

**FILED**

August 10, 2020

**OFFICE OF  
APPELLATE COURTS**

**No. A20-1040**

**STATE OF MINNESOTA  
IN SUPREME COURT**

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

Plaintiffs / Respondents,

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,

Intervenor-Defendants  
Petitioners / Appellants.

**INTERVENOR-DEFENDANTS' /  
PETITIONERS' / APPELLANTS'  
PETITION FOR ACCELERATED  
REVIEW**

Date of District Court Order:  
August 3, 2020

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**TO: The Supreme Court of the State of Minnesota**

Petitioners Republican Party of Minnesota, Republican National Committee, and National Republican Congressional Committee respectfully request accelerated review of this appeal under Minn. R. Civ. App. P. 118. Plaintiffs posit that the State violated the Constitution when it failed to expand Minnesota’s 46-day absentee voting period, which is among the most generous in the nation. In particular, Plaintiffs contend that the Constitution requires the State to replace the Legislature’s Election Day Receipt Deadline for absentee ballots, Minn. Stat. § 203B.08, subd. 3, with Plaintiffs’ preferred postmark deadline. Plaintiffs also contend that the Constitution requires eliminating the Legislature’s Witness Requirement for absentee ballots, Minn. Stat. § 203B.07, subd. 3. Plaintiffs, however, have not identified even a single voter who will be unable to vote in the November general election due to the Election Day Receipt Deadline or the Witness Requirement (collectively, the “Ballot Integrity Rules”).

Nonetheless, less than seven weeks before commencement of absentee voting, the district court set aside the Ballot Integrity Rules for *all* absentee voters in the November general election. The district court accomplished this outcome by approving a consent decree proposed by Plaintiffs and Defendant Secretary of State Simon. The district court rested that approval on its view that it was “reasonable” for the Secretary to agree not to enforce the Legislature’s Ballot Integrity Rules.

The district court’s last-minute order changing the rules for the imminent election departs from the ruling of the U.S. District Court for the District of Minnesota, which declined to approve a consent decree that would have eliminated the Witness Requirement

for the August primary election. *See League of Women Voters v. Simon*, No. 20-1205, Tr. 1–13 (D. Minn. Jun. 23, 2020) (Index #76, Ex. K). It also presents important questions regarding the Legislature’s authority to “make and impose such reasonable regulations and conditions which it deems necessary to secure a pure and orderly election.” *State ex rel. Nordin v. Erickson*, 137 N.W. 385, 386 (Minn. 1912). Accelerated review is necessary for this Court to determine whether the Ballot Integrity Rules will apply to absentee voting in the general election—as they have in the last several election cycles—or whether the district court can entirely halt their application on the eve of absentee voting. Petitioners therefore request that the Court grant accelerated review and resolve this appeal in time to reinstate the challenged rules before absentee voting begins.

## I. STATEMENT OF THE ISSUES

The district court’s order raises three issues that justify accelerated review. **First**, the district court applied an incorrect standard in approving a consent decree that sets aside the Legislature’s Ballot Integrity Rules for the November general election. **Second**, the district court erred in approving the consent decree where Plaintiffs failed to show a likelihood of success on the merits. **Third**, the district court erred in changing the rules mere “weeks” before commencement of absentee voting, which creates a substantial risk of “voter confusion” and erosion of public “[c]onfidence in the integrity of [the State’s] electoral processes.” *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

## II. STATEMENT OF THE CASE

Plaintiffs filed this suit on May 13, 2020. Plaintiffs asserted two categories of claims: (i) unconstitutional burden claims against both Ballot Integrity Rules and (ii) due

process claims against the Election Day Receipt Deadline. *See* Index #2. Defendant filed an answer denying Plaintiffs' claims on June 4.

On June 16, Plaintiffs and Defendant submitted to the district court a proposed consent decree (the "Primary Consent Decree") that, if approved, would eliminate the Ballot Integrity Rules for the August primary election. The district court approved it the next day. Petitioners filed a Notice of Intervention the following day.

Plaintiffs filed a Motion for Temporary Injunction on July 2. Plaintiffs' motion asked the district court to set aside the Ballot Integrity Rules for the November general election. According to Plaintiffs, a temporary injunction was warranted because, in the context of the COVID-19 pandemic, compliance with the challenged laws was unconstitutionally burdensome, and the Election Day Receipt Deadline violated due process. *See* Index #52.

On July 17, Plaintiffs and Defendant submitted another proposed consent decree ("General Election Consent Decree") to eliminate the Ballot Integrity Rules for the November general election. *See* Index #70. Petitioners filed an opposition to Plaintiffs' motion that same day, *see* Index #75, and objections to the General Election Consent Decree two days later, *see* Index #80.

