No. 20-3139

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

James Carson and Eric Lucero,

Plaintiffs-Appellants,

vs.

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

Defendant-Appellee,

and

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

Intervenor-Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

DEFENDANT-APPELLEE'S RESPONSE TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

Nathan B. Hansen (#0328017)
2440 Charles Street North, Suite 242
North St. Paul, MN 55109
(651) 704-9600
BAKER & HOSTETLER, LLP

OFFICE OF THE MINNESOTA ATTORNEY GENERAL
Jason Marisam (#0398187)
Assistant Attorney General
445 Minnesota Street, Suite 1100

Andrew M. Grossman
David B. Rivkin
Richard B. Raile
Jenna M. Lorence
Baker & Hostetler, LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697

Attorneys for Plaintiffs-Appellants

St. Paul, MN 55101-2128
(651) 757-1275

Attorney for Defendant-Appellees

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INTRODUCTION

Appellants are asking for an extraordinary emergency injunction to change the existing rule on ballot timeliness in Minnesota, just days from election day. On August 3, a state court judge approved a consent decree establishing that, for the 2020 election, absentee ballots are timely if they are postmarked by election day, instead of received by election day. The Republican Party of Minnesota and Republican National Committee appealed to the Minnesota Supreme Court, but quickly dropped their appeal and waived their rights to challenge the consent decree in any forum.

Voting in Minnesota began on September 18. As of October 16, about 900,000 Minnesota voters have returned absentee ballots. More than 700,000 additional voters have requested absentee ballots that have not yet been returned and accepted.[1] These ballots come with instructions explaining the postmark rule in place for this election. Appellants did not challenge the consent decree until nearly two months after it was entered. Now, mere days from election day, they seek an emergency injunction that would potentially disenfranchise thousands of voters relying on the ballot instructions.

[1] *See* Office of the Minnesota Secretary of State, Absentee Data, https://www.sos.state.mn.us/election-administration-campaigns/data-maps/absentee-data/. The numbers on the website are updated every Friday until the election.

Appellants' motion fails for five reasons. First, Appellants lack standing, as the district court explained in its two thorough orders below. Second, under the *Purcell* principle and laches doctrine, Appellants waited too long and brought this lawsuit too close to the election. Third, this Court should abstain from interfering with the state court judgment. Fourth, Appellants' claims are meritless. Fifth, the balance of harms weighs heavily against Appellants.

STATEMENT OF THE CASE

I. MINNESOTA'S ABSENTEE VOTING SYSTEM AND CERTIFICATION OF RESULTS.

A. Minnesota's Election Day Receipt Rule.

Early and absentee voting begins 46 days before election day, which was September 18, 2020, for the November 3 general election. Minn. Stat. § 203B.081, subd. 1. While a voter may apply for an absentee ballot up to one day before the election, Minnesota law states that absentee ballots must be received either by 3:00 p.m. (if hand-delivered) or 8:00 p.m. (if delivered by mail) on election day. Minn. Stat. § 203B.08 subd. 3; Minn. R. 8210.2200 subp. 1 (the "election day receipt rule"). Ballots received after these times are marked late and not counted.

B. The Counting of Absentee Ballots.

County ballot boards determine whether absentee ballots have been properly cast. Minn. Stat. § 203B.121. After the polls close on election day, the boards tally the accepted ballots, which are added to the in-person votes. *Id.*, subd. 5. The

totals are reported to a county canvassing board. Minn. Stat. §§ 204C.19, 204C.31 subd. 3. The county canvassing boards meet to certify county results between three and ten days after the election. Minn. Stat. § 204C.33 subd. 1. The county boards transmit their certified results to the Secretary of State. *Id*. On the third Tuesday following election day, the State Canvassing Board meets to certify the official statewide results and declare the winners. *Id.*, subd. 3.

C. The Presidential Electors and the "Safe Harbor" Date.

In a presidential election, the final results determine the state's electors for the Electoral College. Minn. Stat. §§ 208.02-.05. The electors chosen by the party that receives the most votes must cast their electoral votes for their party's presidential nominee. Minn. Stat. § 208.43. Congress generally must accept the votes of a state's electors if they are certified at least six days before the meeting of the Electoral College, often called the "safe harbor" date, which is December 8 this year. 3 U.S.C. § 5.

