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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT
Case Type: Civil

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

Plaintiffs,

v.

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

Defendant.

REPLY IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

Court File No: 62-CV-20-3149

INTRODUCTION

Since 2012, Minnesota's Witness Requirement and Election Day Receipt Deadline (the "challenged laws") have disenfranchised over 25,000 lawful, registered Minnesota voters in statewide general elections. Unrebutted expert testimony establishes that that at least 35,000 (and as much as 50,000) voters in the November 2020 election alone will be disenfranchised if the challenged laws are not enjoined. The threat of disenfranchisement of Minnesota voters (including Plaintiffs) is real, concrete, and anything but minimal. Rather than confront these facts head on, Proposed Intervenors misconstrue precedent and the unrebutted evidence here. Contrary to their assertions, Plaintiffs' claims are not "speculative"; they are amply supported by largely unrefuted evidence. The requested relief is both modest and necessary, not the "dramatic overhaul" of Minnesota's absentee system that Proposed Intervenors claim. The Court should grant Plaintiffs' Motion for Temporary Injunction ("Motion").

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ARGUMENT

I. Plaintiffs are likely to succeed on the merits of their right to vote claims.

A. Plaintiffs' as-applied claims are not speculative.

Proposed Intervenors are simply incorrect that Plaintiffs' claims are limited to a facial challenge. As demonstrated by both the Complaint and the Motion, Plaintiffs specifically challenge enforcement of these laws as applied to Plaintiffs and in the context of the ongoing pandemic. *See* Compl. (Dkt. #2) ¶¶ 9-14, 52-89; Mot. (Dkt. #52) at 14-17, 21, 25, 28-30. Because Plaintiffs seek "a judgment as to the constitutionality of a statute based on the harm to the litigating party," their challenge is treated as as-applied, and this Court must evaluate their Motion on the specific facts presented therein. *State v. Final Exit Network, Inc.*, 889 N.W.2d 296, 304 (Minn. App. 2016) (citations omitted); *see also State v. Mireles*, 619 N.W.2d 558, 561 n.1 (Minn. App. 2000) ("Facial overbreadth challenges should be distinguished from as applied challenges, the latter involving a judgment as to the constitutionality of a statute *based on the harm to the litigating party*.") (quotation marks and citation omitted) (emphasis added); *Rew v. Bergstrom*, 845 N.W.2d 764, 780 (Minn. 2014) ("to evaluate [plaintiffs'] as-applied challenge, we . . . do so *in the context of the specific circumstances presented*") (emphasis added).

Here, the unrebutted evidence demonstrates that the Witness Requirement imposes significant transaction and monetary costs on voters, including Plaintiffs Maples, Sansom, and LaRose, who must identify an eligible witness to vote by mail which risks exposure to COVID-19. *See, e.g.*, Decl. of Dr. K. Mayer ("Mayer Expert Decl.") ¶¶ 56-63; Decl. of T. Maples ("Maples Decl.") ¶¶ 12-13 (Witness Requirement has been a hurdle to voting); Decl. of M. Sansom ("Sansom Decl.") ¶¶ 5-8 (same); Decl. of R. LaRose ("LaRose Decl.") ¶¶ 8-10 (does not know anyone eligible to witness his ballot and objecting to monetary cost of paying notary); *see also*

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Decl. of M. Carpenter ("Carpenter Decl.") ¶¶ 5-6 (discussing difficulties of securing witness while voting out of state); Decl. of K. Choi ("Choi Decl.") ¶¶ 10-11 (expressing concerns about satisfying Witness Requirement during pandemic). While these burdens are present to a degree in every election, the pandemic exacerbates them, making more voters (including Plaintiffs) vulnerable to disenfranchisement due to their inability to satisfy the Requirement. *See* Maples Decl. ¶¶ 12-13, 15-16; Sansom Decl. ¶¶ 6, 9-10; LaRose Decl. ¶¶ 8-11.

