Mayer Expert Decl. ¶ 58. While absentee voting is often recognized as a mechanism to ensure that more individuals with disabilities are able to vote, one study found that in 2018, only 45.7 percent of Minnesotans with disabilities voted, while 65.2 percent of non-disabled Minnesotans cast ballots—the largest gap between voters with and without disabilities in the country. Ex. 29, at 6. The hurdles of finding, communicating with, and meeting with a person eligible to serve as their witness are even more acute for these voters, particularly those with ambulatory disabilities or who experience other mobility challenges. *See* Mayer Expert Decl. ¶¶ 56–59; McCool Decl. ¶ 16. And the CDC warns that people with disabilities might be at a higher risk of infection or severe illness from COVID-19 because of their underlying medical conditions. Ex. 30, at 1; *see also* Troisi Expert Decl. ¶ 12. For persons who are disabled as a result of or in conjunction with an immune deficiency disorder, who are above age 65, or both, like Plaintiff Maples, the Witness Requirement will likely be insurmountable during the pandemic. *Id.*

For voters who are temporarily out of state, even before the pandemic, the Witness Requirement was essentially a mandate that their ballot be notarized, often for a fee. Indeed, students, travelers, and other out-of-state Minnesotans voting absentee—among the groups of voters most likely to need absentee voting—have always been far less likely to have access to a registered Minnesota voter to witness their ballots. *See* Mayer Expert Decl. ¶¶ 60–61; Carpenter Decl. ¶ 5 (discussing significant effort made to locate a witness while living out of state). During the pandemic, securing a qualified witness might be impossible. Plaintiff LaRose, a Minnesotan



temporarily residing in Connecticut, does not currently know any registered Minnesota voters in Connecticut; cannot rely on family members or friends from Minnesota to travel to witness his ballot; and cannot easily use the services of a notary, since his school's notary services have been indefinitely suspended and outside notaries require a fee. LaRose Decl. ¶¶ 2, 6, 8–10. Moreover, the interaction needed to fulfill this requirement places him and those like him at grave risk of contracting COVID-19. *Id.*; *see also* Carpenter Decl. ¶ 6 (stating she would not look for a witness during a pandemic).

Finally, the Witness Requirement severely burdens Minnesota's minority voters. "There is no place harder hit by poverty than on Minnesota's Indian reservations," where more than 30 percent of Native people live in poverty, a problem that has only gotten worse during the pandemic. McCool Expert Decl. ¶¶ 20, 31–34. This poverty is accompanied by associated health problems that increase the risk of severe death or illness for reservation residents exposed to COVID-19. *Id.* ¶ 21; *see also* Troisi Expert Decl. ¶ 13. Compared to urban areas, the Witness Requirement imposes an even greater hurdle for voters on reservations. Other registered voters on reservations are fewer, with greater distances between them, and voters often lack access to transportation and the internet. McCool Expert Decl. ¶¶ 16, 26. Similar socioeconomic burdens mean that the Witness Requirement will also impose severe burdens on many of Minnesota's African-American voters in the coming elections. Minnesota has the second-biggest income inequality gap between Black and white Americans in the entire nation and is ranked 50th for racial disparities in high school graduation rates. Ex. 31, at 3; *see also* Mayer Expert Decl. ¶¶ 18–19 (discussing education gaps and voting). Indeed, the Twin Cities have "some of the most abysmal numbers on racial inequality in the nation," with the highest rates of racial employment discrepancy in the nation and a Black poverty rate (25.4 percent) four times the white poverty rate (5.9 percent). Ex. 31, at 2. These

differences have only been exacerbated by the pandemic. Black Americans die from COVID-19 at a rate three times that of white Americans. Ex. 32; *see also* Troisi Expert Decl. ¶ 13. The CDC has reported that simply being Black is among the factors that raise the chances of being hospitalized for COVID-19. Ex. 33, at 2. Imposing additional transactional voting costs and health risks on these voters via the Witness Requirement creates an undue, and severely unequal, burden.

