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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
Case Type: Civil Other/Misc.

MINNESOTA ALLIANCE FOR RETIRED AMERICANS EDUCATIONAL FUND, TERESA MAPLES, and KHALID MOHAMED,

Plaintiffs,

v.

STEVE SIMON, in his official capacity as Minnesota Secretary of State,

Defendant.

Case No. 62-cv-24-854

Assigned Judge: Hon. Edward Sheu

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Minnesota's witness requirement is unlawful and the Secretary of State's Motion to Dismiss demonstrates why. To defend against Plaintiffs' Voting Rights Act ("VRA") claim, the Secretary insists that the witness requirement is not a voucher of qualifications, as Section 201 prohibits. In fact, the Secretary insists the required witness statement has nothing to do with qualifications at all. But if that is true, then the witness requirement necessarily violates the Civil Rights Act's separate prohibition on denying the right to vote based on "errors or omissions" that are not "material in determining a voter's qualifications." 52 U.S.C. § 10101(a)(2)(B). The Secretary's attempts to wriggle out of this bind rely on atextual readings of both Minnesota and federal law. Indeed, the Secretary's entire defense against Plaintiffs' Civil Rights Act claim rests on the premise that the materiality provision does not apply to absentee voting *at all*. But, as the majority of federal courts to consider the issue have held, that reading is plainly unsupported by the statutory text.

The threshold justiciability issues raised by the Secretary cannot shield the witness requirement from this Court's review. The Plaintiffs plainly have standing. They include two individual voters who regularly vote absentee, have experienced difficulty complying with Minnesota's unlawful witness requirement when voting in the past, and will continue to be subject to that requirement in the future, absent relief from this Court. The Secretary's contention that Plaintiffs need show a likelihood of complete disenfranchisement to have standing is not well founded. Courts regularly hold that it is enough that a voter is subject to a law that imposes on them some burden in exercising their right to vote. That Plaintiffs have managed to comply with the witness requirement in the past—often with great effort—does not negate the injury they experience by having to do so. And should Plaintiffs fail to comply with the witness requirement, they *will* be completely disenfranchised.

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Because at least one member of the Minnesota Alliance for Retired Americans—Plaintiff Teresa Maples—has standing, so too does the Alliance, which litigates on behalf of its members. The Alliance also independently has organizational standing under Minnesota's liberal line of cases, which recognizes impediments to an organization's activities and mission as sufficient. The Alliance easily satisfies that test.

The Secretary's invocation of Minnesota's Administrative Procedure Act is a non sequitur. This is not an APA challenge to administrative rulemaking. *See* Minn. Stat. §§ 14.44–.45. It is a federal statutory challenge to an unlawful Minnesota statute. And because that statute violates federal law, so too do the regulations promulgated by the Secretary to implement it.

Because Plaintiffs have pleaded valid claims within this Court's jurisdiction, the Secretary's motion to dismiss should be denied.

BACKGROUND

Under Minnesota law, an "eligible voter" is a person who is (1) at least 18 years of age or older, (2) a citizen of the United States, and (3) a Minnesota resident who has maintained residence in the state for 20 days immediately preceding the election. Minn. Stat. § 201.014, subdiv. 1. All eligible voters are entitled to vote by absentee ballot. Minn. Stat. § 203B.02, subdiv. 1. Indeed, for some Minnesota voters, that is the *only* option because they live in a rural area without an in-person voting location. *See generally* Minn. Stat. §§ 204B.45, 204B.46 (authorizing mail-only balloting for any precinct having fewer than 100 registered voters).