D. The Secretary of State's Authority.

The Secretary of State is a constitutional officer and Minnesota's chief elections officer. Minn. Const. art. VII, § 8; *Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008). He has the authority to prescribe rules for the receipt of absentee ballots, in addition to those set by the legislature. Minn. Stat. § 203B.08 subd. 4. When provisions of Minnesota's election laws cannot be implemented "as

a result of an order of a state or federal court," the Minnesota legislature has directed that the Secretary "shall adopt alternative election procedures to permit the administration of any election affected by the order. The procedures may include the voting and handling of ballots cast after 8:00 p.m. as a result of a state or federal court order." Minn. Stat. § 204B.47.

II. PROCEDURAL HISTORY.

A. LaRose v. Simon.

On May 13, 2020, a group of plaintiffs filed suit against Secretary Simon in state court. They sought to enjoin enforcement of two Minnesota election laws: Minnesota's election day receipt rule and the requirement that a witness certify an absentee ballot. *LaRose v. Simon*, No. 62-CV-20-3149, Minn. 2d Judicial Cir., County of Ramsey. The plaintiffs challenged these laws generally and as applied during the Covid-19 pandemic.

After arms-length negotiations, the plaintiffs and the Secretary entered into a consent decree for the August 11 primary. *See* Marisam Decl., Ex. A.[2] It provided that the witness requirement is unenforceable and, most relevantly, established a postmark rule, under which ballots are timely if postmarked by election day. *Id.* Judge Grewing signed the consent decree on June 17. *Id.* Local election officials

[2] The Declaration of Jason Marisam, and all of the referenced exhibits (A to E), were filed at the district court and are attached to this response as Exhibit A.

implemented the required changes, and the election was held with no significant problems, despite record-level turnout. *See* Tim Harlow, *More than 100,000 voters cast ballots in primary in Minneapolis*, Star Trib. (Aug. 12, 2020).

After plaintiffs filed for an injunction as to the November 3 general election, the parties again negotiated a consent decree, which they filed on July 17. Marisam Decl., Ex. B. Similar to the primary election, this consent decree provides that the witness requirement is suspended for the election and that ballots postmarked by election day, and received within seven days, are timely.

As to the election day receipt rule, the consent decree establishes:

> For the November General Election Defendant shall not enforce the Election Day Receipt Deadline for mail-in ballots, as set out in Minn. Stat. §§ 203B.08 subd. 3, 204B.45, and 204B.46 and Minn. R. 8210.2200 subp. 1, and 8210.3000, that ballots be received by 8:00 p.m. on Election Day if delivered by mail. Instead, the deadline set forth in paragraph VI.D below shall govern.
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> . . .
>
> Defendant shall issue guidance instructing all relevant local election officials to count all mail-in ballots in the November General Election that are otherwise validly cast and postmarked on or before Election Day but received by 8 p.m. within 5 business days of Election Day (i.e., seven calendar days, or one week). For the purposes of this Stipulation and Partial Consent Decree, postmark shall refer to any type of imprint applied by the United States Postal Service to indicate the location and date the Postal Service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks. Where a ballot does not bear a postmark date, the election official reviewing the ballot should presume that it was mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day.

Id. at 9-10.

The consent decree contains undisputed stipulated facts justifying these changes. *Id.* at 3-4 (a surge in absentee voting due to the pandemic "threaten[s] to slow down the process of mailing and returning absentee ballots" and "[m]ail deliveries could be delayed by a day or more" due to Covid-19).

The district court heard argument on the consent decree on July 31. By that time, the Republican Party of Minnesota, the Republican National Committee, and the National Republican Congressional Committee had moved to intervene and participated in the arguments. On August 3, the court signed the consent decree and entered an accompanying order explaining the decision and why plaintiffs were likely to succeed on the merits. Marisam Decl, Ex. C. The court found that the requirements of the Minnesota Constitution will be carried out by the implementation of the decree. Marisam Decl., Ex. B at 6.

