

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

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

Plaintiffs,

v.

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

Defendant.

AND

National Association for the Advancement
of Colored People Minnesota-Dakotas Area
State Conference; Susan Bergquist; Eleanor
Wagner,

Plaintiffs,

vs.

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

Defendant.

INTRODUCTION

Defendant Secretary of State opposes Intervenor-Defendants' motions to stay this Court's August 3, 2020 orders and entry of consent decrees in these two related matters for several reasons. First, a stay threatens to deprive voters of the voting protections in the consent decrees

Case Type: Other Civil
Court File No. 62-CV-20-3149
Court File No. 62-CV-20-3625
The Honorable Sara R. Grewing

**DEFENDANT'S MEMORANDUM OF
LAW IN OPPOSITION TO
INTERVENOR-DEFENDANTS'
MOTIONS FOR STAYS**

for the November election. Second, a stay would cause confusion by creating at least three contrary sets of instructions regarding enforcement of the challenged election rules: this Court's order (which enjoined enforcement), this Court's stay (which would reinstate enforcement), and the order from the pending appeals. Third, the Intervenors cannot justify a stay in light of the U.S. Supreme Court's recent order in *Republican National Committee v. Common Cause Rhode Island*, Docket 20A28, Order in Pending Case (Sup. Ct. Aug. 13, 2020). Fourth, they are not likely to succeed on the merits. Fifth, they have not posted security, as required by Rule 108.

In the interests of protecting voters' constitutional rights, minimizing voter confusion, and ensuring orderly election administration, the Secretary opposes the stay requests.

BACKGROUND

On August 3, this Court entered consent decrees and accompanying orders that suspend or modify two election rules for the November 3 general election, due to the Covid-19 pandemic. The consent decrees in both the *LaRose* and *NAACP* matters suspend enforcement of the requirement that a witness certify an absentee voter's ballot. The *LaRose* consent decree also modifies the rule that absentee ballots must be received by election day, by establishing that otherwise validly cast ballots will be counted if they are postmarked by election day and received within seven days of the election. Both decrees require the Secretary to notify local election officials about these changes.

In both cases, the Intervenor-Defendants have appealed the orders and the entry of the consent decrees. The Supreme Court has accepted accelerated review, with oral argument scheduled for September 4.

ARGUMENT

When deciding whether to issue a stay, a district court has substantial discretion. *See Webster v. Hennepin Cnty.*, 891 N.W.2d 290, 292 (Minn. 2017); *see also* Minn. R. Civ. P. 62.02

(providing that “the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal”). The district court may consider whether the movants are likely to succeed on the merits of their appeal, the relative harms to the parties if a stay were granted or denied, and the public interest. *Id.* Here, these factors weigh against a stay.

The Secretary has a strong interest in supporting voting rights guaranteed by the Minnesota Constitution and ensuring that Minnesota’s election laws are implemented in accordance with the Constitution, even when unforeseen circumstances, like the Covid-19 pandemic, impact how election rules affect those constitutional guarantees. *See* Minn. Const. art. 4, sec. 8. The Secretary also has a strong interest in orderly election administration and minimizing voter confusion. *See Carlson v. Simon*, 888 N.W.2d 467, 474 (Minn. 2016) (recognizing the “State’s interest in the orderly administration of the election and electoral processes”); *Hippert v. Ritchie*, 813 N.W.2d 374, 381 (Minn. 2012) (recognizing the state interest in minimizing “voter confusion”). Local election officials rely on the Secretary for guidance on election administration and the applicability of various election laws and rules. *See Martin v. Dicklich*, 823 N.W.2d 336, 339-40 (Minn. 2012).

Here, the Secretary opposes a stay because a stay could deprive voters of the relief provided under the consent decrees for the general election. Imagine a scenario where this Court grants a stay and the Supreme Court ultimately affirms the consent decrees, but it does not issue an opinion well before (and at least 46 days before) election day. *See* Minn. Stat. § 203B.081, subd. 1 (early and absentee voting begins 46 days before election day). In this scenario, the Secretary could not implement the relief provided by the consent decrees in time to protect voters in the election. A stay would cause substantial harm to the fundamental voting rights of Minnesotans and render the relief in the consent decrees meaningless.

The Secretary is also concerned that a stay could lead to flip-flopping court orders that cause confusion. A stay would risk three potential court orders changing the voting rules for the November election: the entry of the consent decree, the stay of the consent decree, and a lifting of the stay after the consent decree is affirmed on appeal. Such a seesaw approach could cause confusion among local election officials and voters. *See Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 388-89 (6th Cir. 2014) (denying motion to stay enforcement of temporary injunction for voting rules because “staying the injunction now would risk three potential changes in the . . . voting schedule, one from the injunction, another from the stay, and potentially a third if the injunction is affirmed after being stayed on appeal”); *DSCC and DCCC v. Simon*, 62-CV-20-585, Order & Memorandum 11-12 (Ramsey County Aug. 11, 2020) (Gilligan, J.) (denying a stay of an order enjoining enforcement of a Minnesota election law in part because of “unnecessary confusion to local election officials caused by the issuance of a second directive”).