On July 31, the district court convened a hearing at which it permitted Petitioners to participate. *See* Index #96. On August 3, the district court entered an order granting Petitioners permissive intervention and approving the General Election Consent Decree. *See* Add. 1–25, 26–41. The district court did not analyze whether Plaintiffs are likely to succeed on their challenges to the Election Day Receipt Deadline. Instead, it concluded:

[I]t is reasonable for the Secretary to conclude that the Plaintiffs are likely to succeed on their Election Day Receipt Deadline motion. In this unusual global crisis, it is more than reasonable to conclude that a ballot placed with the United States Postal Service quite possibly might not be delivered until Election Day. It is reasonable for the Secretary to conclude that a ballot posted on or before Election Day should be counted.

*Id.* at 25.

The district court also thought it “reasonable for the Secretary to conclude that the Plaintiffs are likely to succeed on their” challenges to the Witness Requirement. *Id.* at 24. It further stated that it “would have been empowered to grant the preliminary injunction” against the Witness Requirement due to “the current pandemic.” *Id.*

This appeal followed.

### **III. ARGUMENT**

This Court should grant the Petition because the case presents “important” legal questions “upon which the Supreme Court should rule,” and such a ruling “will help develop, clarify, or harmonize the law” and resolve questions with important “statewide impact” on this year’s general election. *See* Minn. R. Civ. App. P. 117, subd. 2(a), (b), (d). Moreover, this appeal “is of such imperative public importance as to justify deviation from the normal appellate procedure and to require immediate determination in the Supreme Court.” Minn. R. Civ. App. P. 118, subd. 1. Indeed, if left uncorrected, the district court’s order will have a significant effect on voting during the fast-approaching absentee voting period—which will be amplified by the widespread increase in absentee voting during the COVID-19 pandemic.

### A. This Petition Presents Important Legal Questions

“[T]o maintain fair, honest, and orderly elections, states may impose regulations that in some measure burden the right to vote.” *Kahn v. Griffin*, 701 N.W.2d 815, 832 (Minn. 2005). “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).

The order set aside the Legislature’s Ballot Integrity Rules for the November general election because the district court thought it “reasonable for the Secretary” to abandon those rules, and because the court believed it could to enjoin the Witness Requirement. Add. 25. The relief provided in the order contravenes orders from courts across the country—including at least one state court of last resort—that have upheld election day receipt deadlines even during the COVID-19 pandemic. *See, e.g., Disability Rights Pa. v. Boockvar*, No. 83 MM 2020, 2020 WL 2820467 (Pa. May 15, 2020); *id.* at \*1–3 (Wecht, J., concurring); *Delisle v. Boockvar*, No. 95 MM 2020, 2020 WL 3053629 (Pa. May 29, 2020); *id.* at \*1 (Wecht, J., concurring); *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329 (D.S.C. May 5, 2020); *Nielsen v. DeSantis*, No. 4:20-cv-236 (N.D. Fla. June 24, 2020) (Index #76, Ex. J). It also contravenes orders from the U.S. Supreme Court and the Seventh Circuit that have upheld witness requirements during the pandemic. *See, e.g., Merrill v. People First of Ala.*, No. 19A1063, Order (S. Ct. July 2, 2020); *Democratic Nat’l Comm. v. Bostelmann*, No. 20-1538, 2020 WL 3619499 (7th Cir. Apr. 3, 2020).

The order now requires election officials to count absentee ballots that are invalid under validly enacted Minnesota statutes, based on an agreement between Plaintiffs and the Secretary that the district court deemed “reasonable.” Thus, by approving the consent decree, the district court substituted the Secretary’s judgment for the Legislature’s judgment on the quintessentially legislative matter of election administration. *See Erickson*, 137 N.W. at 386; U.S. Const. art. I, § 4, cl. 1.

The district court’s decision rested on at least three legal errors upon which this Court “should rule.” Minn. R. Civ. App. P. 117, subd. 2(a).

**1. This Court should review the district court’s deferential standard of judicial review of the consent decree.**

This Court should address the district court’s determination that entry of the General Election Consent Decree was warranted because it deemed “reasonable” the Secretary’s judgment to propose the consent decree. Add. 25. The district court (and the parties below) agreed that a court reviewing a consent decree ““may look to see that the settlement is fair.”” *Id.* at 19 (quoting *Hafner v. Hafner*, 54 N.W.2d 854, 858 (Minn. 1952)). The district court construed *Hafner*, however, to limit its review to whether a consent decree might promote “health and safety” during the COVID-19 pandemic and was not “the product of fraud, neglect or the absence of consent.” *Id.* at 17–19.

