

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 Educational
Fund,

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

Plaintiffs,

v.

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

Defendant,

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

[Proposed] Intervenor-
Defendants.

**PROPOSED INTERVENOR-
DEFENDANTS' MEMORANDUM IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR TEMPORARY
INJUNCTION**

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INTRODUCTION

“[A]s 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). Like all states, Minnesota has enacted a comprehensive set of laws regulating the time, place, and manner of its elections. But in an era of increasingly modernized and streamlined elections, Minnesota has set itself apart by offering one of the most generous and accessible voting regimes in the Nation. Minnesotans enjoy a long early voting period—46 days—during which they may vote in person or submit absentee ballots.

Minnesota voters may elect to vote by absentee ballot for any reason, or for no reason at all. Any voter who wishes to avoid the hassle of requesting an application for an absentee ballot before each election can declare her permanent absentee voting status, which means election officials will automatically mail her an absentee-ballot application before each election. Any Minnesota voter may designate an agent to return her completed absentee ballot on her behalf. And any voter who is unable to go to a polling place because of an incapacitating health condition, disability, or similar reason may designate an agent to deliver her absentee-ballot application and absentee ballot to and from election officials.

Minnesota, moreover, has already taken extraordinary steps to ensure voters’ safety during the COVID-19 pandemic. For example, the Secretary of State has directed state and local election officials to implement guidance promulgated by the Centers for Disease Control (CDC), *Coronavirus Disease 2019: Considerations for Election Polling Locations*—a guidance which Plaintiffs and their putative expert embrace as authoritative. The Secretary also has authorized universal curbside voting so that any voter can avoid entering a polling place for any reason. And election officials—including in Hennepin County, the county of residence of Plaintiff Shehab

Jafari—have made clear that absentee voters may comply with the Witness Requirement while maintaining social distancing and other measures to protect themselves from COVID-19.

Apparently unsatisfied with Minnesota’s generous voting regime and comprehensive response to the COVID-19 pandemic, Plaintiffs challenge two core aspects of Minnesota’s absentee-ballot infrastructure, the Witness Requirement and the Election Day Receipt Deadline (together, the “Ballot Integrity Provisions”). Plaintiffs thus ask the Court to overrule the policy decisions of Minnesota’s political branches, which have already provided significant accommodations to voters during the COVID-19 pandemic and *rejected* a proposal to abandon the Ballot Integrity Provisions for the November general election. In the process, Plaintiffs also ask the Court to depart from the weight of authority from courts across the country, which have upheld absentee-ballot witness requirements and election day receipt deadlines during the COVID-19 pandemic.

Plaintiffs fail to justify their request for this sweeping judicial relief in either fact or law. In the first place, while Plaintiffs purport to bring challenges on behalf of voters allegedly at risk due to the COVID-19 pandemic, they ask the Court to invalidate the Ballot Integrity Provisions for *all* Minnesota voters in the November general election. Worse yet, Plaintiffs ask the Court to invalidate the Witness Requirement for *all time*. This facial challenge fails at the threshold: the irreducible minimum of such a challenge is a showing that a law is “unconstitutional *in all applications*,” *McCaughtry v. City of Red Wing*, 831 N.W.2d 518, 522 (Minn. 2013) (quoting *Minn. Voters All. v. City of Minneapolis*, 766 N.W.2d 683, 696 (Minn. 2009)) (emphasis added), but Plaintiffs *concede* that the Ballot Integrity Provisions are constitutional for hundreds of thousands of Minnesota voters in the November general election.

In fact, Plaintiffs have failed to identify *even a single voter* who is unable to comply with, or who will be unable to vote in November due to, either of the Ballot Integrity Provisions. To the contrary, their request for the extraordinary relief of a temporary injunction rests upon unfounded speculation and a one-sided version of events.

First, Plaintiffs' claims rest on the premise that in-person voting for the 2020 general election will be unconstitutionally unsafe due to the COVID-19 pandemic. Pls.' Mem. 4. Yet Plaintiffs have not brought such a challenge—and they offer zero evidence to substantiate this speculative premise. Nor could they offer any such evidence in light of the extraordinary measures Minnesota is undertaking to preserve voter health and safety during its 46-day in-person voting period. Moreover, the Governor's recent executive orders permitting a wide swath of activities in public places such as restaurants, fitness centers, and the like underscore that there is simply no basis for Plaintiffs' forecast of alleged harms from in-person voting three and a half months from now.

Second, Plaintiffs' challenge to the Witness Requirement rests on the erroneous assumption that compliance requires voters to “break social distancing guidelines” and “interact with the witness in close proximity.” Pls.' Mem. 13. But as Hennepin County has made clear, a voter may fulfill the Witness Requirement consistent with COVID-19 safety guidance and social distancing practices, such as through a window, vehicle window, or open door; via Zoom or similar technology; or by using a notary or e-notary. Plaintiffs' declarations from the four voters who claim imminent harm from the Witness Requirement do not discuss these methods of compliance, let alone prove that they are unworkable.

Third, Plaintiffs speculate that “budget cuts and increased pressure on” the U.S. Postal Service (“USPS”) along with “postal delays resulting from the pandemic,” “all but guarantee[] that

thousands more voters will have their ballots rejected” under the Election Day Receipt Deadline. *Id.* at 22, 23. But that speculation directly contravenes the USPS’s own statement that the pandemic has *not* resulted in delivery delays for first-class letters and recent data showing that increased package delivery during the pandemic has improved USPS’s financial health. Moreover, Plaintiffs once again fail to identify even a single voter who is unable to comply with the Election Day Receipt Deadline or who will be unconstitutionally burdened by completing and returning an absentee ballot within Minnesota’s generous 46-day absentee voting period.

Plaintiffs therefore have failed to prove an entitlement to the extraordinary relief of a preliminary order “short circuit[ing] the democratic process” and enjoining in their entirety two state laws that “embody[] the will of the people” and reflect the Legislature’s appropriate effort to uphold the integrity of Minnesota’s elections. *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008)). To the contrary, as explained in more detail below, the Ballot Integrity Provisions are commonsense and constitutional rules that prophylactically aim to curb “voter fraud” and ballot tampering, to “safeguard[] voter confidence” in the State’s elections, and to facilitate the State’s orderly election administration. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191–200 (2008). The Court should deny Plaintiffs’ Motion for Temporary Injunction.

BACKGROUND

Minnesota generally provides 46 days of early in-person voting. *See Vote Early in Person*, Minn. Sec’y of State, <https://www.sos.state.mn.us/elections-voting/other-ways-to-vote/vote-early-in-person/> (“*Vote Early in Person*”) (Ex. A).¹ For voters who prefer not to vote in person,

¹ All references to “Ex. _” refer to Exhibits to the Declaration of Benjamin L. Ellison, filed contemporaneously herewith.

Minnesota makes “vot[ing] by absentee ballot” available to “[a]ny eligible voter.” Minn. Stat. § 203B.02, subd. 1 (2014).

A Minnesota voter may apply for an absentee ballot for any election “not less than one day before ... that election.” *Id.* § 203B.04, subd. 1(a) (2014). She may do so online, by fax, by mail, or in person. *Id.* The voter need not be registered to vote to apply for an absentee ballot. *Vote Early by Mail*, Minn. Sec’y of State, <https://www.sos.state.mn.us/elections-voting/other-ways-to-vote/vote-early-by-mail/> (“*Vote Early by Mail*”) (Ex. B). She may simply “includ[e] a completed voter registration application with the absentee ballot.” Minn. Stat. § 203B.04, subd. 4. Minnesota voters also have the option of registering as permanent absentee voters for any reason or for no reason at all. This means that, based on a one-time application, a voter generally will “automatically receive an absentee ballot application before each election.” *Id.* § 203B.04, subd. 5(a).

An absentee-ballot return envelope must contain “[a] certificate of eligibility”—a space “designed to ensure that the voter provides the same type of identification as provided on the voter’s absentee ballot application for purposes of comparison.” Minn. Stat. § 203B.07, subd. 3 (2015). The voter must provide her identifying information in that space, sign it, and swear that she is an eligible voter. *Id.* As relevant here, the certificate of eligibility must also contain a statement signed by a registered Minnesota voter or a notary (or other individual authorized to administer oaths) providing that: (1) the ballot was displayed to that individual unmarked; (2) the voter marked the ballot in that individual’s presence without showing how it was marked; and (3) if the voter was not previously registered, the voter provided proof of residence. *Id.* This is the Witness Requirement.

The voter may return her ballot “during the 46 days before the election.” *Id.* § 203B.081, subd. 1; *Vote Early in Person* (Ex. A); *2020 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/> (“*2020 Elections and COVID-19*”) (Ex. C). An absentee voter may return her ballot by mail or in person to the county auditor or municipal clerk who transmitted the ballot. Minn. Stat. § 203B.08, subd. 1 (2015). An absentee voter also “may designate an agent to deliver in person the sealed absentee ballot return envelope to the county auditor or municipal clerk” or “to deposit the return envelope in the mail.” *Id.* Such an agent “may deliver or mail the return envelopes of not more than three voters in any election.” *Id.*; *2020 Elections and COVID-19* (Ex. C). An absentee ballot returned in person “must be submitted . . . by 3:00 p.m. on election day,” while an absentee ballot returned by mail must be received by 8:00 p.m. on election day. Minn. Stat. § 203B.08, subdivs. 1, 3. This is the Election Day Receipt Deadline.