As discussed, even in normal circumstances, a significant number of voters are disenfranchised as a result of the Witness Requirement. *See* Mayer Expert Decl. ¶ 46 (Table 1). This year, given the severity of the burdens imposed by the law as well as the surge in absentee voting—including voters who must navigate the Witness Requirement for the first time—the number of disenfranchised absentee voters promises to skyrocket. *Id.* ¶¶ 64–66. Under these circumstances, Plaintiffs’ expert estimates that the Witness Requirement is likely to disenfranchise upwards of 22,000 voters. *Id.* ¶ 66. “To disenfranchise a single voter is a matter for grave concern,” *Serv. Emps. Int’l Union, Local 1 v. Husted*, 906 F. Supp. 2d 745, 750 (S.D. Ohio 2012); accordingly, “[i]f disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then [it is not clear] what does.” *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at \*6 (N.D. Fla. Oct. 16, 2016). In the context of the pandemic, it is not simply the magnitude of the past disenfranchisement of Minnesota voters, or even the anticipated disenfranchisement of thousands more in November, that makes the burden imposed by the Witness Requirements so severe. Rather, it is the unconscionable choice that the State foists upon its citizens, forcing them to choose between their health—and, in some instances, their lives—and their right to vote. This inexcusable dilemma is particularly egregious given that the very people most likely to vote absentee are *precisely* those who are most at risk for the disease.

**2. There is no legitimate, much less compelling state interest to justify the burdens imposed by the Witness Requirement.**

Because Plaintiffs and countless other vulnerable Minnesota voters face significant threats to their health and their right to vote as a result of the Witness Requirement, it should be evaluated using strict scrutiny. *See, e.g., Fla. Democratic Party*, 2016 WL 6090943, at \*6 (applying strict scrutiny where thousands of voters were disenfranchised); *Ex. 38 (Driscoll v. Stapleton*, No. DV 20-408, slip op. at 11 (Mont. Dist. Ct. May 22, 2020) (applying strict scrutiny to mail ballot restrictions)). But under *any* standard, the burdens imposed by the Witness Requirement far outweigh any purported benefits it has for the integrity of Minnesota elections.

Neither the text nor the legislative history of the Witness Requirement articulates a precise state interest served by the statute. However, Minnesota is likely to attempt to justify the Requirement by citing a generalized interest in promoting election integrity or preventing voter fraud. Such generalized interests are insufficient to outweigh severe or significant burdens on voters discussed above.

The Witness Requirement does nothing to protect the integrity of the ballot. In fact, Minnesota already exempts voters in the military, voters living abroad, and “presidential-only” voters from the Witness Requirement. Minn. Stat. §§ 203B.16, 203B.21; *see also Merrill*, 2020 WL 3207824, at \*18 (noting “[t]he state has not explained why, consistent with its interest in preventing voter fraud, it can exempt” some voters and not others from a photo ID requirement). The Witness Requirement in and of itself provides no identity verification, and therefore no safeguard against the supposed voter claiming to be someone else. Nor does it ensure that the ballot enclosed in the envelope is the same one shown to the witness—an impossibility in Minnesota, considering the ballot must be marked “in private.” *Ex 34*. In evaluating witness requirements that similarly lack these safeguards, courts have found “witnesses’ role in helping to prevent voter

fraud [to be] underwhelming.” *Merrill*, 2020 WL 3207824, at \*16 (“Thus, all that the witnesses certify is that they watched this person—who may or may not be known to them, and who may or may not be the same person who completed the ballot—sign the affidavit. This is hardly a foolproof fraud prevention measure.”).

Moreover, the Witness Requirement is far from the only measure that Minnesota uses to keep absentee ballots secure. For instance, the ballot envelope requires the voter to list their driver’s license number or the last four digits of their social security number. Ex. 34. The voter also certifies that they are, in fact, who they claim to be, which is punishable under penalty of perjury. *Id.*; see also Minn. Stat. §§ 203B.07 subd. 3, 609.48 subd. 2; *People First of Ala.*, 2020 WL 3478093, at \*7 (“It is difficult to understand how getting two witnesses to sign a ballot provides more protection against absentee voter fraud than requiring the voter to sign an affidavit under penalty of perjury.”). And the ballot board is already required to determine whether another ballot has been previously accepted for a voter and to confirm each voter’s identity, address, name, and registration. Minn. R. 8210.2450. Minnesota law further makes it a felony to make or sign a false statement in an application for or on an absentee ballot, engage in voter fraud, or falsify or tamper with voter records or absentee ballots, among a host of other election-related crimes. Minn. Stat. §§ 201.014, 201.054, 201.061, 201.27, 203B.03. In other words, Minnesota has ample other methods to ensure the integrity of the ballot, many of which are on their face far more reliable and effective means of preventing voter fraud. See *People First of Ala.*, 2020 WL 3478093, at \*7 (questioning asserted state interest where “other absentee voting requirements—*e.g.*, the requirement that a voter provide her driver’s license number or the last four digits of his Social Security number with her absentee ballot application—will help prevent voter fraud”); *Common Cause Ind. v. Individual Members of Ind. Election Comm’n*, 800 F.3d 913, 928 (7th Cir. 2015)

(asserted state interests cannot outweigh burdens where they can “be served through other means, making it unnecessary to burden the right to vote”).