On August 10, the intervening parties appealed directly to the Minnesota Supreme Court, which granted their petition for accelerated review. *LaRose v. Simon*, A20-1040, Minn. Sup. Ct. (Aug. 12, 2020 PFR Grant). On August 13, the U.S. Supreme Court issued an order rejecting a challenge to a similar consent decree in Rhode Island. *Republican National Committee v. Common Cause of Rhode Island*, Sup. Ct. Docket 20A28, 591 U.S. (Aug. 13, 2020 order in pending case) (Marisam Decl., Ex. E). The Republican Party of Minnesota, the Republican National Committee, and the National Republican Congressional Committee

responded by voluntarily dismissing their appeal of the Minnesota consent decree and waiving their rights to challenge it in any other forum. Marisam Decl., Ex. D. The Minnesota Supreme Court dismissed the appeal, on August 18, based on this stipulation of dismissal and waiver of rights. *Id.*

On August 28, the Secretary of State's Office, pursuant to the consent decree, sent absentee ballot instructions to local election officials. In large letters, these instructions inform voters: "Your returned ballot must be postmarked **on or before** Election day (November 3, 2020) & received by your Absentee Voting Office within 7 days of the election . . . to be counted." Maeda Decl., Ex. A.[3] Voters began receiving ballots with these instructions on September 18, when absentee and early voting began in Minnesota. Maeda Decl., ¶ 3. The Secretary's Office also posted information about the postmark rule on its website.[4]

As of Friday, October 16, nearly 1.7 million mail or absentee ballots have been requested. About 900,000 of these have been returned and accepted.

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[3] The Declaration of David Maeda, and accompanying exhibit, was filed at the district court and is attached to this response as Exhibit B.

[4] *See* Office of the Minnesota Secretary of State, Vote Early by Mail, https://www.sos.state.mn.us/elections-voting/other-ways-to-vote/vote-early-by-mail/.

However, more than 700,000 absentee ballots have been requested but not yet returned and accepted.[5]

B. Carson v. Simon.

Nearly two months after state court approval of the consent decree, Appellants brought this challenge. On September 24, they moved for a preliminary injunction. On October 12, after full briefing and a hearing, the district court judge issued a 38-page order denying the motion because Appellants lack standing. That same day, Appellants appealed and filed a motion for an injunction pending appeal with the district court. On October 15, Appellants filed an emergency motion for an injunction pending appeal with this Court. On October 16, the district court issued a 16-page order denying the motion pending appeal.

LEGAL STANDARD

Appellants must clear multiple hurdles before the Court addresses the merits of their motion. First, Appellants must demonstrate standing. Second, they must demonstrate why, by waiting nearly two months to challenge the consent decree and bringing this suit so close to election day, they did not forfeit their chances of an injunction under the Supreme Court's *Purcell* principle and the equitable

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[5] *See* Office of the Minnesota Secretary of State, Absentee Data, https://www.sos.state.mn.us/election-administration-campaigns/data-maps/absentee-data/.

doctrine of laches. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006). Third, they must demonstrate why the Court shouldn't abstain from interfering with the state court judgment.

Even if Appellants clear those hurdles, emergency injunctive relief is an extraordinary remedy. This Court "will reverse a decision to deny a preliminary injunction only if the district court has abused its discretion." *Mgmt. Registry, Inc. v. A.W. Companies, Inc.*, 920 F.3d 1181, 1183 (8th Cir. 2019). The Court considers four factors: (1) the threat of irreparable harm to the movant, (2) the balance of harm among the parties, (3) the probability of success on the merits, and (4) the public interest. *Id.* The probability of success is the predominant factor, but a failure to demonstrate irreparable harm is also an independently sufficient ground to deny relief. *Id.*

ARGUMENT

I. APPELLANTS LACK STANDING.

The district court issued two thorough orders, explaining why it found Appellants lack Article III and prudential standing. Appellants are making the same standing arguments the district court rejected in its combined 54 pages of discussion, analysis, and conclusions.