The cases that the district court cited in support of this standard of review all involved private consent decrees that provided relief only between the parties. None involved relief that affected non-parties or statewide invalidation of a statute. *See Hafner*,

54 N.W.2d at 858; *Elsen v. State Farmers Mut. Ins. Co.*, 17 N.W.2d 652 (Minn. 1945); *Hentschel v. Smith*, 153 N.W.2d 199 (Minn. 1967).

But where a proposed consent decree involves a government actor and imposes obligations in addition to, or at odds with, state law, courts “examine” consent decrees “carefully” to ensure that the terms are “fair, adequate, and reasonable,” *United States v. City of Miami*, 664 F.2d 435, 440-41 (5th Cir. 1981) (en banc) (Rubin, J., concurring), as well as consistent with “the public interest,” *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991). This judicial gatekeeping function is of critical import where a government official is the named defendant: after all, it unfortunately “is not uncommon for consent decrees to be entered into on terms favorable to those challenging governmental action because of rifts within the bureaucracy or between the executive and legislative branches.” *Ragsdale v. Turnock*, 941 F.2d 501, 517 (7th Cir. 1991) (Flaum, J., concurring in part and dissenting in part). Given these rifts, courts must “be on the lookout for attempts to use consent decrees to make end runs around the legislature.” *Kasper v. Bd. of Election Comm’rs*, 814 F.2d 332, 340 (7th Cir. 1987).

Moreover, courts have held that the “most important factor” in analyzing a proposed consent decree’s fairness is whether the plaintiff has shown a likelihood of success on the merits. *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975). Courts can gauge “the fairness of a proposed compromise” by “weighing the plaintiff’s likelihood of success on the merits against the amount and form of the relief offered.” *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).



The district court acknowledged this line of authority and stated it “would reach the same result under it.” Add. 17–18. But the district court never analyzed whether Plaintiffs were likely to succeed on their Election Day Receipt Deadline challenges. *See id.* at 25. It also offered scant—and incorrect, *see infra* Part III.A.2—analysis of that question with respect to the Witness Requirement, *see* Add. 24. The court’s approval of a consent decree that elevated the Secretary’s judgment over the Legislature’s judgment warrants this Court’s review.

**2. This Court should review the district court’s approval of a consent decree where Plaintiffs failed to show a likelihood of success.**

Had the district court properly reviewed the proposed consent decree, it would have had no choice but to deny entering it. The consent decree invalidates the Ballot Integrity Rules in *all* of their applications in the November general election. Plaintiffs’ burden to secure such sweeping relief is particularly heavy. *See McCaughtry v. City of Red Wing*, 831 N.W.2d 518, 522 (Minn. 2013). They failed to carry it.

**a.** Plaintiffs’ unconstitutional burden claims require weighing the character and magnitude of the burden imposed by the challenged law against the State’s interests in and justifications for it. *See Kahn*, 701 N.W.2d at 833. Under this analytical approach—known as the *Anderson/Burdick* test—“[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. Laws that impose only “inconvenience[s]” and nothing more than the “usual

burdens of voting” do not unconstitutionally infringe the fundamental right to vote. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008).

The Ballot Integrity Rules are constitutional because they impose no more than a “usual burden[] of voting”—requiring that, as with an in-person ballot, absentee ballots be received by election officials no later than Election Day and allowing voters to bypass the burdens of in-person voting if they secure a witness. *Id.* Moreover, the Rules advance the State’s interests in “deterring and detecting voter fraud,” “protecting public confidence in the integrity and legitimacy of representative government,” and promoting “orderly administration” of its elections. *Id.* at 191, 196, 197; *Thomas*, 2020 WL 2617329, at \*26; *Nielsen*, No. 4:20-cv-236, at \*3.

**b.** A long unbroken chain of authority—including decisions issued during the COVID-19 pandemic—makes clear that a State may constitutionally impose deadlines on the exercise of the franchise, including on submission of absentee ballots. *Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973); *Mays v. LaRose*, 951 F.3d 775, 785 (6th Cir. 2020); *Thomas*, 2020 WL 2617329, at \*26–27; *Nielsen*, No. 4:20-cv-236, at \*3. Even Plaintiffs agree, since they advocate for such a deadline. The district court’s failure to analyze Plaintiffs’ likelihood of success on their Election Day Receipt Deadline challenges alone warrants review, *see supra* Part I.A.1, but Plaintiffs failed to carry that burden in any event.