Minnesota is one of only 12 states that have a witness or notarization requirement.<sup>2</sup> There is no indication that the absentee voting systems of the 38 other states do not have a witness or notarization requirement are plagued with more voter fraud than the 12 that do, nor has any fraud been reported for Minnesota’s own overseas or presidential-only voters for whom no witness signature is required. *See* Mayer Expert Decl. ¶¶ 67–68. A purely hypothetical threat of voter fraud does not outweigh the burdens imposed by the Witness Requirement under *any* circumstances, *see League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 246 (4th Cir. 2014) (explaining “states cannot burden the right to vote in order to address dangers that are remote and only ‘theoretically imaginable,’” such as threats to “election integrity and fraud protection,” with little to no evidence that such dangers exist (quoting *Frank v. Walker*, 17 F. Supp. 3d 837, 850 (E.D. Wis. 2014))), and unproven voter fraud concerns certainly cannot override the safety of elections during the COVID-19 pandemic. *See, e.g., Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2089813, at \*1 (D. Nev. Apr. 30, 2020) (“[The State’s] interests in protecting the health and safety of Nevada’s voters and to safeguard the voting franchise in light of the COVID-19 pandemic far outweigh any burden . . . premised on a speculative claim of voter fraud.”).

In short, Minnesota need not require voters to risk their health and safety to preserve election integrity or prevent voter fraud. And given that the Requirement threatens to severely

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<sup>2</sup> *See Verification of Absentee Ballots*, Nat’l Conf. of State Legislatures (Jan. 21, 2020), <https://www.ncsl.org/research/elections-and-campaigns/verification-of-absentee-ballots.aspx>. At least five of those states have since relaxed their witness requirement in the midst of the pandemic, either by legislative enactment or court order. *See Merrill*, 2020 WL 3207824, at \*29 (Alabama); 2020 N.C. Sess. Laws 17 (North Carolina); *Ziriox*, 463 P.3d at 524 (Oklahoma); *League of Women Voters of Va.*, 2020 WL 2158249, at \*1 (Virginia); *Thomas v. Andino*, Nos. 3:20-cv-01552-JMC, 3:20-cv-01730-JMC, 2020 WL 2617329, at \*30 (D.S.C. May 25, 2020) (South Carolina).

burden and disenfranchise thousands of lawful voters, the only rational conclusion is that leaving it in place for the coming elections will *itself* undermine the integrity of the state's elections.

**B. The Election Day Receipt Deadline violates the fundamental right to vote.**

Plaintiffs are also highly likely to succeed on their claim that the Election Day Receipt Deadline burdens the right to vote under the U.S. and Minnesota Constitutions. The Election Day Receipt Deadline violates the fundamental right to vote by rejecting ballots voted by lawful, registered voters prior to election day, simply because they arrive after the deadline, even where the late arrival was due to circumstances out of the voter's control. Courts have previously held that deadlines must give way when voting rights are at stake. *See, e.g., Doe v. Walker*, 746 F. Supp. 2d 667, 677–80 (D. Md. 2010) (extending deadline to count votes after UOCAVA challenge); *United States v. Cunningham*, No. 3:08cv709, 2009 WL 3350028, at \*4–7 (E.D. Va. Oct. 15, 2009) (same). Courts and states are now relaxing similar deadlines in the context of this pandemic. *See, e.g., Bostelmann*, 2020 WL 1320819, at \*9; *In re Extension of Time for Absentee & Mail-in Ballots to Be Received by Mail & Counted in 2020 Primary Election*, No. 2020-003416, slip op. at 2–3 (Ct. of Common Pleas of Delaware Cty, Pa. June 2, 2020); Exs. 35, 36 (executive orders from the Governors of Pennsylvania and New York extending ballot receipt deadlines).