The unrebutted evidence also demonstrates that the Election Day Receipt Deadline imposes significant burdens on voters, as they are forced to speculate as to when to mail their ballots, trust an unreliable mail system, and vote before the election is complete and information is still forthcoming. Decl. of Dr. D. McCool ("McCool Expert Decl.") ¶¶ 36-46, 53-57; Mayer Expert Decl. ¶¶ 41, 43-44, 52-55; Decl. of S. Jafari ("Jafari Decl.") ¶ 6; Decl. of G. Severson ("Severson Decl.") ¶¶ 4,7; Carpenter Decl. ¶¶ 4, 7-9; LaRose Decl. ¶¶ 2-7, 11; Maples Decl. ¶¶ 8-9, 12-14, 16. Even before the pandemic, the challenged laws disenfranchised thousands, including Plaintiff LaRose and witness Carpenter, due to no fault of their own. Mayer Expert Decl. ¶¶ 46-51, 66; LaRose Decl. ¶¶ 3-4; Carpenter Decl. ¶ 8. As a result of the massive increase in use of absentee voting to protect voters' health in the current crisis, unless the laws are enjoined, they will injure more voters in November than ever before. *See* Mayer Expert Decl. ¶ 66; Sansom Decl. ¶ 6; Maples Decl. ¶¶ 9-14; Madden Decl. ¶ 7; Severson Decl. ¶ 6.

While it is true that those who "live alone, are single parents, have a disability, are temporarily out of state, or who reside on Indian reservations," are particularly susceptible to these burdens, *see* Opp. at 11-12, Proposed Intervenors incorrectly suggest that (1) the burdens that those groups will suffer are not sufficient to establish Plaintiffs' likelihood of success on the merits, or (2) Plaintiffs' case turns solely on the burdens to these groups. As Proposed Intervenors

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acknowledge, Minnesota courts have applied the *Anderson-Burdick* standard to right-to-vote claims brought under the Minnesota Constitution, Opp. at 37, and under that standard courts specifically examine how a challenged elections law impacts those voters who cannot easily satisfy it. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198, 201 (2008) (controlling op.) (noting "[t]he burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a [photo ID]," and "[t]he fact that most voters already possess [a valid photo ID] would not save the statute"); *see also Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily."); *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (*Crawford* instructs that "courts may consider not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe"); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627-32 (6th Cir. 2016) (measuring law's "disparate burden on African-American voters"); *Veasey v. Perry*, 71 F. Supp. 3d 627, 686 (S.D. Tex. 2014) ("This Court reads *Anderson* and *Burdick*, as well as the lead opinion in *Crawford*, to require balancing the state's interest against the burdens imposed upon the subgroup [of voters most impacted by the challenged law]."), *vacated in part on other grounds*, 830 F.3d 216 (5th Cir. 2016) (en banc). Thus, the burdens on the most vulnerable voters alone are sufficient to establish that Plaintiffs are likely to succeed on the merits.

But even if that were not the case, Plaintiffs have alleged, argued, and proven that the burdens the challenged laws impose will fall on all Minnesota voters who vote by mail this year, because the laws require them to put their health at risk (or risk unwittingly spreading the virus) to cast a mail ballot and have it counted. *See supra* 2-3. Even if Proposed Intervenors were correct

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that Plaintiffs must show the laws are unconstitutional in all their applications (which they need not), they ignore that as the novel coronavirus increasingly spreads, these requirements are unconstitutional as applied to *any* mail voter. Plaintiffs are likely to succeed on this claim no matter how it is framed.

Plaintiffs' claims are not speculative. Ample evidence including unrebutted expert testimony establishes that the challenged laws impose real and concrete harms on Minnesota voters that threaten to disenfranchise thousands as they increasingly turn to vote by mail in November to ensure their (and their communities') safety.[1] *See, e.g.*, Mayer Expert Decl. ¶¶ 39-40, 65-66, 70-71; *see also* LaRose Decl. ¶¶ 3-4; Carpenter Decl. ¶¶ 5, 8; Sansom Decl. ¶ 5. Contary to Proposed Intervenors' assertion, Plaintiffs do not need to show that in-person voting is "unconstitutionally unsafe." Opp. at 13. Plaintiffs need only show that Minnesotans' right to vote absentee is burdened by the challenged laws. *Kahn v. Griffin*, 701 N.W.2d 815, 832-33 (Minn. 2005); *see also Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 734 (Minn. 2003) ("The purpose of the absentee ballot is to enfranchise those voters who cannot vote in person."). The fact that the state and counties have taken necessary precautions to attempt to protect voters who are able to cast their ballots in person has no bearing on Plaintiffs' likelihood of success here. Plaintiffs challenge the constitutional infirmities of two laws that apply when voters attempt to exercise their right to vote