II. APPELLANTS CANNOT GET THE RELIEF THEY SEEK UNDER THE *PURCELL* PRINCIPLE AND LACHES DOCTRINE.

Appellants filed this lawsuit after voting began in Minnesota for the general election and nearly two months after entry of the consent decree. Voters have already received ballots with instructions notifying them of the postmark rule. Election day is days away. The *Purcell* principle and equitable doctrine of laches bar the relief Appellants seek at this late date.

Last-minute changes deprive election officials of the time they need to implement changes and notify voters. Orderly election administration requires knowing the rules for the election well in advance of voting. Ideally, any changes to those rules should come with plenty of lead time, so election officials can implement the changes and notify voters. Highlighting these concerns, the Supreme Court, in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), announced a presumption against last-minute interventions in the electoral process: "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 7.

The *Purcell* principle is a sufficient basis to deny injunctive relief. *See id.* at 5. In the *Purcell* case itself, the Supreme Court vacated a lower court's injunction because it changed an election rule too close to an election. *Id.* at 8.; *see also Short v. Brown*, 893 F.3d 671, 680 (9th Cir. 2018) ("[E]ven if the merits question were

close, the district court did not abuse its discretion [by denying a preliminary injunction on *Purcell* grounds]").

In this case, Appellants waited nearly two months to seek an injunction against the consent decree. They wish to change the rules for ballot timeliness in Minnesota mere days from election day. Their decision to wait until so close to election day is fatal under *Purcell*.

The fact that a postmark rule was in place for Minnesota's last election, the August primary, also cuts against an injunction. The U.S. Supreme Court made a similar point when it rejected a challenge to a consent decree suspending enforcement of an absentee witness requirement in Rhode Island due to Covid-19. The Supreme Court denied an application for an emergency stay of the consent decree because the state had also suspended the witness rule for the previous election due to Covid-19: "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." *Republican National Committee v. Common Cause of Rhode Island,* Sup. Ct. Docket 20A28, 591 U.S. __ (Aug. 13, 2020 order in pending case) (Marisam Decl., Ex. E).

The same reasoning applies with even greater force here. The status quo is one in which there was a postmark rule for Minnesota's last election, under the June 17 consent decree. Many Minnesota voters believe that this is the rule for the

general election, because they have received instructions with their ballots telling them this is the rule.

Laches, like *Purcell*, requires denial of an injunction. Courts apply the equitable doctrine of laches to "prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." *Monaghen v. Simon*, 888 N.W.2d 324, 328–29 (Minn. 2016). The Minnesota Supreme Court has repeatedly denied election challenges due to laches. *See Clark v. Reddick*, 791 N.W.2d 292, 294–96 (Minn. 2010); *Clark v. Pawlenty*, 755 N.W.2d 293, 303 (Minn. 2008); *Marsh v. Holm*, 55 N.W.2d 302, 304 (Minn. 1952). The reason is that the "very nature of matters implicating election laws and proceedings routinely requires expeditious consideration and disposition by courts facing considerable time constraints imposed by the ballot preparation and distribution process." *Peterson v. Stafford*, 490 N.W.2d 418, 419 (Minn.1992).

Laches requires dismissal when "there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for." *Monaghen*, 888 N.W.2d at 328-29. Here, Appellants sat on their rights for nearly two months before suing. If they had sued in August, this issue could have been resolved before voting began on September 18 and voters received their absentee ballots and instructions. Now, the Secretary of State would obviously be prejudiced by a last-minute injunction that

could create chaos for Minnesota's election. By sitting on their rights as the election neared, Appellants forfeited their rights.

III. THIS COURT MUST ABSTAIN UNDER *PENNZOIL*.

In *Pennzoil Co. v. Texaco, Inc*., 481 U.S. 1 (1987), after Texaco lost in state court, it filed a federal lawsuit to enjoin enforcement of the state court judgment, alleging violations of the U.S. Constitution. *Id*. at 13. The Supreme Court held that the federal district court could not entertain the suit because "federal injunctions" may not be used to "interfere with the execution of state judgments," particularly where the federal claim could have been raised in the state court action. *Id*. at 13-16. The purpose of *Pennzoil* is to preserve the state's interest in protecting "the authority of the judicial system, so that its orders and judgments are not rendered nugatory." *Id.* at 14 n.12.