**1. The Deadline's arbitrary disenfranchising effects will increase in the midst of the pandemic.**

Even before the onset of the pandemic, the Election Day Receipt Deadline severely burdened the right to vote by disenfranchising *thousands* of eligible voters who mailed their ballot on or before election day—including more than 3,500 in 2018 alone—simply because their ballots do not arrive by 8:00 p.m. on election day. Mayer Expert Decl. ¶ 46 (Table 1). For those voters whose mail ballots take longer than expected to be delivered, through no fault of their own, *see, e.g., LaRose Decl.* ¶¶ 3–4, the punishment is swift and severe: total disenfranchisement.

During the pandemic, the massive increase in absentee voting, coupled with budget cuts and increased pressure on the USPS, all but guarantees that thousands more voters will have their ballots rejected through no fault of their own. *See* Mayer Expert Decl. ¶¶ 64–66; *see also* Exs. 18, 37. Minnesota is on pace to see an exponential surge in absentee ballot requests, increasing the likelihood that neither the postal service nor the county boards will be able to process the ballots efficiently enough to ensure that all are properly delivered prior to the Deadline in November. Mayer Expert Decl. ¶¶ 23–36, 39–42, 64–66. Election officials are unable to offer clear or accurate guidance as to when a ballot must be mailed in time to be counted, leaving it to voters to guess how best to meet the deadline. McCool Decl. at ¶¶ 37–38; *see also* Declaration of Shehab Jafari (“Jafari Decl.”) ¶ 7. Some election officials have gone so far as to suggest that voters use express mail delivery services to increase the chance of their ballot being delivered in time—indicating, in essence, that voters should pay to increase the odds that their votes will be counted. McCool Decl. at ¶ 38. *But see* Carpenter Decl. ¶¶ 7–8 (mail ballot rejected for arriving after Deadline despite paying substantial fee to send ballot via overnight shipping). Many absentee voters strongly prefer to vote closer to election day, to ensure that they can take into account information learned in the final days before an election before voting. McCool Decl. ¶ 44; Jafari Decl. ¶¶ 3, 6–7. But the Election Day Receipt Deadline and the delays in mail service combine to effectively require that absentee voters who need to self-isolate during the pandemic (or otherwise cannot personally deliver their ballot) must cast their votes *at least one week* (or perhaps more) prior to the election, in order to avoid the Deadline’s disenfranchising effects.

The Election Day Receipt Deadline is also disproportionately likely to disenfranchise Minnesota’s young, minority, elderly, and disabled voters—some of the very voters with the greatest need to cast their ballots by mail during the pandemic. *See* McCool Decl. ¶¶ 47–57; *see*

also Mayer Decl. ¶¶ 56–59. For instance, the Deadline poses a uniquely severe obstacle for Native voters who reside on reservations, many of whom lack mail service near their homes and must travel long distances to access post office facilities. McCool Decl. ¶¶ 16, 51–52, 56; *cf. Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1006 (9th Cir. 2020) (en banc) (recognizing voting difficulties for Native communities caused by lack of mail service). Without easy access to either the mail or reliable transportation, these voters might not even receive their ballots from elections officials until several days after they were sent. McCool Expert Decl. ¶ 52. These same factors, compounded by historically unreliable postal service and the additional postal delays resulting from the pandemic, might result in further delays as these voters attempt to return their mail ballots. *Id.* In short, the overall process of sending and receiving mail is slowed for these vulnerable voters, which translates directly into challenges meeting the Election Day Receipt Deadline.

**2. The State has no sufficient countervailing interest to justify the burdens imposed by the Election Day Receipt Deadline.**

The State has no justification that can outweigh the severe burden of disenfranchisement that the Election Day Receipt Deadline imposes on voters whose ballots are mailed on or before election day, but for reasons often entirely out of the voters’ control, arrive shortly thereafter. *See Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (finding likely constitutional violation after state failed to identify “precise interests justifying [] substantial burden” when ballots were rejected due to no fault of the voter). Because Minnesota counties need not even finalize election results until *ten days after* the election, *see* Minn. Stat. § 204C.33 subd. 1, extending the deadline to receive ballots would not jeopardize the State’s ability to finalize election results. *See also id.* § 204C.33 subd. 3 (State Canvassing Board shall conduct state canvass “on the third Tuesday following the state general election”); Ex. 38 (*Driscoll v. Stapleton*, No. DV 20-408, slip op. at 11 (Mont. Dist. Ct. May 22, 2020) (finding no adequate state interest in