[1] Proposed Intervenors rely on two Pennsylvania Supreme Court concurrences in which Justice Wecht stated that allegations of delayed mail delivery during Pennsylvania's June 2, 2020 primary were speculative. *See* Opp. at 12-13. But the facts demonstrate that Justice Wecht was decidedly wrong: Thousands of voters were disenfranchised in Pennsylvania's June 2 primary due to mail delays and corresponding late ballots. Jonathan Lai, *Courts extend Pa. mail ballot deadlines in Bucks and Delaware Counties*, The Philadelphia Inquirer (June 2, 2020), https://www.inquirer.com/politics/election/bucks-delaware-county-mail-ballot-deadlines-extended-20200602.html.

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by mail, a right that the state has conferred on voters, and which in the context of the pandemic will provide the only safe means of voting for countless lawful voters.

Proposed Intervenors effectively argue that as long as one method of voting is available, a plaintiff has no basis to challenge the burdens associated with other means of voting (even when those other means are the *only* reasonable way to access the franchise). That is not the law. *See, e.g., League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018) (finding substantial likelihood of success under *Anderson-Burdick* on challenge to early voting location restriction); *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 549 (6th Cir. 2014) (same), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012) (same). While in-person voting precautions may factor into the Court's consideration as it weighs the burdens imposed under the challenged laws, *see, e.g., Obama for Am.*, 697 F.3d at 431, the mere fact that another means of voting is theoretically available does not doom Plaintiffs' Motion. This is particularly so when the unrefuted evidence demonstrates that thousands of voters cannot avail themselves of in-person voting no matter what precautions the State takes. *See, e.g.*, Maples Decl. ¶¶ 9-11; Sansom Decl. ¶¶ 6-10; LaRose Decl. ¶ 2; Severson Decl. ¶¶ 4-6; Choi Decl. ¶ 5.

Plaintiffs' evidence of anticipated mail delays is also concrete and extensive. Plaintiffs unrebutted expert testimony establishes that, in at least two nearby states that conducted elections during the pandemic, "the increase in mail volume also stretched the capacity of the U.S. Postal Service," resulting in "first-class mail taking . . . as long as 7-9 days" to be delivered. Mayer Expert Decl. ¶ 32. In Wisconsin, "[p]roblems with mail delivery included voters not receiving absentee ballots; . . . an unusually large number of ballots not returned (including one county where only 1% of one batch of absentee ballots were returned, []); large numbers of ballots erroneously sent

back to election offices rather than delivered to voters; and bins of undelivered ballots discovered in post office facilities." *Id.* ¶ 33. In fact, since 2011, Minnesota has had substantial mail delivery delays due to processing center closures; thus, even without the pandemic, the evidence is that mail delays are not just likely, but effectively certain. McCool Expert Decl. ¶¶ 53-54. This is particularly so for voters on Indian reservations. *Id.* ¶¶ 53-57.

The evidence that Proposed Intervenors cite does not credibly call these facts into question. They rely heavily upon USPS's April 17, 2020 FAQ page, which asserts that (at least as of three months ago) the USPS *anticipated* "no impact to First-Class letters and flats." USPS Coronavirus Updates: Expected Delivery Changes (Apr. 17, 2020), https://faq.usps.com/s/article/USPS-Coronavirus-Updates-Expected-Delivery-Changes. In contrast, Plaintiffs' unrefuted evidence documents the *reality* of election mail delivery as it has occurred during the pandemic and in Minnesota more broadly.[2] Mayer Expert Decl. ¶¶ 32, 33; McCool Decl. ¶¶ 12, 15, 19, 34-57; *see also* Jafari Decl. ¶¶ 7-9. And, as of July 24, 2020, USPS has stated that it "cannot guarantee a specific delivery date" and that "[m]ost [not all] domestic First-Class Mail is delivered in 2-5 days." Ex. 1.[3] Since Plaintiffs submitted their Motion, the evidence of significant postal delays has only grown stronger. Less than two weeks ago, it was reported that "[m]ail deliveries could be delayed by a day or more under cost-cutting efforts being imposed by the new postmaster general. The plan eliminates overtime for hundreds of thousands of postal workers and says employees must adopt a 'different mindset' to ensure [USPS's] survival during the coronavirus pandemic."