Plaintiffs’ own putative expert evidence demonstrated that, in past elections, only around 1% of absentee ballots—some of which may have been mailed after Election Day—were not counted due to the Deadline. *See* Mayer Decl. 11 (Table 1). Plaintiffs also offered declarations from four lay witnesses expressing “concerns” about complying with the

Election Day Receipt Deadline in the November general election. But none provided any reason why she could not already apply for an absentee ballot, which would result in her ballot being sent out 46 days before election day. Nor did any testify that the 46-day period is inadequate to facilitate absentee voting. *See* Severson Decl.; LaRose Decl.; Jafari Decl.; Maples Decl.

Moreover, the Election Day Receipt Deadline affects only voters who wait until late in the absentee voting period to submit their ballots. But any “interest . . . in making a late rather than an early decision” to request or complete a ballot is slight at best, and is outweighed by the State’s interests advanced by the Deadline. *Storer v. Brown*, 415 U.S. 724, 736 (1974); *see also Rep. Nat’l Comm. v. Dem. Nat’l Comm.*, 140 S. Ct. 1205, 1207 (Apr. 6, 2020). And given Minnesota’s generous 46-day absentee voting period, 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.

The evidence that the district court discussed in its order does not affect this result. The court first pointed to delays in postal service caused by the COVID-19 pandemic, noting “reports” in Ohio that average delivery times have increased by six days. *See* Add. 6–7. But, of course, any pandemic-related postal delays are not unique to Minnesota. And such delays have not been sufficient to persuade other courts to invalidate election day receipt deadlines—including in states with shorter absentee voting periods than Minnesota. *See Disability Rights Pa.*, 2020 WL 2820467 (Pennsylvania: 50 days); *Delisle*, 2020 WL

3053629 (same); *Thomas*, 2020 WL 2617329, \*24–27 (South Carolina: 30 days); *Nielsen*, No. 4:20-cv-236 (Florida: up to 40 days).

The district court next pointed to a Postal Service report warning that Minnesota voters are at “high risk” of not receiving their ballots on time. *See* Add. 7. But that report had nothing to do with postal delays or the COVID-19 pandemic. Instead, the referenced “high risk” flows from Minnesota’s rule permitting voters to request absentee ballots up to the day before Election Day. *See* Index #90, Ex. 3. Plaintiffs, however, have not challenged that rule. In any event, it is Minnesota’s *generosity* toward absentee voters, not some constitutional violation, that creates this circumstance. *Cf. Ohio Dem. Party v. Husted*, 834 F.3d 620, 628–29 (6th Cir. 2016).

Plaintiffs thus failed to establish a likelihood of success on their unconstitutional burden challenge to the Election Day Receipt Deadline. They also failed to show a likelihood of success on their due process claim because they did not demonstrate that the Election Day Receipt Deadline results in “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), or any “erroneous” deprivation of rights, *Berndorf v. Comm’r of Pub. Safety*, 727 N.W.2d 410, 415–16 (Minn. 2007).

c. The district court thought it was “empowered to grant the preliminary injunction” against the Witness Requirement, Add. 24, but Plaintiffs failed to establish a likelihood of success on that challenge as well. The district court gave short shrift to the federal court’s rejection of a similar consent decree, suggesting that it was not bound by federal law on “overbreadth” of remedies. *Id.* at 20. But Minnesota law likewise prohibits

courts from issuing overbroad remedies that are unsupported by the record. *See McCaughtry*, 831 N.W.2d at 522. And as in *League of Women Voters*, the evidence here failed to show that the Witness Requirement is unconstitutional in all applications.

Once again, Plaintiffs' own putative expert evidence demonstrates that, in past elections, only around 1% of absentee ballots were not counted due to the Witness Requirement. *See* Mayer Decl. 11 (Table 1). Plaintiffs also submitted declarations from four lay witnesses expressing "concerns" about complying with the Witness Requirement. 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.

The district court did not mention the record evidence—a guidance document issued by the Hennepin County Elections Office—outlining those options, including use of a window, open door, or video technology such as Zoom, or enlisting a grocery store clerk, health care professional, or delivery person as a witness. *See* Index #76, Ex. H. Rather, the district court suggested that elimination of the Witness Requirement was warranted because the fact that "many schools throughout Minnesota will begin the school year remotely" suggests that in-person voting will not be safe in November. Add. 23. But the district court also ignored the ample record evidence that Minnesota's political branches are implementing extensive safeguards for in-person voting in the November general election. Those safeguards include the generous 46-day early voting period, the State's offer of curbside voting "for anyone who cannot enter the polling place for any reason," Index #76, Ex. C, the State's implementation of the CDC guidance for polling place social

distancing and hygiene, *id.*, and the Legislature’s dedication of millions of dollars to ensure the safety of in-person voting, H.F. 3429, § 4.