maintaining receipt deadline where postmark deadline would not frustrate timely election results certification)). Expecting workflow backups, the State already extended the period during which absentee ballots can be processed by elections officials to include up to two days following the election. Minn. HF 3429 § 1 subd. 2(3), subd. 3. A postmark deadline, whereby all ballots mailed on or before election day are counted, would provide certainty and efficiency to Minnesota voters without compromising the state's interest in timely finalizing election outcomes.<sup>3</sup>

Wisconsin's recent experience is instructive. In April, a Wisconsin federal court extended the deadline for receipt of absentee ballots because voters were at risk of being disenfranchised by that state's election day receipt deadline. *See Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-cv-249-wmc, 20-cv-278-wmc, 20-cv-284-wmc, 2020 WL 1638374, at \*5, \*12 n.14 (W.D. Wis. Apr. 2, 2020), *appeal docketed*, No. 20-1546 (7th Cir. Apr. 3, 2020). The court concluded that "the state's general interest in the absentee receipt deadline is not so compelling as to overcome the burden faced by voters who, through no fault of their own, will be disenfranchised by the enforcement of the law." *Id.* at \*17. The Seventh Circuit declined to stay the district court's ruling on the ballot receipt deadline. *See Democratic Nat'l Comm. v. Republican Nat'l Comm.*, No. 20-1538, slip op. at 3 (7th Cir. Apr. 3, 2020). Shortly thereafter, the Supreme Court, evaluating the extension under *Anderson-Burdick*, agreed that it was appropriate to require the state to accept and count ballots mailed on or before election day, even though Wisconsin (like Minnesota) ordinarily rejects ballots received after election day. *See Republican Nat'l Comm.*, 140 S. Ct. at 1208 ("That extension was designed to ensure that the voters of Wisconsin can cast their ballots and have their

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<sup>3</sup> At least 15 states and the District of Columbia provide postmark deadlines for absentee ballots. *See* Alaska Stat. § 15.20.081(e), (h); Cal. Elec. Code § 3020(b); D.C. Code § 1-1001.05(a)(10A); 10 Ill. Comp. Stat. 5/19-8(c); Iowa Code § 53.17(2); Kan. Stat. Ann. § 25-1132(b); Md. Code Ann., Elec. Law § 9-505(a)(2); N.J. Stat. Ann. § 19:63-22; N.Y. Elec. Law § 8-412(1); N.C. Gen. Stat. § 163-231(b)(2)(b); N.D. Cent. Code § 16.1-07-09; Ohio Rev. Code Ann. § 3509.05(B)(1); Tex. Elec. Code Ann. § 86.007(a)(2), (e); Utah Code Ann. § 20A-3a-204(2)(a); Wash. Rev. Code § 29A.40.091(4); W. Va. Code, § 3-3-5(g)(2).

votes count.”). As a result of that ruling, nearly 80,000 ballots that would have been rejected under Wisconsin’s virtually identical receipt deadline were instead counted. Ex. 16, at 7. Plaintiffs seek precisely the same relief here.

## **II. Plaintiffs are likely to succeed on their due process claims.**

The Election Day Receipt Deadline also deprives Minnesota voters, including Plaintiffs and the Alliance’s members, of their liberty interest in voting, without adequate procedural safeguards. Plaintiffs are accordingly highly likely to succeed on the merits of this claim as well.

Both the Minnesota and U.S. Constitutions prohibit depriving any person of “liberty . . . without due process of law.” Minn. Const. art. I, § 7; U.S. Const. amend. XIV, § 1. Determining which protections are due in a given case requires a careful analysis of the importance of the rights and the other interests at stake. *Bendorf v. Comm’r of Pub. Safety*, 727 N.W.2d 410, 415–16 (Minn. 2007) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))); accord *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (same). Minnesota’s “due process protection . . . is identical to the due [process] guaranteed under the Constitution of the United States.” *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988); accord *McDonald v. City of St. Paul*, 679 F.3d 698, 704 n.3 (8th Cir. 2012). And Minnesota courts have looked to federal law, including the application of the test laid out in *Mathews v. Eldridge*, when evaluating whether the State Constitution’s due process clause has been violated. See, e.g., *Bendorf*, 727 N.W.2d at 415–16; *Sartori*, 432 N.W.2d at 453. Courts thus consider: (1) “the private interest that will be affected by the official action,” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,” and (3) “the Government’s interest, including the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail.” *Bendorf*, 727 N.W.2d at 415–16 (quoting *Mathews*, 424 U.S. at 335).