Pennzoil forbids the relief Appellants seek here, because Appellants seek a federal injunction that would render the state court's judgment nugatory. *Pennzoil* applies even though Appellants were not parties in state court. *Pennzoil* is a form of *Younger* abstention, which bars claims from federal plaintiffs whose interests are inextricably intertwined with, or essentially derivative of, parties to a state court action. *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 881 (8th Cir. 2002); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 82-84 (2d Cir. 2003). Appellants' interests are clearly intertwined with, and essentially

derivative of, the interests of the Republican Party of Minnesota and Donald J. Trump for President, two entities that expressly waived their right to challenge the consent decree in any judicial forum. Marisam Decl., Ex. D. Appellants claim that they are members of the Republican Party and the party's nominees to serve as electors for the Republican nominee in this presidential election. Compl. ¶¶ 7-8, 73 (ECF No. 1). Appellants cannot credibly claim that their interests are distinct from the Republican Party's or the Trump Campaign's on these issues.

IV. APPELLANTS' ARTICLE II CLAIM FAILS ON THE MERITS.

Even if Appellants' claims are justiciable, they are not likely to succeed on the merits. Appellants' claim under the Electors Clause of Article II fails for four reasons. First, the U.S. Supreme Court has established that courts can order a change from an election day receipt rule to a postmark rule due to Covid-19. *Republican Nat'l Comm. v. Dem. Nat'l Comm*, 140 S. Ct. 1205 (2020) (per curiam). Second, the Secretary of State has authority to enter into a consent decree and implement the relief ordered by the state court. Third, Appellants' claim has no grounding in the clause's text, purpose, or history. Fourth, the Minnesota legislature has authorized the Secretary of State to make changes to election laws pursuant to court orders.

A. The Supreme Court Has Established that a Court Can Enter an Order Changing a State's Election Day Receipt Rule to a Postmark Rule.

Earlier this year, the U.S. Supreme Court ordered that Wisconsin change its election day receipt rule to a postmark rule for its primary election, due to Covid-19. *Republican Nat'l Comm. v. Dem. Nat'l Comm*, 140 S. Ct. 1205 (2020) (per curiam).

Wisconsin, like Minnesota, has a requirement that absentee ballots must be received by election day. Wisc. Stat. § 6.87(6). Before Wisconsin's April 7, 2020, primary, a federal district court ordered that absentee ballots received six days after the election should be counted, regardless of when they are postmarked, based on concerns related to Covid-19. 140 S. Ct. at 1206. The Supreme Court stayed the district court's order to the extent it required the state to count absentee ballots postmarked after election day. *Republican National Committee*, 140 S. Ct. at 1206. However, the Court ordered that all ballots postmarked by election day and received within six days are timely. *Id.* at 1208. The rationale for the change was that the pandemic had led to a surge in absentee ballot requests, creating a backlog and delay in how quickly voters would receive their ballots. *Id.* at 1209-1210 (Ginsburg, J., dissenting).

The consent decree and judgment issued by the state court judge in *LaRose* implemented virtually the identical relief for the Minnesota general election, and for similar reasons.

B. The Secretary Has Authority to Enter into a Consent Decree and to Implement the Relief Ordered by the State Judge.

The Secretary is a constitutional officer and chief elections officer for Minnesota. He is bound to support the Constitution and exercise his best judgment when implementing Minnesota's election laws. Minn. Const., art. V, sec. 6. When the *LaRose* lawsuit was filed, he had an obligation to exercise his best judgment to determine whether application of the challenged laws would violate Minnesota's Constitution. The Secretary, though, did not unilaterally sign a settlement agreement to halt enforcement of the laws. He presented a consent decree that invited judicial review and approval. The Secretary is now bound by the judicial power of the courts to implement the relief in the consent decree judgment.