Minnesota provides unique accommodations for some voters. If, for example, an eligible voter who applied for an absentee ballot “is a temporary or permanent resident or patient in a health care facility or hospital in the municipality in which the voter maintains residence,” two election judges must deliver the absentee ballot to the voter, witness the voter’s completion of the ballot, and then return the ballot. Minn. Stat. § 203B.11, subd. 1 (2008). Similarly, if in the seven days leading up to an election, an eligible voter (1) lives in a nursing home, assisted living facility, residential treatment center, group home, or battered women’s shelter, (2) is hospitalized, or (3) is unable to go to the polling place due to incapacitating health reasons or a disability—then that voter may designate an agent to deliver both the application and the absentee ballot between the voter and election officials. *Id.* § 203B.11, subd. 4; *Have an Agent Pick Up Your Ballot (Agent Delivery)*, Minn. Sec’y of State, <https://www.sos.state.mn.us/elections-voting/other-ways-to->

vote/have-an-agent-pick-up-your-ballot-agent-delivery/ (“*Have an Agent Pick Up Your Ballot (Agent Delivery)*”) (Ex. D).

This year, Minnesota has implemented a host of safeguards to protect voters who vote in-person or by absentee ballot during the COVID-19 pandemic. The list of safeguards includes the 46-day early voting period, during which a voter may vote in person or submit her absentee ballot. *See Vote Early in Person* (Ex. A); *2020 Elections and COVID-19* (Ex. C). The 46-day early voting period permits voters to avoid crowds and reduces the number of in-person voters on election day. In addition, the Secretary of State has emphasized that curbside voting is available for “anyone who cannot enter the polling place for any reason.” *2020 Elections and COVID-19* (Ex. C). Voters who take advantage of this option can thus register, update their registration, and vote—all “without leaving their vehicle.” *Id.*

The Secretary also has issued guidance encouraging polling places and in-person voters “to follow CDC guidance on social distancing (maintaining six feet of distance between voters), equipment sanitization, and hygiene for polling places.” *Id.* Moreover, “[t]he use of cloth face coverings can be considered as an additional measure to reduce the risk in public areas.” *Id.* The CDC guidance itself is extraordinarily detailed and has been employed throughout Minnesota. *See Coronavirus Disease 2019: Considerations for Election Polling Locations*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (Ex. E); *see also 2020 Elections and COVID-19* (“Special election jurisdictions and voters are encouraged to follow CDC guidance[.]”) (Ex. C); *Voting and COVID-19: What You Should Know*, City of Minneapolis, <http://vote.minneapolismn.gov/COVID-19/index.htm> (“We are relying heavily on” the CDC guidance.) (Ex. F).

Earlier this year, the Minnesota Legislature also enacted legislation to make voting easier and safer during the pandemic. *See* Peter Callaghan, *Minnesota Senate passes 2020 election bill: more money for no-excuse absentee balloting, but no all vote-by-mail*, MinnPost (May 8, 2020), <https://www.minnpost.com/state-government/2020/05/minnesota-senate-passes-2020-election-bill-more-money-for-no-excuse-absentee-balloting-but-no-all-vote-by-mail/>. The most prominent feature of that legislation is that it dedicated millions of dollars in federal funds to (among other things) “ensuring the health and safety of election officials and in-person voters, including the purchase of sanitation and disinfectant supplies.” H.F. 3429, § 4 (May 13, 2020), https://www.revisor.mn.gov/bills/text.php?number=HF3429&version=latest&session=ls91&session_year=2020&session_number=0. It also dedicated the same funds to “public outreach and preparations for implementing social distancing guidelines related to voting, including additional signs and staff,” and “facilitation, support, and preparation for increased absentee voting.” *Id.*

Moreover, Hennepin County has advised absentee voters how to fulfill the Witness Requirement while complying with social distancing protocols, the CDC guidance, and recommendations from the Minnesota Department of Health (MDH):

Q: Absentee voting by mail for non-registered voters requires a witness (either a Minnesota voter or a notary public). Due to COVID-19, what options do I have for obtaining a witness while following recommended CDC and Minnesota Department of Health guidelines like social distancing?

A: Ask a family member, friend, or neighbor to witness your blank ballot through a window, a vehicle window, open door or other physical barrier. Pass the signature envelope through an opening and have them sign it. Or, ask a food delivery person, mail delivery carrier, medical professional or personal care assistant to be your witness. Or, have a video chat with your witness, then put your official ballot envelope outside your door or in a mailbox for your witness to sign. You can also use a notary or e-notary as a witness.

Frequently Asked Questions, Absentee Voting and Other Ways to Vote, Hennepin Cnty., <https://www.hennepin.us/residents/elections/absentee-voting> (“Hennepin County FAQ”) (Ex. H).

Courts across the country—including the U.S. Supreme Court—have upheld absentee-ballot witness requirements during the pandemic. *See Merrill v. People First of Ala.*, No. 19A1063, Order (S. Ct. July 2, 2020) (“*Merrill Order*”) (Ex. I); *Democratic Nat’l Comm. v. Bostelmann*, No. 20-1538, 2020 WL 3619499 (7th Cir. Apr. 3, 2020); *Miller v. Thurston*, No. 20-2095, 2020 WL 3240600 (8th Cir. June 15, 2020); *Clark v. Edwards*, --- F. Supp. 3d ----, 2020 WL 3415376 (M.D. La. June 22, 2020); *Nielsen v. DeSantis*, No. 4:20-cv-236 (N.D. Fla. June 24, 2020) (Ex. J); *League of Women Voters v. Simon*, No. 20-1205, Tr. 1–13 (D. Minn. Jun. 23, 2020) (Ex. K). Those orders include the U.S. Supreme Court’s order, issued the very day Plaintiffs filed their motion, staying an injunction against Alabama’s requirement that an absentee ballot be verified by a notary or *two* witnesses. *See Merrill Order* (Ex. I). Other courts have upheld election day receipt deadlines for absentee voters during the COVID-19 pandemic. *See, e.g., Disability Rights Pa. v. Boockvar*, No. 83 MM 2020, 2020 WL 2507661 (Pa. May 15, 2020); *Delisle v. Boockvar*, No. 95 MM 2020, 2020 WL 3053629 (Pa. May 29, 2020); *Stapleton v. Thirteenth Judicial Dist. Ct.*, No. OP 20-0293, Order (Mont. May 27, 2020) (Ex. L); *Nielsen*, No. 4:20-cv-236 (Ex. J); *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329 (D.S.C. 2020).²

ARGUMENT

Plaintiffs have failed to carry their heavy burden to demonstrate that a temporary injunction is warranted. *See U.S. Bank Nat’l Ass’n v. Angeion Corp.*, 615 N.W.2d 425, 434 (Minn. Ct. App. 2000) (citing *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 91 (Minn. 1979)).

² On June 19, 2020, the Republican Committees filed and served their notice of intervention and proposed pleading, seeking intervention as of right under Minnesota Rule of Civil Procedure 24.01, and, alternatively, permissive intervention under Rule 24.02. Under Rule 24.03, intervention will be “deemed to have been accomplished” if no party objects within 30 days. As of the date of this filing, no party has objected to the intervention notice. In an abundance of caution, and to avoid any delay, the Republican Committees have submitted this opposition brief now and sought leave to do so, while their status as intervenors is pending.

“A temporary injunction is an extraordinary remedy” meant “to preserve the status quo until adjudication of the case on its merits.” *Haley v. Forcelle*, 669 N.W.2d 48, 55 (Minn. Ct. App. 2003) (internal quotation marks and citation omitted). As relevant here, “[a] district court errs in granting temporary injunctive relief if a plaintiff can show no likelihood of prevailing on the merits.” *Id.* at 58. And a temporary injunction may only issue if it “is necessary to prevent great and irreparable injury.” *Id.* at 56.

Plaintiffs have failed to satisfy either requirement for essentially the same reason: they have not identified a single voter who will be harmed by the Ballot Integrity Provisions. As a result, they have failed to show that they are likely to succeed on their claims that these provisions impose unconstitutional burdens that require facial invalidation. As a corollary, they have failed to establish any plausible claim of irreparable harm to any voter. This Court should deny the Motion for Temporary Injunction.

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs have not demonstrated that they are likely to succeed on the merits of their claims. That is fatal because “[a] primary factor in determining whether to issue a temporary injunction is the proponent’s probability of success in the underlying action.” *Minneapolis Fed’n of Teachers, AFL-CIO, Local 59 v. Minneapolis Pub. Sch., Special Sch. Dist. No. 1*, 512 N.W.2d 107, 110 (Minn. Ct. App. 1994) (citing *Dalco Corp. v. Dixon*, 338 N.W.2d 437, 440 (Minn. 1983)). The most significant reason Plaintiffs have not demonstrated a likelihood of success on the merits is that, even though they press facial challenges and seek an injunction invalidating the Ballot Integrity Provisions for *all* Minnesota voters, they concede (and their declarations confirm) that the Ballot Integrity Provisions are constitutional in hundreds of thousands of situations. Plaintiffs’ facial challenges also are based on raw (and, in many cases, incorrect) speculation, which is a core

reason the Minnesota Supreme Court has cited for disfavoring facial challenges. Those glaring deficiencies foreclose any chance that Plaintiffs could succeed on the merits of their claims.