Each of these factors weighs heavily in Plaintiffs’ favor. *First*, the nature of the interest at stake—the right to vote and to have that vote count—is the most precious liberty interest there is, because it is preservative of all other basic civil and political rights. *See Erlandson*, 659 N.W.2d at 729–30 (“[N]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” (quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992))); *see also Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (“There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted.” (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting))). This interest extends to absentee voting, which Minnesota has statutorily conferred upon its citizens. *See Erlandson*, 659 N.W.2d at 734 (“The purpose of the absentee ballot is to enfranchise those voters who cannot vote in person.”); *see also Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) (“Having created an absentee voter regime through which qualified voters can exercise their fundamental right to vote, the State must now provide absentee voters with constitutionally adequate due process protection.”); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) (“Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters’ ballots are fairly considered and, if eligible, counted.”). This interest also extends to designated mail ballots, which are the sole option for thousands of Minnesota citizens to vote.

*Second*, the risk of erroneous deprivation resulting from the Election Day Receipt Deadline for absentee voters is extraordinarily high. This deprivation is neither hypothetical nor speculative;

it is established by public data reported by Minnesota and its counties that thousands of voters' mail ballots have been rejected in every general election, including over 3,500 in the most recent general election. *See* Mayer Expert Decl. ¶ 46 (Table 1). Under current procedures, the “cutoff” to mail a ballot is a moving target based on the current state of the USPS, varying from county to county and even from one election to another, making it patently unreliable and confusing to voters. McCool Expert Decl. ¶¶ 36-38. Minnesota's existing procedures thus too often deprive voters of having their ballot counted because (1) many voters are not able to accurately ascertain when they must return their ballot by mail, (2) even voters who mail their ballots well in advance of election day will be disenfranchised if their ballots do not arrive, through no fault of their own, by 8 p.m. on election day, and (3) some voters do not even receive their ballots from elections officials in time to return them by the Deadline. *See supra* at 21–22; LaRose Decl. ¶¶ 3–4; Carpenter Decl. ¶¶ 4–9. Finally, the Election Day Receipt Deadline effectively moves election day forward by a week or more for voters who must cast their ballot by mail, denying them the ability to carefully consider their choices (particularly where they receive their ballot from elections officials not long before election day) or to take into account new information that they would otherwise learn in the final week before election day. *See* McCool Expert Decl. ¶¶ 41–45; Thorson Decl. ¶ 7; Jafari Decl. ¶¶ 3–7. Simply put, Minnesota's current procedures are neither a fair nor a reliable way to administer mail voting. A state's elections system, “the specifics of which are not explicitly made known to potential voters, that leaves potential voters in the dark as to its effect on a voter's [ability to vote] and that fails to give voters a fair opportunity to [participate], is fundamentally unfair and violative of the Due Process Clause.” *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1185 (11th Cir. 2008) (Barkett, J., concurring in part and dissenting in part).

*Third*, the value of additional or substitute procedural safeguards to ensure that mail ballots are counted is readily apparent. A substitute procedure—specifically, a postmark deadline requiring election officials to count mail ballots that are mailed on or before election day and received by the county within a reasonable time period after election day (i.e., by 5:00 p.m. the day before the county canvass)—solves the inequities inherent in the Election Day Receipt Deadline. A postmark deadline not only offers a clear and reliable date to voters by which they must cast their ballots, but it also ensures that voters who receive their ballots just a few days before election day, through no fault of their own, are still able to engage in the franchise. For the reasons explained above, requiring Minnesota to count these ballots would put little administrative burden on the state.

Having conferred the right to vote absentee (and required some voters to vote by designated mail ballot), the State must establish adequate procedures to ensure that voters have a reliable, fair, and effective method to cast their ballots. Because the Election Day Receipt Deadline is markedly inadequate in every respect, and Minnesota is readily capable of instituting a substitute procedure that would protect voters' rights with minimal burden to the State, the Election Day Receipt Deadline violates Minnesota voters' procedural due process rights under the State and U.S. Constitutions.