[2] The Washington Post article that Proposed Intervenors cite actually supports Plaintiffs' position that USPS is experiencing budget shortfalls: "The recent trends indicate that our 2020 financial performance will be better than our early scenarios predicted, but the pandemic will nevertheless have an extremely detrimental impact on the financial condition of the Postal Service." 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/.

[3] All "Ex." citations refer to exhibits attached to the Supplemental Declaration of Abha Khanna.

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Ex. 2. Consistent with this shift in postal protocols, the Office of Inspector General for the USPS itself is warning that states with absentee ballot request deadlines less than seven days before Election Day, including Minnesota, are at "*high risk*" of ballots "not being delivered, completed by voters, and returned to the election offices in time . . . due to the time required for election commissions to produce ballots and Postal Service delivery standards." Ex. 3 at 2 (emphasis added); *see also* Ex. 4. Proposed Intervenors' assertion that Plaintiffs' concerns about mail delay are speculative is divorced from reality and contrary to the view of the USPS.

B. The burdens imposed by the challenged laws are severe.

Proposed Intervenors' assertion that the burdens imposed by the challenged laws are minimal is without merit. They rely on *Crawford* to claim that (1) complete disenfranchisement is required for a burden to be more than minimal, and (2) *Anderson-Burdick* does not apply to subgroups. *See* Opp. at 20-22, 29. But *Crawford* provides no support. While the *Crawford* Court found that the plaintiffs had failed to prove they were substantially burdened by Indiana's voter identification law, it made clear that its decision was based on the lack of evidence in that case. *Crawford*, 553 U.S. 181, 188-189, 201-02 (discussing lack of evidence in record) (controlling opinion); *id.* at 200 ("But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified."). More importantly, the Court made no blanket finding that evidence of disenfranchisement is required to demonstrate burden. In fact, the very idea that a showing of disenfranchisement is required is contrary to the structure of the *Anderson-Burdick* test. As the *Crawford* Court reiterated, *Anderson-Burdick* is a balancing test where the applicable level of scrutiny is determined by the magnitude of the burden on the plaintiffs' rights. *Crawford*, 553 U.S. at 190. There is no "litmus test" to determine that a burden is so insignificant that it may

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avoid scrutiny. *Id.* To the contrary: "*However slight* that burden may appear, . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Id.* at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)) (emphasis added).

Here, the evidence that the challenged laws have and will impose severe burdens—including disenfranchisement—on thousands of voters is extensive and largely unrefuted. Even before the pandemic, the challenged laws disenfranchised thousands each election. Mayer Expert Decl. ¶¶ 46-51. With the additional dangers the pandemic poses, as well as the substantial shift to mail voting, thousands more are certain to suffer the same fate in November. *Id.* ¶¶ 64-66. The burdens here are a far cry from the minimal burdens caused by the "vagaries" of life as Proposed Intervenors suggest. They are severe and appropriate for strict scrutiny—or, at a minimum, they are substantial, and heightened scrutiny still applies.[4] This is especially so where other forms of voting are foreclosed for many voters. Maples Decl. ¶¶ 9-11 (absentee voting only form available in pandemic); Sansom Decl. ¶¶ 6-9 (same); Severson Decl. ¶¶ 4-6 (same); Madden Decl. ¶¶ 7-9; *see also* LaRose Decl. ¶¶ 2, 5 (absentee voting only form available for out of state voters).