A. Plaintiffs Bring Legally Insufficient Challenges

1. Plaintiffs have argued themselves out of viable facial challenges

This Court's assessment of Plaintiffs' probability of success on the merits can begin and end with the nature of Plaintiffs' claims. They are facial challenges dressed up as as-applied challenges. To be sure, Plaintiffs frame their challenges and requested relief in terms of "the coronavirus pandemic" and the "November 2020" general election, Pls.' Mem. 1—both of which give off the aura of an as-applied challenge. But make no mistake about the relief that Plaintiffs actually seek: invalidation of the Ballot Integrity Provisions in *all* their applications as to *all* Minnesota voters. Indeed, Plaintiffs expressly ask the Court to invalidate the Witness Requirement for all time. That is quintessential facial relief.

The problem for Plaintiffs is that they have argued themselves out of a legally sufficient facial challenge. "Facial challenges are disfavored[.]" *McCaughtry*, 831 N.W.2d at 522 (quoting *Wash. State. Grange*, 552 U.S. at 450–51). That is because facial challenges "often rest on speculation," raising "the risk of premature interpretation of statutes on the basis of factually barebones records." *Id.* They also "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* A plaintiff who brings a facial challenge, therefore, faces a high bar. "[I]n a facial challenge to constitutionality, the challenger bears the heavy burden of proving that the legislation is unconstitutional *in all applications.*" *Id.* (quoting *Minn. Voters All.*, 766 N.W.2d at 696) (emphasis added). Thus, if a court "identif[ies] a single situation in which the [challenged provisions] might be applied constitutionally, [the] facial challenge fails." *Id.*

Plaintiffs have made this Court’s job easy. They make crystal clear that their challenge to the Witness Requirement turns on those Minnesotans who “live alone,” “are single parents,” have a disability, “are temporarily out of state,” or who reside on “Indian reservations.” Pls.’ Mem. 14–16. And they make equally clear that their challenge to the Election Day Receipt Deadline turns on its alleged effects upon “young, minority, elderly, and disabled voters.” *Id.* at 22. By their own telling, therefore, Plaintiffs acknowledge that the Ballot Integrity Provisions are constitutional as applied to hundreds of thousands of Minnesotans—those who do not fit into the subgroups Plaintiffs have crafted. Far from “a single situation in which the [challenged provisions] might be applied constitutionally,” *McCaughtry*, 831 N.W.2d at 522, Plaintiffs effectively concede that thousands such situations exist. Their facial challenges thus necessarily “fail[.]” and the Court should deny the motion. *Id.*

2. Plaintiffs’ claims are based on blatant and erroneous speculation

Plaintiffs’ declarations are a case study in the sort of unfounded (and incorrect) “speculation” that the Minnesota Supreme Court has highlighted as a reason why facial challenges are “disfavored” and that forecloses entry of a preliminary injunction here. *McCaughtry*, 831 N.W.2d at 522.³ In fact, in the days leading up to Pennsylvania’s June primary election, the Pennsylvania Supreme Court denied two petitions to invalidate that State’s election day receipt deadline and to replace it with a postmark deadline precisely because the petitioners’ allegations regarding the effect of the COVID-19 pandemic on the election were speculative. *See, e.g.*,

³ The Republican Committees have framed this analysis as a failure to successfully press facial challenges. But the same analysis illustrates that, as a matter of standing, Plaintiffs have not identified an individual that will suffer an imminent injury-in-fact—“a concrete and particularized invasion of a legally protected interest”—that is fairly traceable to the Ballot Integrity Provisions. *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007). Because Plaintiffs lack standing to sue, it necessarily follows that they are not likely to succeed on the merits of their challenges.

Disability Rights Pa., 2020 WL 2820467, at *1–3 (Wecht, J., concurring); *Delisle*, 2020 WL 3053629, at *1 (Wecht, J., concurring).

Here, Plaintiffs’ challenges to the Ballot Integrity Provisions rest on three strands of speculation. *First*, the fundamental premise of Plaintiffs’ lawsuit is that in-person voting is unconstitutionally unsafe because it creates an inordinate “risk of contracting COVID-19.” Pls.’ Mem. 4. In fact, if Plaintiffs were correct that the Ballot Integrity Provisions unconstitutionally require unsafe physical interaction, then *a fortiori* in-person voting—which would require the same, if not more, physical interaction—is unconstitutionally unsafe. But Plaintiffs have not brought any challenge against Minnesota’s in-person voting system. They thus ask this Court for an advisory opinion—assuming (without a challenge before this Court) that in-person voting is unconstitutionally unsafe—en route to a dramatic overhaul of absentee voting in Minnesota. This Court should decline that invitation.

More fundamentally, however, Plaintiffs offer no evidence to support the speculative premise that in-person voting is unconstitutionally unsafe. For starters, Plaintiffs conspicuously fail to acknowledge the extensive safeguards that Minnesota is implementing to ensure safe elections in 2020. Those safeguards include the 46-day early voting period, which permits voters to avoid crowds and reduces the number of in-person voters on election day. *See Vote Early in Person* (Ex. A); *2020 Elections and COVID-19* (Ex. C). They also include the offer of curbside voting for “anyone who cannot enter the polling place for any reason.” *2020 Elections and COVID-19* (Ex. C). Voters who take advantage of this option can thus register, update their registration, and vote—all “without leaving their vehicle.” *Id.*

The Secretary also has encouraged polling places and voters “to follow CDC guidance on social distancing (maintaining six feet of distance between voters), equipment sanitization, and

hygiene for polling places.” *Id.* Moreover, “[t]he use of cloth face coverings can be considered as an additional measure to reduce the risk in public areas.” *Id.* The Legislature was aware of these challenges and accommodations when it rejected calls for an all-mail election, opting instead to enact legislation and to allocate millions of dollars to facilitate safe voting both in person and by absentee ballot. H.F. 3429, § 4 (May 13, 2020), https://www.revisor.mn.gov/bills/text.php?number=HF3429&version=latest&session=ls91&session_year=2020&session_number=0.

Moreover, Governor Walz’s COVID-19-related executive orders have uniformly permitted critical businesses and related establishments to remain open, while exempting government functions from stay-at-home restrictions. Emergency Executive Order 20-74 at 4–5 (June 5, 2020), https://mn.gov/governor/assets/EO%2020-74%20Final_tcm1055-437539.pdf. And as Plaintiffs implicitly acknowledge, consistent with social-distancing and related safety requirements, the Governor has begun reopening “non-critical businesses” and easing COVID-19-related restrictions on public and private activity. In particular, in a pair of recent orders that Plaintiffs do not provide to the Court, the Governor opened state rights of way for outdoor dining at restaurants, Emergency Executive Order 20-70 at 1 (June 2, 2020), https://mn.gov/governor/assets/EO%2020-70%20Final_tcm1055-434594.pdf, and has further “continu[ed] to safely reopen Minnesota’s economy and ensure safe non-work activities,” including “non-critical businesses,” Emergency Executive Order 20-74 at 1. Under those orders, Minnesotans may now dine in restaurants; participate in small social gatherings; attend weddings, funerals, and religious services; patronize barbershops, salons, and other personal-care establishments; go to pools, gyms, fitness centers, theatres, and performances venues; and so on. *See generally id.* Plaintiffs offer no explanation

for how in-person voting—subject to the restrictions recommended by the CDC and implemented in Minnesota—is somehow less safe than these public activities in public venues.

Plaintiffs nonetheless ask this Court to speculate that, despite these safeguards and the ongoing guidance, in-person voting approximately three and a half months from now will be unconstitutionally unsafe. That request is remarkable given that Plaintiffs and their putative expert, Dr. Triosi, *embrace* the CDC guidance as authoritative. *See* Pls.’ Mem. 4; Triosi Decl. ¶ 20. It is even more remarkable given that Plaintiffs offer no evidence, expert or otherwise, to suggest that implementation of the CDC guidance is somehow inadequate to protect the health and safety of in-person voters. Dr. Triosi, for example, actually endorses the measures outlined in the CDC guidance, such as “social distancing” and “environmental disinfection.” Triosi Decl. ¶¶ 16–17. To be sure, Dr. Triosi unremarkably opines that, as an abstract matter, coronavirus could be spread at polling places where individuals come into “close proximity” with each other and touch common “environmental surfaces,” *id.* ¶ 19, but she never opines as to whether such a spread will occur in Minnesota’s 2020 general election three and a half months from now, *see id.* ¶¶ 29–30.

For his part, Plaintiffs’ putative political science expert Dr. Mayer briefly alludes to in-person voting experiences in primary elections in other states earlier in 2020. *See* Mayer Decl. ¶¶ 23-36. But Dr. Mayer does not opine about the CDC guidance or Minnesota’s safeguards for in-person voting—and he makes no prediction regarding any health risks from in-person voting in Minnesota in November. *See* Mayer Decl.

Second, Plaintiffs’ challenge to the Witness Requirement likewise rests on an invalid premise, namely that the Witness Requirement will require some voters to “break social distancing guidelines” and “interact with the witness in close proximity.” Pls.’ Mem. 13. Not so. Absentee voters have myriad options for complying with the Witness Requirement while maintaining social

distancing and other measures to avoid the risk of exposure to the novel coronavirus— including, but not limited to, complying through open windows and doors, through Zoom calls, and so on. *See Hennepin County FAQ (Ex. H).*

In fact, Plaintiffs have not identified even a single voter who will be unable to vote due to the Witness Requirement. Plaintiffs have submitted declarations from nine lay witnesses. One of those witnesses, Ms. Carpenter, resides in New York and is “no longer a registered Minnesota voter.” Carpenter Decl. ¶ 10. Another witness, Mr. Madden, is President of Plaintiff Minnesota Alliance for Retired Americans Fund. Madden Decl. ¶ 2. He testifies about that organization’s activities, and does not claim that he is unable to vote or faces an unconstitutional burden due to the Ballot Integrity Rules. *See id.* A third witness, Ms. Thorson, is “not sure how [she] will vote in the upcoming election” and, therefore, may not even be affected by Minnesota’s absentee voting rules. Thorson Decl. ¶ 3.