The district court, moreover, never mentioned that Governor Walz’s current executive orders allow Minnesotans to participate in a variety of activities in public venues such as restaurants, barber shops, gyms, fitness centers, and performance venues. *See* Emergency Executive Order 20-74. The district court did not explain how in-person voting—subject to safeguards like the CDC guidance—is somehow less safe than these activities.

The district court instead pointed out that “the President’s own tweets suggest a recognition that voter safety will be compromised in November.” Add. 22. But a recognition that the pandemic creates a public health crisis is not tantamount to an “admission,” *id.*, that the Ballot Integrity Rules should be set aside—as courts across the country have recognized in upholding similar rules during the pandemic. And it certainly is not tantamount to an “admission” that those rules should be set aside in *all* of their applications. *See McCaughtry*, 831 N.W.2d at 522.<sup>1</sup>

Finally, the district court pointed to other judicial decisions that have eliminated witness requirements during the pandemic. *See* Add. 21 (citing *Thomas*, 2020 WL 2617329; *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-cv-024, 2020 WL 2158249 (W.D. Va. May 5, 2020); *Common Cause R.I. v. Gorbea*, No. 1:20-cv-

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<sup>1</sup> The district court also implied that the President is a party to this action. Add. 22–23. He is not. His reelection campaign, Donald J. Trump for President, Inc., has intervened only in a related case, *NAACP v. Simon*, No. 62-cv-20-3625.

0318-MSM-LDA, 2020 WL 4365608 (D.R.I. July 30, 2020)). Those decisions, however, do not justify eliminating the Witness Requirement where Plaintiffs failed to show a likelihood of success in *this* case.

**3. This Court should review the district court’s setting aside of the Ballot Integrity Rules mere weeks before absentee voting begins.**

If left uncorrected, the district court’s order barring the State “from conducting this year’s elections pursuant to statutes enacted by the Legislature”—where no party has proven them “unconstitutional”—“would seriously and irreparably harm the State” and its voters. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Moreover, invalidation of the Ballot Integrity Rules for *all* Minnesota voters is plainly overbroad. *See McCaughtry*, 831 N.W.2d at 522; *Milliken v. Bradley*, 418 U.S. 717, 744 (1974); *Sullivan v. Eginton*, 406 N.W.2d 599, 602 (Minn. Ct. App. 1987).

And, as the U.S. Supreme Court has repeatedly warned, courts should not make last-minute changes to election-administration rules mere “weeks” before an election. *Purcell*, 549 U.S. at 4–5 (staying injunction issued 33 days before election day); *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (32 days before election day); *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014) (61 days before election day). Such changes by court order can create widespread “voter confusion” and erode the “[c]onfidence in the integrity of our electoral process[.]” that “is essential to the functioning of our participatory democracy.” *Purcell*, 549 U.S. at 4–5.

The district court did not mention any of these factors. *See* Add. 25. The Court therefore should review whether it properly weighed the equities in approving the consent decree.

**B. This Case Is Of Such Imperative Public Importance As To Justify Deviation From The Normal Appellate Procedure And To Require Immediate Determination In The Supreme Court.**

Accelerated review is warranted because the district court's decision invalidates the Ballot Integrity Rules shortly before an election in which Minnesotans will cast votes for President, U.S. Senator, U.S. Representative, and State Senator and Representative. This Court has previously recognized that accelerated review is appropriate in cases that are time-sensitive because of an upcoming election. *See Bicking v. City of Minneapolis*, 891 N.W.2d 304, 306 (Minn. 2017); *Vasseur v. City of Minneapolis*, 887 N.W.2d 467, 468 (Minn. 2016). The Court should grant accelerated review.



DATED: August 10, 2020

Respectfully submitted,

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**FORM 132**

**No. A20-1040**

**STATE OF MINNESOTA  
IN SUPREME COURT**

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Educational Fund,

**CERTIFICATION OF LENGTH OF  
DOCUMENT**

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Minnesota Secretary of State,

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I hereby certify that this document conforms to the requirements of the applicable rules, is produced with a proportional font, and the length of this document is 3,973 words. This document was prepared using Microsoft Office Word 2016.

DATED: August 10, 2020

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