Even if the challenged laws imposed "minimal" burdens on voters generally, Plaintiffs have successfully shown that the laws severely burden voters who are: (1) located out-of-state, (2) Native American, (3) disabled, or (4) living alone. *See* Mot. at 13-17. As discussed above, this is all that *Anderson-Burdick* requires. *See supra* at 9. *Anderson-Burdick*, in other words, meets that

[4] Proposed Intervenors' reliance on *Rosario v. Rockefeller*, 410 U.S. 752 (1973), *Mays v. LaRose*, 951 F.3d 775 (6th Cir. 2020), and *Erlandson*, 659 N.W.2d at 733, for the proposition that "[s]trict scrutiny is triggered only when a state has 'totally denied' voters 'a chance to vote,'" Opp. at 28, is also unavailing. Neither case makes any such holding and, in fact, *Erlandson* plainly states that it did not resolve that question. 659 N.W.2d at 734 ("We need not resolve whether strict scrutiny or rational basis review is the proper standard here."). Moreover, as demonstrated, the challenged laws have denied thousands of Minnesota voters a chance to vote and, unless enjoined, will do so to an even greater degree in November.

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voter where they are—in a pandemic, post-hurricane, or experiencing the ongoing socioeconomic effects of discrimination—and determines the severity of the burdens imposed by the challenged laws in those circumstances. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208 (2020) (implementing postmark deadline during pandemic); *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) ("In our current era of social distancing—where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household—the burden [of the witness requirement] is substantial for a substantial and discrete class of Virginia's electorate."); *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (extending voter-registration deadline due to a hurricane); *Ga. Coal. for the Peoples' Agenda, Inc., v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016) (same); *NAACP*, 768 F.3d at 537-43 (evaluating socioeconomic factors as part of *Anderson-Burdick* analysis). Here, Proposed Intervenors provide no argument or evidence to refute that the challenged laws severely burden certain vulnerable groups made more vulnerable in the pandemic.

Proposed Intervenors' additional burden arguments also fail. *First*, it is of no consequence that Plaintiffs have not specifically asserted that the 46-day early voting period in Minnesota is not long enough to comply with the challenged laws. Opp. at 23. Plaintiffs have demonstrated that voters who have made every reasonable effort to comply with Minnesota's election laws during that time period have still been disenfranchised through no fault of their own due to the challenged laws.[5] *See, e.g.*, LaRose Decl. ¶¶ 3-4; Carpenter Decl. ¶¶ 4, 8; Maples Decl. ¶¶ 7, 12; Sansom

[5] For this same reason, Proposed Intervernors' reliance on *Rosario v. Rockefeller*, *Mays v. LaRose*, and *Thomas v. Andino*, No. 3:20-cv-01552, 2020 WL 2617329 (D. S.C. 2020), for the proposition that neutral deadlines merely represent the "usual burdens of voting" is misplaced. *See* Opp. at 23. In these cases, courts upheld the challenged deadlines precisely because voters had ample time to

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Decl. ¶¶ 5, 6; *see also* Madden Decl. ¶ 8; Thorson Decl. ¶ 6; Choi Decl. ¶¶ 10-11. Plaintiffs have demonstrated that voters must undertake substantial efforts to comply with the laws, *see* Sansom Decl. ¶ 5; Carpenter Decl. ¶ 5-6, and may still be disenfranchised. Carpenter Decl. ¶¶ 6-7.

Second, it is similarly inconsequential that Hennepin County has provided socially distant accommodations to the Witness Requirement. *See* Opp. at 16-17, 23, 30. None of the individual Plaintiffs reside in Hennepin County, thus the accommodations there do not implicate their ability to vote in their own counties. *See* Sansom Decl. ¶ 1; Maples Decl. ¶ 1; LaRose Decl. ¶ 2. Nor are these accommodations are offered statewide. Even in Hennepin County, the accommodations still require significant effort and, in some instances, internet access, merely adding to the burdens imposed by the Witness Requirement. *See* Mayer Expert Decl. ¶ 60. It also remains unclear how Plaintiffs or other Minnesota voters are expected to locate a witness on Zoom, or to ensure their contacts also have sufficient internet access. *See* Mot. at 12-13. Plaintiffs have demonstrated that the Witness Requirement burdens voters by adding significant transaction and monetary costs to voting by mail. Mayer Expert Decl. ¶¶ 56-62; McCool Expert Decl. ¶¶ 11-12, 14-22, 26-27; *see also* Maples Decl. ¶ 7; Sansom Decl. ¶ 5; Carpenter Decl. ¶ 5. None of the purported accommodations address the burdens the Requirement places on Plaintiffs or other voters.