Four of Plaintiffs’ remaining lay witnesses express “concerns” about complying with the Witness Requirement, but none discusses—let alone explains the inadequacy of—any of the many options for complying with that requirement while maintaining social distancing or other protective measures. *See Choi Decl.; Samson Decl.; LaRose Decl.; Maples Decl.; compare Hennepin County FAQ (Ex. H).* Ms. Maples, for example, relies on the erroneous assumption that “[t]o find an appropriate witness[,] I will likely need to leave my home or to interact with someone at my home within a six-foot distance.” Maples Decl. ¶ 12. As explained above, Ms. Maples would not have to do either thing. *See supra* Section I.A.2. Moreover, two of those witnesses, Ms. Choi and Ms. Samson, testify that they continue to “go out in public,” observe social distancing, and wear gloves and face coverings; Ms. Choi also testifies that she “sanitize[s]” her mail. Choi Decl. ¶ 6; Samson Decl. ¶ 9. Thus, by their own declarations, Ms. Choi and Ms.

Samson could engage in those same measures when having their absentee ballots witnessed. *See* Choi Decl. ¶ 6; Samson Decl. ¶ 9. Mr. LaRose voices his “object[ion]” to the Witness Requirement, LaRose Decl. ¶ 10, but his personal opposition to the Witness Requirement does not demonstrate a constitutional violation.

Third, Plaintiffs speculate that “postal delays resulting from the pandemic,” along with “budget cuts and increased pressure on USPS,” “all but guarantee[] that thousands more voters will have their ballots rejected” under the Election Day Receipt Deadline. Pls.’ Mem. 22, 23. Plaintiffs’ putative political science expert, Dr. McCool, states that “issues” with USPS “delivery times may be greatly exacerbated by the pandemic.” McCool Decl. ¶ 55. Dr. McCool also asserts that USPS “is facing dramatic budgetary shortfalls.” *Id.* But both Plaintiffs and Dr. McCool ignore the Postal Service’s own statement that the pandemic has had “no impact” on delivery times for “First-Class letters and flats,” which is the category of service applicable to completed absentee or mail-in ballots. *See* USPS Coronavirus Updates: Expected Delivery Changes (Apr. 17, 2020), <https://faq.usps.com/s/article/USPS-Coronavirus-Updates-Expected-Delivery-Changes> (“USPS Coronavirus Updates”). And they also ignore more recent data showing that “a tidal wave of packages is keeping the U.S. Postal Service afloat during the coronavirus recession, boosting the beleaguered agency’s finances to near pre-pandemic levels.” Jacob Bogage, *Under Siege from Trump, U.S. Postal Service Finds Surprising Financial Upside In Pandemic*, Washington Post, (June 25, 2020), <https://www.washingtonpost.com/business/2020/06/25/postal-service-packages-coronavirus/>. Thus, the facts contradict Plaintiffs’ speculation that delays in mail delivery will affect voters in the November general election (or beyond).

Moreover, even Dr. McCool acknowledges that the reason for the Postal Service’s downsizing and budget cuts is that “[i]n the last fifteen years, the volume of first-class mail has

decreased so dramatically.” McCool Decl. ¶ 53. The Postal Service itself has said as much. *See* U.S. Postal Service, Area Mail Processing Consolidations, Audit Report NO-AR-15-007 at 1 (“[M]ail volume [has] continued to decline indicating the need for further mail processing facilities’ consolidations.”). Yet even with changes in its operations (which are offset by the decrease in demand for its services), the Postal Service remains committed to delivering first-class mail “in 1–3 business days,” U.S. Postal Service, First-Class Mail, <https://www.usps.com/ship/first-class-mail.htm>, and the COVID-19 pandemic has had “no impact” on that delivery time, USPS Coronavirus Updates.

Most critically, Plaintiffs do not identify a single person who will be unable to vote because of the Election Day Receipt Deadline. Four of Plaintiffs’ lay witnesses express “concerns” about complying with the Election Day Receipt Deadline, but none provides any reason why they could not apply for an absentee ballot now, which would result in their ballots being sent out 46 days before election day. *See* Severson Decl.; LaRose Decl.; Jafari Decl.; Maples Decl. Moreover, none of these witnesses testifies that 46 days is an inadequate period to receive, complete, and return an absentee ballot. *See* Severson Decl.; LaRose Decl.; Jafari Decl.; Maples Decl. Ms. Maples recounts past confusion with delivery of her incoming mail, but offers no basis to believe that she faces any particular delay in delivery of her outgoing mail. *See* Maples Decl. ¶ 8.

To the extent that “[m]any 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,” Pls.’ Mem. 22, they are free to do so. They can return their voted ballots in person or by an agent—even on election day itself. *See* Minn. Stat. § 203B.08, subd. 1. For those with health concerns or “who need to self-isolate during the pandemic,” they can simply ask someone else to return their ballot for them. *Id.* §§ 203B.08, subd. 1, 203B.11, subd. 4. And they can hand

it over by slipping it through a window or door to their agent—essentially, contactless delivery. Mr. Jafari testifies that he is “planning to mail [his] ballot, at a minimum, at least a week before Election Day” but might want to delay his vote to react to “last-minute bombshells.” Jafari Decl. ¶ 7. Mr. Jafari states, however, that he will take his ballot to the post office, and does not explain why he could not instead deliver it in person to the county election office if he decides to vote closer to election day. *Id.* ¶ 9.

In the end, it is worth taking a step back to appreciate how hard it is to conjure up just one voter who might be harmed by the Ballot Integrity Provisions under Plaintiffs’ theory. It is also worth remembering that a successful facial challenge is a million miles away, because even “a single situation in which” either rule “might be applied constitutionally” dooms a facial challenge. *McCaughtry*, 831 N.W.2d at 522. That is how badly Plaintiffs miss the mark. Plaintiffs’ rampant and unfounded speculation dooms their facial challenges from the start.

B. Plaintiffs Have Failed To Establish That They Are Likely To Succeed On The Merits Of Their Unconstitutional Burden Claims

Even if Plaintiffs’ facial challenges rested on something more than speculation, the Court still should deny the motion because Plaintiffs have failed to demonstrate a “likelihood of prevailing on the merits” of their unconstitutional burden challenges to the Ballot Integrity Provisions. *Haley*, 669 N.W.2d at 58. Indeed, courts across the country have upheld absentee-ballot witness requirements against unconstitutional burden challenges premised upon the COVID-19 pandemic. *See Merrill Order* (Ex. I); *Democratic Nat’l Comm.*, 2020 WL 3619499; *Miller*, 2020 WL 3240600; *Clark*, 2020 WL 3415376; *Nielsen*, No. 4:20-cv-236 (Ex. J); *League of Women Voters*, No. 20-1205, Tr. 1–13 (Ex. K). Other courts also have upheld election day receipt deadlines against such challenges. *See, e.g., Disability Rights Pa.*, 2020 WL 2507661; *Delisle*, 2020 WL 3053629; *Stapleton*, No. OP 20-0293 (Ex. L). *Nielsen*, No. 4:20-cv-236 (Ex. J);

Thomas, 2020 WL 2617329. The Court should adhere to the weight of authority and deny a temporary injunction.

1. The *Anderson/Burdick* test governs unconstitutional burden claims

The U.S. Constitution permits Minnesota to regulate the time, place, and manner of its elections. U.S. Const. art. I, § 4, cl. 1. Although this power “may not be exercised in a way that violates other . . . provisions of the [U.S.] Constitution” or the Minnesota Constitution, *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *see also Kahn v. Griffin*, 701 N.W.2d 815, 832 (Minn. 2005), it is a bedrock principle of our federalist system that not all state election laws raise constitutional concerns, *see Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (recognizing that state election laws “will invariably impose some burden upon individual voters”). “[T]o maintain fair, honest, and orderly elections, states may impose regulations that in some measure burden the right to vote.” *Kahn*, 701 N.W.2d at 832 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). “Indeed, it is th[e] paramount importance of the right to vote that imbues the state with a compelling interest in preserving the orderliness and integrity of the election process.” *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 730 (Minn. 2003) (citing *Burson v. Freeman*, 504 U.S. 191, 199 (1992)).

Plaintiffs’ unconstitutional burden claims require the Court to weigh the character and magnitude of the burden (if any) imposed by the challenged law on protected rights against the State’s interests in and justifications for the law. *See Kahn*, 701 N.W.2d at 833. Under this analytical approach—commonly known as the *Anderson/Burdick* test for the two U.S. Supreme Court cases from which it is derived—“[r]egulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest,” while those imposing “[l]esser burdens . . . trigger less exacting review, and [the] State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Id.* at 832 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358–59 (1997)) (internal quotation marks

omitted). In assessing the alleged burden, the Court must “consider[] all available opportunities to vote” provided under Minnesota’s election scheme. *Mays v. LaRose*, 951 F.3d 775, 785 (6th Cir. 2020); *see also Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973).

The U.S. Supreme Court’s decision in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), well illustrates the *Anderson/Burdick* test in practice. There, the plaintiffs challenged Indiana’s requirement that voters present photo ID before voting. *See* 553 U.S. at 185. The plaintiffs, however, did not introduce “evidence of a single, individual Indiana resident who [would] be unable to vote” due to the challenged law. *Id.* at 187 (internal quotation marks omitted).