In the litigation over a Rhode Island consent decree altering an election rule due to Covid-19, the First Circuit expressly rejected an argument that the Rhode Island Secretary of State lacked the authority to enter into a decree changing a state's election laws. The court held: "if state officials fairly conclude, as credibly happened here, that enforcement of a law is unconstitutional in certain circumstances, one can hardly fault them for so acknowledging." *Common Cause Rhode Island*, 2020 WL 4579367, at *4. "And it would be odd indeed to say that a

plaintiff cannot get relief from an unconstitutional law merely because the state official charged with enforcing the law agrees that its application is unconstitutional." *Id.*

Appellants are asking this Court to make the same "odd" finding: that a constitutional officer of a state cannot conclude that a law he implements is constitutionally problematic if applied under certain conditions, such as a pandemic, and then ask a judge to approve a change to avoid those constitutional difficulties. This Court should reject that request.

C. Nothing in Article II Prevents a State from Finding that Its Election Laws Violate Its Constitution.

Appellants' claim stretches Article II far beyond its text, historical purpose, and existing precedent.

The Electors Clause provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." Art. II, § 1, cl. 2.

On its face, it gives state legislatures authority to determine how electors are selected. The consent decree makes no changes to the state laws on how electors are selected. *See* Minn. Stat. § 208.40 *et seq.* (the Uniform Faithful Presidential Electors Act). Nothing in the clause's text or history suggest it is a violation for a court to order changes to election procedures under the state constitution.

A large body of Supreme Court case law makes the same point regarding the conceptually similar Elections Clause of Article I, which grants state legislature's authority to set time, place, and manner rules for U.S. congressional elections. Art. I, § 4, cl. 1. While the Electors Clause of Article II addresses presidential elections, the Elections Clause of Article I addresses congressional elections. Both clauses grant authority to state legislatures to set relevant state election rules. The Electors Clause and Elections Clause have "considerable similarity," and interpretations of one clause may inform the other. *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting).

The Supreme Court has repeatedly held that nothing in the Elections Clause alters a state court's authority to review state election laws and provide relief from them. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court held that the Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws" and does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id*. at 365, 368.

More recently, the Supreme Court has explained: "Nothing in that [Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal

elections in defiance of provisions of the State's constitution." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 817-18 (2015).

Historically, Appellants' reading of Article II also finds no support. Alexander Hamilton, writing in the Federalist Papers, emphasized that the primary purpose of the electoral process established by Article II was to minimize "cabal, intrigue, and corruption" in the selection of the President. THE FEDERALIST NO. 68 (Alexander Hamilton). This basic purpose is not implicated in this case at all.

D. Even If Article II Requires a Legislative Enactment Authorizing Changes to Election Procedures, Minnesota Has Such a Statute.

Even if Article II requires a legislative enactment to authorize the Secretary to implement the relief in the consent decree, Minnesota has such a statute. Section 204B.47 provides: "When a provision of the Minnesota Election Law cannot be implemented as a result of an order of a state or federal court, the secretary of state shall adopt alternative election procedures to permit the administration of any election affected by the order." Minn. Stat. § 204B.47. This authority specifically includes procedures for "the voting and handling of ballots cast after 8:00 p.m. as a result of a state or federal court order." *Id.*

The consent decree and accompanying order are a judgment and order from a state court establishing that the election day receipt rule cannot be implemented in 2020. *See Hentschel v. Smith*, 153 N.W.2d 199, 206 (Minn. 1967) (consent

decrees have the force of a court judgment). By implementing the consent decree, the Secretary is acting pursuant to this express legislative enactment.

V. APPELLANTS' STATUTORY CLAIM FAILS ON THE MERITS BECAUSE THE CONSENT DECREE DOES NOT CHANGE THE DATE OF THE ELECTION.

Appellants' second claim is unlikely to succeed because the consent decree does not change the date of the election.

Appellants rely on a single sentence in the decree: "Where a ballot does not bear a postmark date, the election official reviewing the ballot should presume that it was mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day." Marisam Decl., Ex. B at 10.