Third, disenfranchisement is not, as Proposed Intervenors argue, a "consequence" of "noncompliance" with the Witness Requirement. Opp. at 30. It is an actual (and, indeed, the ultimate) burden on Minnesotans right to vote that results from enforcing the Requirement itself, *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016) ("If disenfranchising thousands of eligible voters does not amount to a severe

meet the deadline but willfully or negligently failed to do so. Here, Plaintiffs have demonstrated that voters who make every reasonable effort to return their ballots are still disenfranchised.

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burden on the right to vote, then [it is not clear] what does."), and it has disenfranchised over 10,000 eligible Minnesota voters since 2012. *See* Mayer Expert Decl. ¶ 46.

Finally, Proposed Intervenors invite this Court to ignore the direction the U.S. Supreme Court provided in *Republican National Committee*, by misrepresenting the holding in that case.[6] Contrary to Proposed Intervenors' representation, the case did not concern the "extension of [Wisconsin's] postmarked-by deadline for absentee ballots." Opp. at 36. Rather, Wisconsin, like Minnesota, had an Election Day receipt deadline. Given the increased influx of absentee ballots in the pandemic, the Court enjoined that deadline and imposed a postmark deadline, allowing ballots postmarked by Election Day but received within a certain time thereafter to be counted. 140 S. Ct. at 1208. This is precisely what Plaintiffs seek here.

C. The purported "state interests" offered by Proposed Intervenors cannot justify the burdens the challenged laws will impose on voters in November.

The "state interests" asserted by Proposed Intervenors cannot serve to justify the weighty burdens the challenged laws place on Minnesota voters. As a threshold matter, Proposed Intervenors—partisan political committees—do not speak on behalf of the State, and thus have no standing to assert the State's interests. *Cf. Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 146 (Minn. App. 1999) (only the State can speak for the general public interest). This is especially true where, as here, the Secretary has made clear that the current state interest is preserving the health, safety, and voting rights of Minnesotans in November via the parties' stipulated partial consent decree. Allowing Proposed Intervenors to hypothesize theoretical state interests would reduce the *Anderson-Burdick* analysis to something akin to rational basis review, in which any conceivable rationale for a law could support a burden on the right to vote. Both the

[6] Similarly, while it is true that *Driscoll v. Stapleton*, No. DV 20-402, slip op. (Mont. Dist. Ct. May 22, 2020) was stayed, the stay was a limited stay given the proximity of the primary election.

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U.S. and Minnesota Supreme Courts reject such an approach. Longstanding precedent makes clear that (1) the interest supporting an electoral law must be articulated by the State itself, and (2) a court should consider whether a challenged law is necessary to address that interest. *See Kahn*, 701 N.W.2d at 833 (Minnesota courts weigh the burden "against the interests *the State contends justify that burden*, and . . . the extent to which *the State's concerns make the burden necessary*") (emphasis added); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (a court must weigh "*the precise interests put forward by the State* as justifications") (citation omitted; emphasis added). But even if Proposed Intervenors could be the standard bearer for the State, none of their purported "state interests" are sufficient to justify the severe burdens the challenged laws impose.

First, Proposed Intervenors' point to an interest in preventing voter fraud but wholly ignore the evidence demonstrating that voter fraud in Minnesota is virtually nonexistent. There have "only [been] 143 criminal convictions for absentee fraud nationwide over the past 20 years, an occurrence that translates to about 0.00006% of total votes cast." Mayer Expert Decl. ¶ 68. Plaintiffs' expert calculates Minnesota's absentee ballot fraud rate at 0.000004%. *Id.* ¶ 69. The purported incidents of fraud cited by Proposed Intervenors do not call this into question. One of them is included in Dr. Mayer's comprehensive analysis, *id.* (discussing 2017 incident), and the other involves a *witness* lying about (or misunderstanding) his eligibility to witness absentee ballots, which resulted in those ballots being rejected—at no fault of the voters. If anything, this counsels *against* having a witness requirement, as it subjects the acceptance or rejection of a voter's ballot to the veracity (and understanding of the law) of a third party. When the severity of the burdens imposed by the challenged laws are balanced against Proposed Intervenors' phantom evidence of voter fraud, they are insufficient to justify the laws under any standard of review. *See, e.g.*, *People First of Ala. v. Sec'y of State*, No. 20-12184, slip op. at 19 (11th Cir. June 25, 2020)

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("interest for maintaining the photo ID and witness requirements do not outweigh" burdens where evidence "suggests that Alabama has not found itself in recent years to have a significant absentee-ballot fraud problem"); *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.").