The Supreme Court rejected the plaintiffs’ challenge. *See id.* at 200–204. The court recognized that the law placed some burden on voters, particularly voters who lacked a photo ID. *See id.* at 198. It noted that voters who did not already have a photo ID must bear “the inconvenience of making a trip to the [D]MV, gathering the required documents, and posing for a photograph.” *Id.* The court concluded, however, that such inconvenience “surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” *Id.* It also rejected the plaintiffs’ attempt to focus on subgroups of voters because the plaintiffs presented insufficient evidence of any alleged burdens. *Id.* at 200–03; *see also id.* at 204–09 (Scalia, J., joined by Thomas, J. and Alito, J., concurring) (concluding that a subgroup analysis is improper under the *Anderson/Burdick* framework); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016) (a subgroup analysis fails to prove an unconstitutional burden where “the record . . . is devoid of quantifiable evidence from which an arbiter could gauge the frequency with which th[e] narrow class of voters has been or will become disenfranchised” by the challenged law).

Against that deficient showing, the Supreme Court credited “several state interests that arguably justify the burdens” imposed by election measures. Among other interests, states have an interest “in deterring and detecting voter fraud.” *Crawford*, 553 U.S. at 191 (plurality op.). This interest also entails a related interest in “orderly administration” of elections. *Id.* at 196. In addition, states may have “a particular interest in preventing voter fraud” due to “voter registration rolls [that] include a large number of names of persons who are either deceased or no longer live in Indiana.” *Id.* at 191. And finally, states have an interest “in safeguarding voter confidence.” *Id.* Although “closely related to the State’s interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Id.* at 197. Because these legitimate interests were at stake, and because they plainly outweighed the “usual burdens of voting” imposed by the photo ID requirement, the Supreme Court upheld the requirement. *See id.* at 200–204.

2. The Ballot Integrity Provisions satisfy the *Anderson/Burdick* test because they entail no more than the usual burdens of voting

Minnesota’s Ballot Integrity Provisions are constitutional under the *Anderson/Burdick* analysis. *Crawford* illustrates as much. If “the inconvenience of making a trip to the [D]MV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote,” *Crawford*, 553 U.S. at 198, then neither does finding a witness (in person or by video) or returning a ballot by election day. Indeed, finding a witness and returning a ballot by election day are less onerous than the usual burdens of going to a polling place, waiting in line, and voting on election day. Even in light of the COVID-19 pandemic, complying with these requirements in person would be no more dangerous than going grocery shopping, attending a wedding, working out at a fitness center, or engaging in any of the other activities that the Governor has permitted so long as proper safety measures are in place. What is

more, as explained above, virtually no Minnesotan has to comply with the Ballot Integrity Provisions through physical interaction. *See supra* Section I.A.2.

To the extent these provisions could be described as “burdens,” they are no more than “the usual burdens of voting.” *Crawford*, 553 U.S. at 198. Indeed, both before and during the COVID-19 pandemic, courts have upheld as constitutional—and at most, only “minimal[ly]” burdensome—neutral deadlines for exercising voting rights such as election day receipt deadlines. *Mays*, 951 F.3d at 791 (absentee ballot request deadline); *Rosario*, 410 U.S. at 758 (voter registration deadline for party primaries); *Thomas*, 2020 WL 2617329, at *26–27 (election day receipt deadline during COVID-19 pandemic).

Moreover, Minnesota’s generous provision of up to 46 days for voters to complete and submit their absentee ballots only underscores that the Election Day Receipt Deadline does not impose a cognizable burden upon voters. Not a single one of Plaintiffs’ witnesses testifies that 46 days is an inadequate period to receive, complete, and return an absentee ballot. *See* Severson Decl.; LaRose Decl.; Jafari Decl.; Maples Decl. Given the length of this period—and the myriad steps Minnesota has taken to accommodate voters both generally and during the COVID-19 pandemic—any voter’s inability to cast a timely ballot is “not caused by” the Election Day Receipt Deadline but instead “by their own failure to take timely steps to effect” completion and return of their ballot. *Rosario*, 410 U.S. at 758; *see also Mays*, 951 F.3d at 786 (rejecting unconstitutional burden challenge where “[j]ust as in *Rosario*, Plaintiffs’ choice to not participate in the opportunities Ohio provides to vote other than on Election Day was, at least in part, the cause of their inability to vote”); *see also id.* at 787 (“Plaintiffs could have avoided all that uncertainty by taking advantage of the opportunities Ohio provides to vote early.”); *Thomas*, 2020 WL 2617329, at *26 (“Of course, voters who fail to get their vote in early cannot blame South Carolina law for

their inability to vote; they must blame their own failure to take timely steps to effect their enrollment.” (internal quotation marks omitted)).

The fact that neither Ballot Integrity Provision imposes a substantial burden on the right to vote is all the more striking when measured against Minnesota’s weighty interests. At least three “legitima[te]” and “unquestionably relevant” interests are relevant here. *Crawford*, 553 U.S. at 191; *Kahn*, 701 N.W.2d at 832 (rule imposing non-severe burden can be justified by “important regulatory interests”).

First, the Ballot Integrity Provisions promote the State’s important interest in “detering and detecting voter fraud” and preventing ballot tampering. *Crawford*, 553 U.S. at 191; *see also id.* at 196 (“There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters.”).

The Witness Requirement does so primarily by ensuring that the person who submits an absentee ballot (1) began with an unmarked ballot, (2) was the voter who marked the ballot, and (3) provided proof of residence, if the voter was not previously registered to vote. Minn. Stat. § 203B.07, subd. 3. Relatedly, it ensures that the person who completes an absentee ballot does so free from undue influence or coercion. *See Veasey v. Abbott*, 830 F.3d 216, 255–56 (5th Cir. 2016) (en banc) (recognizing examples of “people who harvest mail-in ballots from the elderly”).

The same goes for the Election Day Receipt Deadline. It ensures that an absentee voter—like an in-person voter—votes on or before Election Day before polls close and results might become available. It therefore “eliminates the remote possibility that in an extremely close election . . . a person who did not vote on or before election day can fill out and submit a ballot later.” *Nielsen*, No. 4:20-cv-236, at *3 (Ex. J).

The State’s interest in combatting voter fraud would be sufficient to justify the Ballot Integrity Provisions even if “[t]he record contain[ed] no evidence of any voter such fraud actually occurring in [Minnesota] at any time in its history.” *Crawford*, 553 U.S. at 194. But here, Minnesota has a firm basis for concern about voting fraud—particularly in absentee voting. In 2017, for example, Michelle Marie Landsteiner of Mapleton was convicted of forging and submitting an absentee ballot. *Voter fraud charge reduced to misdemeanor*, The Free Press (Feb. 13, 2017), https://www.mankatofreepress.com/news/local_news/voter-fraud-charge-reduced-to-misdemeanor/article_1e875196-f206-11e6-8cd9-e72c8c0a799d.html. And just last year, Abdihakim Amin Essa of Minneapolis was charged with 13 felony counts of voting fraud for unlawfully signing absentee ballots as a witness, even though he was ineligible. *Minneapolis Man Charged With Absentee Ballot Fraud*, U.S. News & World Report (Nov. 5, 2019), <https://www.usnews.com/news/best-states/minnesota/articles/2019-11-05/minneapolis-man-charged-with-absentee-ballot-fraud>. Absentee voting fraud is thus very real in Minnesota.

That problem, unfortunately, is not unique to Minnesota. Numerous courts and commentators have recognized the legitimacy of states’ concerns about voter fraud—and especially in the context of absentee voting. *See, e.g., Crawford*, 553 U.S. at 195–96 (explaining history of in-person and absentee fraud “demonstrate[s] that not only is the risk of voter fraud real but that it could affect the outcome of a close election”); *Griffin v. Roupas*, 385 F.3d 1128, 1130–31 (7th Cir. 2004) (“Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting.” (citing John C. Fortier & Norman J. Ornstein, *Symposium: The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483 (2003))); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1197 (Ill. App. Ct. 2004) (“It is evident that the integrity of a vote is even more susceptible to influence and manipulation when done by

absentee ballot.”); *see also* Natasha Khan & Corbin Carson, *Comprehensive Database of U.S. Voter Fraud Uncovers No Evidence That Photo ID Is Needed*, News21, available at <https://votingrights.news21.com/article/election-fraud> (last visited Mar. 31, 2020) (study of election crimes from 2000–2012 finding that more fraud crimes involved absentee ballots than any other categories).

The renowned Commission on Federal Election Reform, which was chaired by former President Jimmy Carter and former Secretary of State James A. Baker III and whose report was cited in *Crawford*, reached the same conclusion. The Report determined that “[a]bsentee ballots remain the largest source of potential voter fraud.” Commission on Federal Election Reform, Center for Democracy and Election Management, American University, *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform* 46 (Sept. 2005) (Ex. M). “Absentee balloting is vulnerable to abuse in several ways” because ballots can be “intercepted” on their way to or from the voter; “[c]itizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure”; and “[v]ote buying schemes are much more difficult to detect when citizens vote by mail.” *Id.*

Against this backdrop, there can be no doubt that Minnesota has a legitimate interest in deterring absentee-ballot fraud. To be sure, no fraud-prevention measure is foolproof, and the Ballot Integrity Provisions cannot prevent every instance of fraud. But they undoubtedly play a role in deterring voter fraud, and that is what counts for constitutional purposes.

Second, and equally important, the Ballot Integrity Provisions promote Minnesota’s interest in “protecting public confidence in the integrity and legitimacy of representative government.” *Crawford*, 553 U.S. at 197 (internal quotation marks omitted). “[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen

participation in the democratic process.” *Id.*; see also *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”). As the Carter-Baker Report observed, “[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud.” Carter-Baker Report 18.