**III. No legal remedy can compensate for the irreparable harm Plaintiffs will suffer absent a temporary injunction, and a temporary injunction will not harm Defendant.**

Absent judicial intervention, Plaintiffs will suffer irreparable injury to their constitutional right to vote. Both the Witness Requirement and the Election Day Receipt Deadline put the individual Plaintiffs, as well as the thousands of the Alliance's members, at great risk of disenfranchisement. Courts regularly consider such constitutional deprivations irreparable. *See, e.g., League of Women Voters of N.C.*, 769 F.3d at 247 (“Courts routinely deem restrictions on

fundamental voting rights irreparable injury.”); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (similar); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (explaining that the loss of constitutional “freedoms . . . unquestionably constitutes irreparable injury”). Indeed, “[t]he denial of the opportunity to cast a vote that a person may otherwise be entitled to cast—even once—is an irreparable harm.” *Jones v. Governor*, 950 F.3d 795, 828 (11th Cir. 2020); *see also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1321 (11th Cir. 2019) (“[I]t is a ‘basic truth that even one disenfranchised voter—let alone several thousand—is too many.’” (quoting *League of Women Voters of N.C.*, 769 F.3d at 244)). And once an election occurs, “there can be no do-over and no redress.” *League of Women Voters of N.C.*, 769 F.3d at 247.

It is precisely because Plaintiffs face the loss of constitutional rights that legal remedies would be inadequate. *See Christian Legal Soc’y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). More specifically, money damages cannot cure disenfranchisement *ex post*, nor can they cure diversion of resources. *See Frank v. Walker*, 196 F. Supp. 3d 893, 904 (E.D. Wis 2016) (finding “traditional legal remedies, such as monetary damages, would be inadequate” where plaintiffs faced violations of their right to vote in elections that might occur before resolution of their claims), *aff’d in part, rev’d in part sub nom. Luft v. Evers*, Nos. 16-3003, 16-3052, 16-3083, 16-3091, 2020 WL 3496860 (7th Cir. June 29, 2020); *see also Metro. St. Louis Equal Hous. Opportunity Council v. Lighthouse Lodge, LLC*, No. 2:09-cv-04019-NKL, 2009 WL 1576735, at \*3–4 (W.D. Mo. June 4, 2009) (finding diversion of resources cannot be cured with monetary relief). Given the proximity of the November 2020 general election, and the potential deprivation of rights faced by Plaintiffs and thousands of Minnesota voters, legal remedies would be wholly inadequate.

Moreover, as long as the challenged provisions remain in effect, the Alliance will be required to divert resources to assist thousands of its members and constituency with overcoming

the burdens imposed by these laws so that it can effectuate its mission. *See* Madden Decl. ¶ 11. These efforts include, among other things, an extensive get-out-the-vote and education campaign about the challenged provisions, both of which will require the Alliance to take time and resources away from its core issue-advocacy work that is mission-critical, particularly in a presidential general election year. *Id.* ¶¶ 5–10. Once this election cycle has come and gone, those injuries to the Alliance cannot be “undone through monetary remedies.” *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987). And it is precisely for this reason that courts have routinely recognized that such diversion of resources constitutes irreparable harm. *See League of Women Voters of Mo. v. Ashcroft*, 336 F. Supp. 3d 998, 1005 (W.D. Mo. 2018) (“Courts routinely recognize that organizations suffer irreparable harm when a defendant’s conduct causes them to lose opportunities to conduct election-related activities.”); *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) (finding plaintiffs’ lost opportunity to register voters was irreparable harm); *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1350 (N.D. Ga. 2016) (“[C]onduct that limits an organization’s ability to conduct voter registration activities constitutes an irreparable injury.”).

In addition to the irreparable harm experienced by Plaintiffs, thousands of other Minnesota voters who will be voting by mail this year to protect their health and safety will also suffer irreparable harm. Indeed, amidst the ongoing public health crisis, the challenged provisions put all voters at severe risk of disenfranchisement and require them to face an unconscionable choice between their health and their right to vote.