As explained in Plaintiffs' Motion, *see* Mot. at 18-19, the Witness Requirement does nothing to protect ballot integrity. For this reason, Proposed Intervenors' assertion that UOCAVA and presidential-only voters are prohibited by federal law from being subjected to the Requirement misses the point. The lack of evidence of fraud in connection with these ballots indicates that witness signatures are unnecessary to protect the integrity of the ballot. Further, Minnesota already has laws in place that ensure ballot integrity without burdening voters. *See id.* at 19.

Second, "protecting public confidence" is also insufficient to justify these laws. As an initial matter, this purported justification is merely a repackaged version of Proposed Intervenors' voter fraud argument. *See* Opp. at 26-27 ("The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud." (quotation marks and citation omitted)). Accordingly, it fails for the reasons stated above. In any event, Proposed Intervenors have presented no evidence that the challenged laws protect public confidence. On the contrary, they appear to admit the opposite by stating that some witnesses "may even take their post with nefarious intentions." Opp. at 27. Thus, this "state interest" also fails to justify the burdens the challenged laws impose. *See Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789, 802–03 (W.D. Tex. 2015) (rejecting standing argument where alleged injuries of "undermined voter confidence and the risk of vote dilution[] are speculative").

Finally, the Election Day Receipt Deadline does not promote a purported "state interest" in orderly election administration. Minnesota counties do not finalize election results until ten days after the election, *see* Minn. Stat. § 204C.33 subd., and the state does not conduct its canvass until at least 21 days after Election Day, *see id.* § 204C.33 subd. 3 (State Canvassing Board shall conduct state canvass "on the third Tuesday following the state general election"). Thus, extending the deadline to receive ballots would not jeopardize the State's ability to finalize election results or otherwise impact the orderly administration of elections. Indeed, an interest in orderly election administration is particularly within the purview of the State, which administers elections. And the only position the State has taken regarding election administration is that a consent decree instituting a *postmark deadline* for November should be instituted soon. The State's position on this point is hardly radical; postmark deadlines are commonplace across the country, demonstrating their administrative feasibility. *See* Mot. at 24 n. 3, 32.

II. Plaintiffs are likely to succeed on the merits of their Due Process Claim.

The applicable standard for evaluating a procedural due process claim is the three-part standard set out in *Bendorf v. Commissioner of Public Safety*, 727 N.W.2d 410, 415–16 (Minn. 2007), and discussed below. It is not, as Proposed Intervenors argue, *Anderson-Burdick*, and multiple cases evaluate procedural due process claims involving voting under the three-part standard discussed herein.[7] *See, e.g.*, *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1337 (N.D. Ga. 2018), *appeal dismissed sub nom. Martin v. Sec'y of State of Ga*, No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 215 (D.N.H. 2018). Unlike

[7] Neither of the cases cited by Proposed Intervenors for this proposition evaluate procedural due process claims. *See* Op. at 37 (citing *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944 (7th Cir. 2019), and *Obama for Am.*, 697 F.3d 423).