Appellants twist this language to claim that it changes the date of the election. It does no such thing. It does not alter the rule that a ballot must be mailed by election day. It just establishes a presumption to ensure that voters are not disenfranchised when they timely submit their ballots but, for no fault of their own, the Postal Service inadvertently does not postmark their ballots.

When a ballot lacks a postmark, due to inadvertence or negligence by the Postal Service, it can lead to post-election litigation over whether to count the ballot. *See, e.g., Gallagher v. New York State Bd. of Elections*, No. 20 CIV. 5504, 2020 WL 4496849 (S.D.N.Y. Aug. 3, 2020). Unfortunately, this kind of post-election litigation about the validity of ballots cast for particular candidates "threatens to undermine voter confidence in the electoral process and potentially to

undermine confidence in the judiciary as well." Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 Stan. L. Rev. 1, 5 (2007).

To avoid this post-election problem, the consent decree establishes a presumption that ballots without postmarks are timely, if they are received within seven days and there is no evidence, such as other markings or dates, showing they were mailed after election day. This presumption is based on the Postal Service's own guidance regarding how long it takes for a ballot to go through the postal system and be delivered to election officials. *See* State And Local Election Mail—User's Guide, United States Postal Service, January 2020; Office of Inspector General, U.S.P.S., Rpt. No. 20-235-R20, Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Center Service Area 6-7 (2020);[6] Marisam Decl, Ex. B at 4 (citing postal service guidance and reports on ballot delivery times).

Recent reports have found that "postal districts across the country are missing by wide margins the agency's own goals for on-time delivery, raising the possibility that scores of mailed ballots could miss deadlines for reaching local election offices if voters wait too long." Anthony Izaguirre and Pia Deshpande,

[6] The guidance document is available at https://about.usps.com/publications/pub632.pdf. The report is available at https://www.uspsoig.gov/sites/default/files/document-library-files/2020/20-235-R20.pdf.

Records: Mail delivery lags behind targets as election nears, Star Trib. (Sept. 24, 2020). In light of these reports, it is even more important that voters have protections to ensure they are not disenfranchised if, through no fault of their own, the Postal Service fails to postmark their ballot.

Most importantly, though, the presumption in the consent decree does not change the date of the election. It simply establishes an evidentiary presumption for determining whether a ballot was mailed on election day. Under the consent decree, election day remains November 3.

VI. THE BALANCE OF HARMS AND PUBLIC INTEREST WEIGH HEAVILY AGAINST AN INJUNCTION.

The state's strong interests in orderly elections and minimizing voter confusion cut heavily against an injunction. *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").

It is incredibly important that this presidential election, held during a once-in-a-century pandemic, goes as smoothly as possible. An order enjoining the postmark rule at this late date would cause confusion and interfere with orderly election administration. Since voting began on September 18, ballots have been mailed to voters with instructions notifying them that their ballots will be timely if

they are postmarked by election day. *See* Maeda Decl. At this point, the postmark rule cannot be undone without causing massive confusion and disenfranchisement. The worst-case scenario would be that scores of ballots are not counted because voters, relying on their ballot instructions, mail their ballots on or shortly before election day. This disenfranchisement is a likely outcome if Appellants prevail.

Appellants come nowhere close to identifying an interest sufficient to outweigh the state interest in minimizing voter confusion and ensuring orderly election administration.

CONCLUSION

For these reasons, the Court should deny the motion.

Dated: October 20, 2020

KEITH ELLISON
Attorney General
State of Minnesota

s/ Jason Marisam
JASON MARISAM (#0398187)
CICELY MILTICH (#0392902)
Assistant Attorneys General

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1275 (Voice)
(651) 282-5832 (Fax)
jason.marisam@ag.state.mn.us
cicely.miltich@ag.state.mn.us

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF COMPLIANCE
WITH FRAP 27

1. This response complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,171 words.

2. This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt Times New Roman font.

s/ Jason Marisam
JASON MARISAM
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH 8th Cir. R. 28A(h)(2)

The undersigned, on behalf of the party filing and serving this brief, certifies that the brief has been scanned for viruses and that the brief is virus-free.

s/ Julie Peick
JULIE PEICK