For its part, the Witness Requirement allays any concerns the public may have regarding the freedom and flexibility of a no-excuse absentee ballot. It installs an ordinary Minnesotan as a watchman to ensure that the ballot—and the vote it contains—is a valid and proper exercise of the voting franchise. Of course, like all humans, no Minnesotan is infallible, and some may even take their post with nefarious intentions. But it is the ideal of an honest, watchful eye that inspires public confidence in the integrity and legitimacy of absentee ballots cast in Minnesota.

The procedural safeguards embodied in the Election Day Receipt Deadline function in much the same way. The Election Day Receipt Deadline treats in-person and absentee voters on a par—and by guaranteeing that only ballots received by election day will be counted, forecloses any possibility that late-cast ballots could have any effect on the outcome of the election. See *Nielsen*, No. 4:20-cv-236, at *3 (Ex. J).

Third, the Election Day Receipt Deadline promotes Minnesota’s interest in “orderly administration” of its elections, including its interest in finality. *Crawford*, 553 U.S. at 196. Deadlines are part and parcel of modern elections and of a state’s generalized interest in orderly election administration. See, e.g., *Rosario*, 410 U.S. at 758; *Mays*, 951 F.3d at 787; *Thomas*, 2020 WL 2617329, at *26–27. Indeed, such deadlines “ensur[e] a smooth process for [voters] to cast ballots and officials to count those ballots.” *Thomas*, 2020 WL 2617329, at *26 (citation omitted). As the Northern District of Florida recently explained:

A state could reasonably so provide [a postmark deadline]; some do. But . . . a state could also reasonably decide, as Florida has, to require receipt on or before election

day. This eliminates the problem of missing, unclear, or even altered postmarks, eliminates delay that can have adverse consequences, and eliminates the remote possibility that in an extremely close election—Florida has had some—a person who did not vote on or before election day can fill out and submit a ballot later.

Nielsen, No. 4:20-cv-236, at *3 (Ex. J).

At day’s end, the burdens, if any, that the Ballot Integrity Provisions impose on Minnesotans’ right to vote are minimal and justified by Minnesota’s important interests in preventing fraud and ensuring the integrity and orderly administration of its elections. *See, e.g., Am. Civil Liberties Union of N.M. v. Santillanes*, 546 F.3d 1313, 1322 (10th Cir. 2008) (“Restrictions that are generally applicable, even-handed, politically neutral, and which protect the reliability and integrity of the election process are generally not considered severe restrictions and are upheld.” (citation and internal quotation marks omitted)). The Court should deny the motion.

3. Plaintiffs’ counterarguments fail in law and fact

Plaintiffs offer no persuasive arguments to rebut the conclusion that the Ballot Integrity Provisions are constitutional under the *Anderson/Burdick* framework. To begin with, Plaintiffs’ most significant error is their request that the Court subject the Ballot Integrity Provisions to “strict scrutiny.” Pls.’ Mem. 18. Plaintiffs hang their hat on the strict-scrutiny standard, arguing that it applies because they allegedly face “significant threats to their health and their right to vote.” *Id.* But Plaintiffs’ own cases demonstrate that strict scrutiny is inapplicable here: for example, in *Kahn*, the Minnesota Supreme Court expressly rejected strict scrutiny in favor of the *Anderson/Burdick* test for assessing “regulations that in some measure burden the right to vote.” 701 N.W. 2d at 832.

Strict scrutiny is triggered only when a state has “totally denied” voters “a chance to vote.” *Mays*, 951 F.3d at 787; *see also Rosario*, 410 U.S. at 757; *Erlandson*, 659 N.W.2d at 733 (strict scrutiny reserved for restrictions that “either dilute[] the effectiveness of some citizens’ votes or

den[y] the franchise to citizens who are otherwise qualified”). Plaintiffs, of course, have made no showing that any single voter will be unable to vote or experience a severe burden on the right to vote due to the Ballot Integrity Provisions. *Cf. Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (“To deem ordinary and widespread burdens . . . severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.”). Plaintiffs’ claims of a denial of the right to vote are thus unfounded, and strict scrutiny does not apply.⁴

Plaintiffs also vaguely reference the circumstances of subgroups who they claim will be severely burdened by the challenged rules. *See* Pls.’ Mem. 14–16, 22. But this is rank speculation that lacks any specifics and is not supported by any evidence. If Plaintiffs are attempting to prompt some sort of subgroup analysis, therefore, it would fail for the same reasons this attempt failed in *Crawford*—a glaring lack of evidence. 553 U.S. at 200–03 (plurality opinion rejecting this argument for lack of sufficient evidence); *see also id.* at 204–09 (Scalia, J., joined by Thomas, J. and Alito, J., concurring) (arguing that a subgroup analysis is improper under the *Anderson/Burdick* framework); *Husted*, 837 F.3d at 631 (“Zeroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst.”).

Beyond these global errors, Plaintiffs advance a number of arguments specific to the Ballot Integrity Provisions. All fail to make the demanding showing required for a temporary injunction.

⁴ This case thus bears no resemblance to *Fla. Democratic Party v. Detzner*, No. 4:16cv607, 2016 WL 6090943 (N.D. Fla. 2016) (cited at Pls.’ Mem. 16), in which thousands of voters indisputably were disenfranchised. *See id.*, at *6. Plaintiffs also cite a Montana case in support of their invitation to apply strict scrutiny, *see Driscoll v. Stapleton*, No. DV 20-408 (Mont. Dist. Ct. May 22, 2020) (cited at Pls.’ Mem. 18), but neglect to mention that the Montana Supreme Court stayed the injunction against Montana’s election day receipt deadline in that case, *see Stapleton*, No. OP 20-0293 (Ex. L).

a. Plaintiffs' challenges to the Witness Requirement fail

Beginning with the Witness Requirement, Plaintiffs' only submission relevant to the burden side of the *Anderson/Burdick* ledger is that the Witness Requirement allegedly "forces thousands of voters to forego their state and medically advised self-isolation practices and increase their risks of contracting COVID-19." Pls.' Mem. 11. The Republican Committees have already explained that—consistent with relevant guidance in Minnesota and throughout the country—Minnesotans may comply with the Witness Requirement in any number of ways consistent with social-distancing protocols. *See supra* Section I.A.2. The Republican Committees also have already explained that there is no evidentiary basis for Plaintiffs' suggestion that in-person voting (which they have not challenged) is unconstitutionally unsafe. *Id.* Plaintiffs thus have not identified a cognizable burden from the Witness Requirement.

Plaintiffs also note in passing their putative expert's assertion that "since 2012, Minnesota has discarded over 10,000 mail ballots for failure to comply with the Witness Requirement" and his prognostication about the number of absentee ballots that might fail to comply with the Witness Requirement in November. Pls.' Mem. 12 (citing Mayer Decl. ¶ 46). But that noncompliance with the Witness Requirement has *consequences* does not mean that it imposes an *unconstitutional burden* on voters. *Compare Crawford*, 553 U.S. at 200 (photo ID requirement was valid even though noncompliance resulted in invalidation of ballot). The question is whether compliance with the challenged rules is unconstitutionally burdensome, not whether noncompliance results in invalidation of a ballot. *See id.*

It is perhaps for that reason that Plaintiffs spend much more time attacking Minnesota's interests "in promoting election integrity or preventing voter fraud." Pls.' Mem. 18. As a threshold matter, it is notable that Plaintiffs do not address how the Witness Requirement inspires public confidence. In any event, Plaintiffs' attacks are unpersuasive. *First*, Plaintiffs assert that the

Witness Requirement “does nothing to protect the integrity of the ballot.” *Id.* This is so, according to Plaintiffs, because the requirement “in and of itself provides no identity verification” and does not “ensure that the ballot enclosed in the envelope is the same one shown to the witness.” *Id.* But the Witness Requirement is not ineffective simply because a hypothetical voter might choose to misrepresent her identity or the ballot she enclosed. *Id.* Moreover, Plaintiffs’ attack fails to account for the public confidence inspired by the fact that, in the mine-run of cases, the Witness Requirement will be fulfilled (and election integrity will be ensured) by a witness’s verification of an absentee voter’s proper completion of a ballot. *See Crawford*, 553 U.S. at 196 (“There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters. . . . While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.”).

Second, Plaintiffs complain that the Witness Requirement exempts “voters in the military, voters living abroad, voters living abroad, and ‘presidential-only’ voters.” Pls.’ Mem. 18. But under federal law, Minnesota *cannot* impose a witness requirement on military and overseas voters. As amended by the Help America Vote Act of 2002 (HAVA), 52 U.S.C. § 20302(a)(5) provides that, if a state “requires an oath or affirmation to accompany” an overseas or military voter ballot, the state must “use the standard oath prescribed by the Presidential designee under section 20301(b)(7) of this title.” Like virtually every other state, Minnesota requires all absentee voters—including overseas and military voters—to submit a sworn statement affirming their eligibility to vote. *See* Minn. Stat. §§ 203B.07, subd. 3, 203B.21, subd. 3 (2012). As a result, in compliance with HAVA, Minnesota requires overseas and military voters to submit a signed oath—“the standard oath” required by HAVA—which reads in relevant part: “In voting, I have marked and sealed my ballot in private and have not allowed any person to observe the marking

of the ballot, except for those authorized to assist voters under state or federal law.” *Id.* § 203B.21, subd. 3. Overseas and military voters are thus differently situated from the ordinary absentee voter because federal law makes them so. *See, e.g., Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012) (“Federal and state law makes numerous exceptions and special accommodations for members of the military, within the voting context and without, and no one argues that these exceptions are somehow constitutionally suspect.”).