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the standard for substantive due process, the *procedural* due process claim Plaintiffs advance here does not require a showing of "fundamental unfairness," *see* Opp. at 38.[8]

Application of the three factors relevant to assessing Plaintiffs' due process claim firmly establishes a likelihood of success. *First*, the interest at stake—the right to vote—is a liberty interest protected by due process, which extends to mail voting. *See Erlandson*, 659 N.W.2d at 729–30. *Second*, the "risk of an erroneous deprivation" by the Deadline—disenfranchising thousands—is extraordinarily high. *Bendorf*, 727 N.W.2d at 415–16. Currently, the date by which a voter must mail a ballot to have a reasonable certainty it will be counted varies from county to county and from one election to another. For this and other reasons set forth in Plaintiffs' Motion, the Deadline is far from a "fair" or "reliab[le]" procedure for ensuring that Plaintiffs' liberty interest in voting by mail is guaranteed. Mot. at 26-27. *Third*, the public interest favors protecting voting rights. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Plaintiffs have proposed a "substitute" procedure for counting ballots. *Id.* And, as explained in Plaintiffs Motion and *supra* 15-16, it would put little "administrative burden" on the state. *Id.* at 28.

III. The balance of the equities supports a temporary injunction.

The balance of the equities supports a temporary injunction. There is no question that Minnesota voters are at great risk of disenfranchisement due to the challenged laws, and it is well established that loss of the right to vote constitutes irreparable harm. *See, e.g.*, *League of Women Voters of N.C v. North Carolina.*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem

[8] The cases that Proposed Intervenors cite for this proposition either involve questions about substantive due process, *see Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1183 (11th Cir. 2008); *Roe v. State of Ala.*, 43 F.3d 574, 580 (11th Cir. 1995); *Hunter v. Hamilton Cty. Bd. of Elections*, 850 F. Supp. 2d 795, 846-47 (S.D. Ohio 2012), or are procedural due process claims that actually advance the three-part standard discussed herein, *see Kemp*, 341 F. Supp. 3d 1326; *Saucedo*, 335 F. Supp. 3d 202.

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restrictions on fundamental voting rights irreparable injury."); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional "freedoms . . . unquestionably [] irreparable injury").

Moreover, granting an injunction will not result in any "ungirding" of the "state's interests," Opp at 41, above all because *the State has asserted no interest* in enforcing the challenged laws this November. To the extent the State has expressed any interests at all, it is in the protection of the health and safety as well as constitutional rights of Minnesota voters, as set out in the stipulated consent decree. This goal is also consistent with the public interest and weighs in favor of granting Plaintiffs' request. *See League of Women Voters of Va.*, No. 6:20-cv-00024, 2020 WL 2158249, at *10 (finding in public interest to enjoin witness requirement contributing to spread of COVID-19); *see also Diretto 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.").

Finally, temporarily enjoining the Witness Requirement and Election Day Receipt Deadline is not overbroad. This remedy addresses the precise harms Plaintiffs identify. Enjoining the Witness Requirement during the pandemic eliminates the associated health risks of interacting with a witness and the risk of disenfranchisement where a voter is unable to procure a witness. Likewise, the implementation of a postmark deadline ensures that voters who do everything right, by requesting and sending a ballot on or before Election Day, have their ballot counted, curbing the disenfranchisement caused by the Deadline.

CONCLUSION

For the reasons stated above and in Plaintiffs' Motion for Temporary Injunction, Plaintiffs' respectfully request this Court grant their Motion for Preliminary Injunction.

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GREENE ESPEL PLLP

By: /s/ *Samuel J. Clark*
Sybil L. Dunlop (Reg. No. 390186)
Samuel J. Clark (Reg. No. 388955)
222 South Ninth Street, Suite 2200
Minneapolis, MN 55402
Phone: (612) 373-0830
Fax: (612) 373-0929
Email: SDunlop@GreeneEspel.com
Email: SClark@GreeneEspel.com

PERKINS COIE LLP

Marc E. Elias*
Amanda R. Callais*
700 13th St. N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 654-6200
Fax: (202) 654-9106
Email: MElias@perkinscoie.com
Email: ACallais@perkinscoie.com

Abha Khanna*
1201 Third Avenue Suite 4900
Seattle, WA 98101-3099
Phone: (206) 359-8312
Fax: (206) 359-9312
Email: AKhanna@perkinscoie.com

Charles G. Curtis, Jr.*
33 East Main Street, Suite 201
Madison, Wisconsin 53703-3095
Phone: (608) 663-7460
Fax: (608) 663-7499
Email: CCurtis@perkinscoie.com

*Admitted pro hac vice

Attorneys for Plaintiffs

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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*
Samuel J. Clark