No opposing harm outweighs these injuries. Injunctive relief would do nothing more than ensure that Minnesotans are able to fully exercise their right to vote, while also protecting their health. There is no reason to believe that such permissive injunctive relief would cause any injury

to the Secretary (or to anyone else for that matter), let alone an injury that outweighs the constitutional harm and risk to their health that Plaintiffs and Minnesota voters face. *See People First of Ala.*, 2020 WL 3478093, at \*6 (finding counties’ burdens “minimal” and “light” when compared to risk of forcing voters to expose themselves to COVID-19).

**IV. A temporary injunction is in the public interest, the court will have no administrative burdens in supervising and enforcing it, and the parties do not have a preexisting relationship that would be unsettled by an injunction.**

The public interest also weighs heavily in Plaintiffs’ favor. Protecting statutory and constitutional rights is always in the public interest. *Rodgers v. Bryant*, 942 F.3d 451, 458–59 (8th Cir. 2019); *see also Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) (concluding that public interest favors protecting constitutional freedoms). The public interest is particularly served by issuing an injunction in a case where voting rights are at issue because “[t]he public has a ‘strong interest in exercising the fundamental political right to vote,’” *League of Women Voters of N.C.*, 769 F.3d at 248 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)), and thus “[t]he public interest [] favors permitting as many qualified voters to vote as possible.” *Obama for Am.*, 697 F.3d at 437.

Moreover, issuing an injunction against the Witness Requirement and the Election Day Receipt Deadline would safeguard public health by ensuring that Minnesotans have a meaningful (and contact-free) way to vote from their homes, which will help prevent the further spread of COVID-19. This is plainly in the public interest. *See League of Women Voters of Va.*, 2020 WL 2158249, at \*10 (finding it was in public interest to enjoin witness requirement that contributed to spread of COVID-19); *see also Diletto v. Country Inn & Suites by Carlson*, No. 1:16cv1037 (JCC/IDD), 2016 WL 4400498, at \*4 (E.D. Va. Aug. 18, 2016) (“The public interest is clearly in remedying dangerous or unhealthy situations and preventing the further spread of disease.”).



Even assuming there is an opposing interest in protecting the integrity and efficiency of elections, granting Plaintiffs' request for a temporary injunction will not upset that interest. With respect to the Witness Requirement, there is no reason to believe that granting the requested relief will undermine the integrity of the election process. *See supra* 18–19. Minnesota law already provides ample protection against illegal voting, and ballot tampering that sufficiently protect the integrity of mail ballots. Minn. Stat. §§ 203B.08, 203B.03(a)(5). And, indeed, indeed UOCAVA and presidential-only voters have been submitting absentee ballots without a witness requirement, and without incident, for years. More to the point, there is no evidence to suggest that voter fraud is a concern in Minnesota. *See* Mayer Expert Decl. ¶¶ 67–69. Further, a postmark deadline would not only ensure that as many Minnesota voters as possible are enfranchised, but such deadlines are commonplace across the country, demonstrating their administrative feasibility. *Supra* n.3.

The Court will also face no administrative burdens in supervising and enforcing a temporary injunction. The Secretary is the chief elections officer. He is responsible for overseeing the enforcement of the State's election laws and has broad power to enact these changes. *See e.g.*, Minn. Stat. §§ 203B.08 subd. 4, 203B.09, 204B.27 subd. 1, 4, 11, 204B.181. The Secretary, not the Court, will be responsible for supervising and enforcing the election law and, in fact, is specifically authorized to make such changes upon the demand of this court. *Id.* § 204B.47. (“The secretary of state shall adopt alternative election procedures . . . [that] may include the voting and handling of ballots cast after 8:00 p.m. as a result of a state or federal court order or any other order extending the time established by law for closing the polls.”).

Finally, the nature and background of the parties' relationship before this dispute also weigh in favor of granting the temporary injunction because the parties had no preexisting relationship that would be unsettled by an injunction.

## **CONCLUSION**

Plaintiffs respectfully request that the Court grant their motion for a temporary injunction to prevent the violation of Plaintiffs' rights and ensure that voters can fully and safely engage in the democratic process and exercise their fundamental right to vote in November.

Dated: July 2, 2020

Respectfully submitted,

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**ACKNOWLEDGEMENT**

The undersigned hereby acknowledges that pursuant to Minn. Stat. § 549.211, Subd. 3, sanctions may be imposed if, after notice and a reasonable opportunity to respond, the Court determines that the undersigned has violated the provisions of Minn. Stat. § 549.211, Subd. 2.

*/s/ Samuel J. Clark*

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Samuel J. Clark