“Presidential-only” voters also are differently situated from every other category of absentee voter in Minnesota. A voter qualifies for a presidential-only absentee ballot only if she has moved from Minnesota to another state within 30 days before Election Day and is “not eligible to vote in [her] new state.” *See Presidential-Only Absentee Ballot*, Minn. Sec’y of State, <https://www.sos.state.mn.us/elections-voting/other-ways-to-vote/presidential-only-absentee-ballot/>. Such voters are the only category of permanent non-residents whom Minnesota permits to vote. *See* Minn. Stat. § 200.031. Thus, presidential-only voters are not similarly situated to Plaintiffs, their declarants, or any other absentee voters in Minnesota, and the State’s decision to exempt this small subset of voters from the Witness Requirement is of no moment. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *State v. Holloway*, 916 N.W.2d 338, 347 (Minn. 2018); *see also Mays*, 951 F.3d at 787–88.

Third, Plaintiffs argue that the Witness Requirement “is far from the only measure that Minnesota uses to keep absentee ballots secure.” Pls.’ Mem. 19. And in the same vein, Plaintiffs argue that the Witness Requirement is unjustified because “Minnesota is one of only 12 states that have a witness or notarization requirement.” *Id.* at 20. But these are just attempts to sneak strict scrutiny and its narrow-tailoring requirement in the back door. Minnesota does not need to satisfy strict scrutiny and demonstrate narrow tailoring. *See Burdick*, 504 U.S. at 434. Witness

requirements “prophylactically prevent[] fraud,” and *Anderson/Burdick* ensures that States have leeway to supplement existing measures with such requirements. *Sinner v. Jaeger*, No. 3:20-cv-00076, 2020 WL 3244143, at *7 (D.N.D. June 15, 2020). “Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively[.]” *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986); *see also Griffin*, 385 F.3d at 1131 (“[T]he striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry.”).

Fourth, in an attempt to shore up their deficient challenges, Plaintiffs cite five decisions in four cases in which courts purportedly “recognized the great burden that witness and notarization requirements place on voters, striking them down in the wake of COVID-19.” Pls.’ Mem. 11; *see also id.* at 12, 20 n.2. But those cases offer no help to Plaintiffs. As to the two Alabama opinions Plaintiffs cite, *see id.* at 11–12, on the same day that Plaintiffs filed their motion, the United States Supreme Court entered a stay of the injunction of Alabama’s witness requirement—effectively crediting Alabama’s arguments that are nearly identical to the Republican Committees’ arguments raised above, *see Merrill Order* (Ex. I).

The other cases are readily distinguishable. In approving a consent decree, the court in *League of Women Voters of Va. v. Va. State Board of Elections*, No. 6:20-CV-00024, 2020 WL 2158249 (W.D. Va. May 5, 2020), remarkably (and erroneously) thought that complying with Virginia’s witness requirement while also complying with social-distancing guidelines was a substantial burden on the right to vote—but even that court did not consider compliance through Zoom or FaceTime or e-notaries, which would avoid the court’s concerns. *Id.* at *8. The court in *Thomas v. Andino*, Nos. 3:20-cv-01552-JMC & 3:20-cv-01730-JMC, 2020 WL 2617329 (D.S.C.

May 25, 2020), based its preliminary injunction on the understanding that—unlike Minnesota’s Witness Requirement and guidance—South Carolina’s witness requirement would require voters to violate social-distancing protocols and thereby “place their health at risk.” *See id.* at *19, *21. And *League of Women Voters of Okla. v. Ziriak*, 463 P.3d 524, 524 (Okla. 2020), did not address the COVID-19 pandemic, a witness requirement, or *any* constitutional claim. Instead, it addressed, as matter of an Oklahoma statute, a voter affidavit requirement for absentee ballots. *See id.*

Finally, Plaintiffs invoke the “consent decree” that this Court approved waiving the Witness Requirement for “the August primary.” Pls.’ Mem. 9. But the consent decree recites that it does not “resolve or purport to resolve any claims pertaining to the constitutionality or enforceability of the Witness Requirement . . . during the November 3, 2020 general election or any election thereafter.” Consent Decree ¶ IV.B. Moreover, Plaintiffs neglect to mention that a federal district court *declined* to approve an identical consent decree that would have swept aside Minnesota’s Witness Requirement for all voters in the August 2020 primary election. The federal court concluded that the proposed consent decree was “not substantively fair or reasonable because it would, if approved, impose relief that goes far beyond remedying the harm [p]laintiffs have alleged” they would “suffer” from “Minnesota’s witness requirement [in] the August primary.” *League of Women Voters* Tr. 10 (Ex. K). In particular, the federal court found that the proposed consent decree “would impose injunctive relief that is not necessary or justified by [p]laintiffs’ factual showing.” *Id.* Indeed, while the federal court acknowledged that some voters might face a risk of exposure to COVID-19, “[t]hat’s not everyone,” and many voters “do not face the health challenges” that the plaintiffs alleged. *Id.* at 11. Accordingly, the plaintiffs had not “shown a justification for the Secretary’s blanket refusal to enforce the witness requirement.” *Id.* at 11–12.

“In other words, that blanket refusal . . . go[es] well beyond [p]laintiffs’ injuries, and [p]laintiffs have not established a need for wholesale non-enforcement of the witness requirement.” *Id.* at 12.

Here as well, Plaintiffs have failed to establish a constitutional violation or entitlement to the injunction they seek, and the Court should uphold the Witness Requirement.

b. Plaintiffs’ challenges to the Election Day Receipt Deadline fail

Plaintiffs fare no better with their arguments related to the Election Day Receipt Deadline. *First*, in an attempt to establish that the Election Day Receipt Deadline burdens the right to vote, Plaintiffs dramatically refer to evidence that in 2018, “more than 3,500” absentee ballots were rejected in “2018 alone . . . simply because [they] did not arrive by 8:00 p.m. on election day.” Pls.’ Mem. 21 (citing Mayer Decl. ¶ 46 (Table 1)). But Plaintiffs offer no evidence about whether *any* of those ballots were mailed or even completed on or before election day. *See id.* Plaintiff Mr. LaRose, who resides out of state, also testifies that he received his absentee ballot only one week before election day in 2016 and was unable to return it on time—but he does not disclose how far in advance he requested or returned his ballot. *See* LaRose Decl. ¶¶ 3–6. Accordingly, Plaintiffs’ ominous intonations that voters whose ballots were rejected suffered “total disenfranchisement,” Pls.’ Mem. 21, are woefully unsupported. After all, given Minnesota’s generous 46-day absentee voting period and accommodations for voters, any voter’s inability to cast a timely ballot is “not caused by” the Election Day Receipt Deadline but instead “by their own failure to take timely steps to effect” completion and return of their ballot. *Rosario*, 410 U.S. at 758; *see also Mays*, 951 F.3d at 786–87; *Thomas*, 2020 WL 2617329, at *26.

Second, Plaintiffs invoke Dr. McCool’s declaration regarding the difficulties faced by “Native voters who reside on reservations.” Pls.’ Mem. 23. Of course, for the reasons explained above, Plaintiffs cannot show, and have not shown, a viable subgroup claim here. *See supra* Section I.B.3. Moreover, Dr. McCool does not identify even a single voter who is unable to vote

due to the Election Day Receipt Deadline. *See* McCool Decl. Instead, Dr. McCool testifies about absentee voting among Native Americans generally and reviews academic literature about the relative merits of various voting schemes. *See* McCool Dec. In fact, if anything, Dr. McCool’s analysis points *away* from Plaintiffs’ preferred conclusion that the Witness Requirement and the Election Day Receipt Deadline place unconstitutional burdens on voters: Dr. McCool identifies several socioeconomic factors and demographic factors that do not result from those rules—such as economic well-being, education, and internet access—as reasons that keep people from voting. *See id.*

Third, Plaintiffs grossly mischaracterize the cases they cite in support of their challenge to the Election Day Receipt Deadline. As mentioned, Plaintiffs fail to disclose that the Montana Supreme Court stayed the *Driscoll v. Stapleton* order on which they rely. *See supra* at 29 n.4. Moreover, *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012), had nothing to do with election day receipt deadlines. Rather, it dealt with the problem of precinct workers incorrectly sending voters to the wrong precinct to vote. Finally, the U.S. Supreme Court *never* “agreed that it was appropriate to require” Wisconsin “to accept and count ballots mailed on or before election day.” Pls.’ Mem. 24. To the contrary, in that case the U.S. Supreme Court faced only “a narrow, technical question” about Wisconsin’s absentee voting process. *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1206 (2020). That question did not involve the receipt deadline but, rather, the district court’s extension of the postmarked-by deadline for absentee ballots. *See id.* The Supreme Court reversed that 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 1208. “That point cannot be stressed enough.” *Id.*

Plaintiffs have not established that they are likely to succeed on the merits of either of their unconstitutional burden claims. The Court should deny Plaintiffs’ motion.

C. Plaintiffs Have Failed to Establish That They Are Likely To Succeed On The Merits Of Their Due Process Claim

Plaintiffs also have failed to establish a likelihood of success on their procedural due process challenge to the Election Day Receipt Deadline. That claim is, at best, duplicative of their unconstitutional burden claim and, at worst, nonsensical.