Third, a stay is inappropriate for the reasons provided by the U.S. Supreme Court in *Republican National Committee v. Common Cause Rhode Island*, Docket 20A28, Order in Pending Case (Sup. Ct. Aug. 13, 2020). That case involves litigation over a similar consent decree on Rhode Island’s witness requirement. On July 30, a federal district court in Rhode Island approved a consent decree between the Rhode Island Secretary of State and a group of plaintiffs enjoining enforcement of Rhode Island’s witness requirement for the November 3 general election. *See Common Cause of Rhode Island v. Gorbea*, 20-cv-318, 2020 WL 4365608 (D.R.I. July 30, 2020). Intervenors, the Rhode Island Republican Party and the Republican National Committee, moved for a stay at the First Circuit Court of Appeals. On August 7, the appellate court denied the stay, holding that the intervenors were not likely to succeed on the merits or show an irreparable injury. *Common Cause Rhode Island v. Gorbea*, -- F.3d --, No. 20-

1753, 2020 WL 4579367 (1st Cir. Aug. 7, 2020). The intervenors applied to the U.S. Supreme Court for an emergency stay. *Republican National Committee v. Common Cause Rhode Island*, Docket 20A28, Aug. 10, 2020 Application. On August 13, the Supreme Court denied the emergency stay request because the intervenors lacked a cognizable interest:

[H]ere the state election officials support the challenged decree, and no state official has expressed opposition. Under these circumstances, the applicants lack a cognizable interest in the State's ability to enforce its duly enacted laws. The status quo is one in which the challenged requirement has not been in effect, given the rules used in Rhode Island's last election, and many Rhode Island voters may well hold that belief.

Id. Order in Pending Case (Sup. Ct. Aug. 13, 2020) (citation and quotation omitted).

The exact same reasoning applies to this nearly identical case. Here, the state election officials support the challenged consent decrees, and no state official has expressed opposition. The status quo for the last election, the August 11 primary, is one in which there was a postmark rule and no witness requirement, pursuant to the June 17 consent decree in *LaRose*. Accordingly, Intervenors lack a cognizable interest to support a stay.

Fourth, the Intervenors have not shown they are likely to succeed on the merits. In the Rhode Island litigation, the First Circuit denied a motion to stay the consent decree suspending that state's witness requirement because the intervenors could not show they were likely to succeed on the merits. The court explained that the increased burden from the witness requirement during the pandemic was not outweighed by a countervailing state interest:

The burden imposed by these [witness] requirements in the midst of a pandemic is significant. First, many more voters are likely to want to vote without going to the polls and will thus only vote if they can vote by mail. Second, many voters may be deterred by the fear of contagion from interacting with witnesses or a notary. Could a determined and resourceful voter intent on voting manage to work around these impediments? Certainly. But it is also certain that the burdens are much more unusual and substantial than those that voters are generally expected to bear. Taking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote.

Common Cause Rhode Island v. Gorbea, -- F.3d --, No. 20-1753, 2020 WL 4579367, at *2 (1st Cir. Aug. 7, 2020) (per curiam). Similarly, here, Intervenor-Defendants have not shown they are likely to succeed on the merits.

Finally, Rule 108.02 requires the Intervenor-Defendants to post security before the Court may grant a stay. The Rule states that a district court may grant a stay “if the appellant provides security in a form and amount that the trial court approves.” Minn. R. Civ. App. P. 108.02, subd. 2; *see also Anderson v. Anderson*, 179 N.W.2d 718, 721 (Minn. 1970) (“Generally, proceedings in the trial court are stayed only if a supersedeas bond is filed.”). The Intervenor-Defendants have not provided the required security. *Cf. DSCC and DCCC v. Simon*, 62-CV-20-585, Order & Memorandum 11-12 (Ramsey County July 28, 2020) (Gilligan, J.) (requiring plaintiffs to post a \$100 security for an injunction enjoining the Secretary from enforcing an election law).

For these reasons, the Secretary opposes the stays and respectfully requests that Intervenor-Defendants’ motions be denied.

Dated: August 14, 2020

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MINN. STAT. § 549.211 ACKNOWLEDGMENT

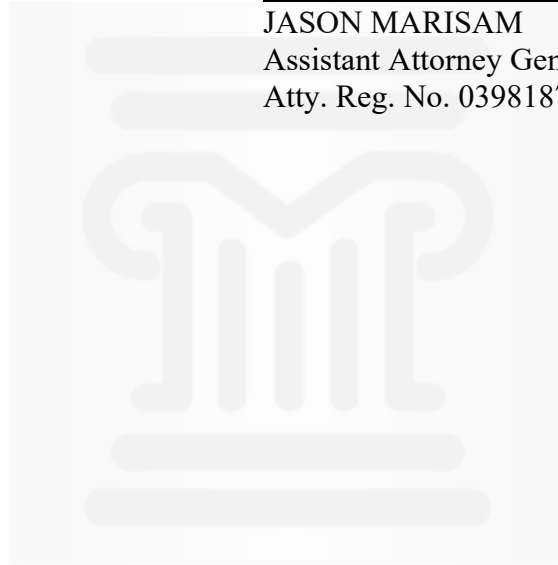
The party on whose behalf the attached document is served acknowledge through their undersigned counsel that sanctions may be imposed.

/s/ Jason Marisam

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