At the threshold, it cannot be disputed that the State may constitutionally impose deadlines on the exercise of the franchise, including a deadline for absentee voters to submit their ballots. A long unbroken chain of authority recognizes that voting deadlines are constitutional, including during the COVID-19 pandemic. *See, e.g., Rosario*, 410 U.S. at 758; *Mays*, 951 F.3d at 791; *Disability Rights Pa.*, No. 83 MM 2020, 2020 WL 2507661; *Delisle*, No. 95 MM 2020, 2020 WL 3053629; *Stapleton*, No. OP 20-0293 (Ex. L); *Nielsen*, No. 4:20-cv-236 (Ex. J); *Thomas*, 2020 WL 2617329, at *26–27. Nonetheless, Plaintiffs posit that the State has committed a violation of constitutional magnitude by selecting the Election Day Receipt Deadline rather than their preferred postmark deadline. This theory fails for at least three reasons.

First, recent decisions from courts across the country have agreed that the *Anderson/Burdick* framework is the exclusive rubric by which challenges to election laws are judged. This is so, regardless of whether the challenge is couched in terms of “due process,” “equal protection,” or the “fundamental right to vote.” *See Acevedo v. Cook Cnty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (holding that the *Anderson/Burdick* test “applies to *all* First and Fourteenth Amendment challenges to state election laws”); *Obama for Am.*, 697 F.3d at 430

(noting that *Anderson* “creat[ed] a single standard for evaluating challenges to voting restrictions”).

Even the court in Plaintiffs’ cited case, *Democratic Nat’l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374 (W.D. Wis. Apr. 2, 2020) (cited at Pls.’ Mem. 24), agreed. That court held that the *Anderson/Burdick* framework, rather than a due process rubric, governed a challenge to Wisconsin’s election day receipt deadline: “[W]hile plaintiffs’ separately argue that the challenged provisions violate the equal protection clause and the due process clause of the Fourteenth Amendment, these concerns are properly addressed within the more specific *Anderson-Burdick* framework.” *Id.* at *11 n.13 (internal citation omitted). These holdings make perfect sense: both *Anderson* and *Burdick* clarified that the framework they adopted addressed claims arising under “the First and Fourteenth Amendments.” *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick*, 504 U.S. 428, 432–34. Thus, because Plaintiffs’ *Anderson/Burdick* challenge to the Election Day Receipt Deadline fails, *see supra* Section I.B, their procedural due process challenge likewise fails.

Second, Plaintiffs cannot satisfy the high standard that their own cases adopt for establishing a procedural due process violation. Those cases make clear that “an election process” violates procedural due process only when it “reache[s] the point of patent and fundamental unfairness.” *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1183 (11th Cir. 2008) (Barkett, J., concurring in part and dissenting in part) (cited at Pls.’ Mem. 27). Under that standard, courts “do not involve themselves in ‘garden variety’ election disputes” or any “ordinary dispute over the counting and marking of ballots.” *Roe v. State of Ala.*, 43 F.3d 574, 580 (11th Cir. 1995). Rather, courts have held that patent and fundamental unfairness of a constitutional dimension can be shown where a state attempts to count ballots that are invalid under state law, *see, e.g., id.*, or

uses a standardless, discretionary approach to determining whether a ballot is validly cast, *see, e.g., Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018) (cited at Pls.’ Mem. 26); *Saucedo v. Gardner*, 335 F. Supp. 3d 202 (D.N.H. 2018) (cited at Pls.’ Mem. 26).

The Election Day Receipt Deadline is valid under this rule. The State has reasonably adopted that deadline as part of its orderly election administration. *See supra* Section I.B. By enforcing that deadline, the State is not seeking to reject ballots that are valid under state law or to count ballots that are invalid under state law. To the contrary, Plaintiffs seek an order from this Court requiring the State to count invalid ballots as a matter of judicial fiat. *See Roe*, 43 F.3d at 581 (holding that state court’s post-election change in standard for validity of absentee ballots violated due process). And the Election Day Receipt Deadline is not a standardless, discretionary approach to counting ballots; instead, it is a valid, neutral, bright-line standard.

Third, if more were somehow needed, the *Mathews v. Eldridge* analysis that Plaintiffs invoke, *see* Pls.’ Mem. 25, further confirms that their procedural due process claim fails. As Plaintiffs point out, one factor in that analysis is “the risk of an erroneous deprivation” of a protected interest under “the procedures used.” *Id.* (quoting *Berndorf v. Comm’r of Pub. Safety*, 727 N.W.2d 410, 415–16 (Minn. 2007)). But here, the Election Day Receipt Deadline does not result in the “erroneous” deprivation of *any* person’s right to vote. *Id.* That is because the Election Day Receipt Deadline supplies part of the definition of what constitutes a valid vote under Minnesota law. *See, e.g., Roe*, 43 F.3d at 580–81 (upholding Alabama’s witness requirement for absentee votes and holding that a state-court order excusing that requirement violated due process); *Hunter v. Hamilton Cnty. Bd. of Elections*, 850 F. Supp. 2d 795, 846–47 (S.D. Ohio 2012) (rejecting due process challenge to Ohio election board’s refusal to count ballots cast in the wrong precinct where “Ohio law would have prevented the Board from counting those miscast ballots

regardless of the explanation”). To be sure, the Legislature may adopt a different deadline if it so chooses—but that does not make the deadline it has chosen unconstitutionally erroneous. *See, e.g., Nielsen*, No. 4:20-cv-236, at *3 (Ex. J); *see also Rosario*, 410 U.S. at 758; *Mays*, 951 F.3d at 791; *Disability Rights Pa.*, No. 83 MM 2020, 2020 WL 2507661; *Delisle*, No. 95 MM 2020, 2020 WL 3053629; *Stapleton*, No. OP 20-0293 (Ex. L); *Nielsen*, No. 4:20-cv-236 (Ex. J); *Thomas*, 2020 WL 2617329, at *26–27. The Court should deny Plaintiffs’ motion.

II. THE BALANCE OF EQUITIES ALSO REQUIRES DENIAL OF A TEMPORARY INJUNCTION

For the same reasons that Plaintiffs have failed to establish a likelihood of success on the merits, the balance of equities cuts decisively against Plaintiffs. No one disputes that the right to vote is a sacred right. But a temporary injunction “should be granted only when it is clear that the rights of a party will be irreparably injured before a trial on the merits is held.” *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982); *see also Haley*, 669 N.W.2d at 56 (“A lack of irreparable injury may be a sufficient ground for showing that a district court abused its discretion in granting a temporary injunction.”). And that is Plaintiffs’ Achilles heel. Because their case turns on plainly incorrect premises, they have not identified a single voter whose right to vote will be irreparably injured before a trial on the merits. *See supra* Section I.A.2.

Moreover, an injunction barring the State “from conducting this year’s elections pursuant to a statute enacted by the Legislature”—where no party has proven that it “is unconstitutional”—“would seriously and irreparably harm” the State and its voters. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *see also id.* at 2324 n.17 (“[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State.”). That is particularly true here, where the Legislature has allocated millions of dollars to facilitate safe voting this year and the Legislature and the Governor have decided to conduct the November general election in accordance with the Ballot Integrity

Provisions. Plaintiffs simply supply no basis for this Court to overrule the policy judgments of its co-equal branches of government and impose Plaintiffs' preferred election-administration policy on the State and its voters.

What is more, Plaintiffs' contention that no harm will result from an injunction turns a blind eye toward Minnesota's interests undergirding these provisions. Pls.' Mem. 30–32. Those interests—described at length above—include Minnesota's legitimate interests in deterring fraud, in maintaining public confidence in the integrity of its elections, and in ensuring the orderly administration of its elections. *See supra* Section I.B.2. And that includes the fact that Plaintiffs' requested relief would force Minnesota to change its election rules mere months before the election, with the attendant risk of “voter confusion and consequent incentive to remain away from the polls.” *See Purcell*, 549 U.S. at 4–5. In a COVID-19 world of uncertainty that comes on the heels of documented absentee ballot fraud in Minnesota, the public's interest is in preserving these important interests, not gutting them. *Cf. Minn. Voters All. v. Simon*, 885 N.W.2d 660, 667 (Minn. 2016).

Finally, Plaintiffs' requested relief—wholly eliminating the Ballot Integrity Provisions—is plainly overbroad. *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) (“the scope of the remedy”—particularly in a case like this one seeking equitable relief—“is determined by the nature and extent of” the violation proven); *see also Sullivan v. Eginton*, 406 N.W.2d 599, 602 (Minn. Ct. App. 1987). One natural remedy for Plaintiffs' complaint about the Witness Requirement would be requiring absentee voters to certify that they had a witness observe their completion of the ballots, without requiring a witness's signature (and thus potential physical interaction)—not, as Plaintiffs ask, jettisoning the rule in its entirety. *See League of Women Voters* Tr. 10 (Ex. K); *see also Democratic Nat'l Comm.*, 2020 WL 3619499, at *2 (staying lower court's COVID-19-related

injunction of Wisconsin's witness requirement out of "concern[] with the overbreadth of the district court's order, which categorically eliminates the witness requirement applicable to absentee ballots and gives no effect to the state's substantial interest in combatting voter fraud."). The sweeping relief that Plaintiffs seek illustrates that Plaintiffs are more interested in securing the election-administration policy they prefer (in direct contravention of the Legislature's policy decisions) rather than specifically targeting any alleged harms.

The equities cut against a temporary injunction.

CONCLUSION

The Court should deny Plaintiffs' Motion for Temporary Injunction.

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Respectfully submitted,

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

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