But an absentee ballot cannot be counted unless it is returned in a designated envelope containing a "certificate of eligibility" that must be completed and signed by both the voter *and* a qualified witness. Minn. Stat. § 203B.07, subdiv. 3. The witness must be either (1) a registered Minnesota voter, (2) a notary public, or (3) another individual authorized to administer oaths. *Id.* The witness section of the signature envelope includes an attestation stating that "(1) the ballots

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were displayed to that individual unmarked; (2) the voter marked the ballots in that individual's presence without showing how they were marked, or, if the voter was physically unable to mark them, that the voter directed another individual to mark them; and (3) if the voter was not previously registered, the voter has provided proof of residence as required by section 201.061, subdivision 3." *Id.*

Once submitted, each absentee ballot must be reviewed by two members of the ballot board for compliance with the witness requirement. Minn. Stat. § 203B.121, subdiv. 2; *see also* Minn. R. 8210.2450. To that end, the Secretary has promulgated guidance instructing ballot boards to reject absentee ballots where the witness (1) omits their signature, (2) omits their street name or number, (3) omits their city, (4) lists an address that appears to be outside of Minnesota, or (5) lists a PO Box as an address. *See* Absentee Voting Guide at 7, 72, 83–85.[1] A signature envelope that fails to comply with the witness requirement to the satisfaction of two members of the ballot board must be marked "rejected" and the ballot inside cannot be opened or counted. Minn. Stat. § 203B.121, subdiv. 2.

Plaintiffs are two Minnesota voters who regularly vote absentee and plan to do so in future elections, and the Minnesota Alliance for Retired Americans—a nonpartisan organization whose members include retirees from public and private sector unions, community organizations, and individual activists. Absentee voting is particularly important for the Alliance's members, many of whom are home-bound or have limited mobility due to medical issues. *See* Am. Compl. ¶ 9. As a result, an overwhelming majority of the Alliance's members vote by mail. *Id.* Plaintiff Teresa

[1] Office of the Minn. Sec'y of State, 2022 Absentee Voting Administration Guide (July 21, 2022) [hereinafter "Absentee Voting Guide"], available at: https://www.sos.state.mn.us/media/5058/absentee-voting-administration-guide.pdf.

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Maples, for example, suffers from several chronic health conditions that compromise her mobility and make it difficult for her to drive herself to the polls. *Id.* ¶ 11.

Plaintiffs filed their Complaint on February 13, 2024, Index No. 2, and on March 5, the Secretary filed a Notice of Motion and Motion to Dismiss with a hearing date of May 23, 2024, Index No. 11. Plaintiffs filed an Amended Complaint on May 1, 2024. Index No. 52. Plaintiffs filed their Notice of Motion for a Temporary Injunction and supporting Memorandum on May 2, 2024. Index Nos. 53, 54. On May 8, 2024, the Secretary filed an Amended Notice of Motion and Motion to Dismiss noting the parties' agreement that the Secretary's April 25 memorandum supporting dismissal of the original complaint may be applied to the amended complaint. Index No. 58.

ARGUMENT

The Secretary's arguments for dismissal each miss the mark. Plaintiffs—who include individual voters who plan to vote absentee and are therefore subject to Minnesota's unlawful witness requirement—plainly have standing to challenge that requirement. And on the merits, the witness requirement is *either* (1) a voucher of qualifications, in violation of the VRA or (2) immaterial to determining the voter's qualifications, in violation of the Civil Rights Act's materiality provision. Either way, the requirement cannot stand.

I. Plaintiffs have standing to challenge Minnesota's witness requirement.

Plaintiffs have alleged more than sufficient facts to establish their standing to bring this action. "To demonstrate standing, the complaint must allege facts to show the plaintiff suffered 'some injury-in-fact fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision.'" *Stone v. Invitation Homes, Inc.*, 986 N.W.2d 237, 248 (Minn. App. 2023) (quoting *Garcia-Mendoza v. 2003 Chevy Tahoe*, 852 N.W.2d 659, 663 (Minn. 2014)). "An injury-in-fact is a concrete and particularized invasion of a legally protected interest."

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Enright v. Lehmann, 735 N.W.2d 326, 329 (Minn. 2007) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). That injury must be more than "merely possible or hypothetical." *Minn. Sands, LLC v. County of Winona*, 940 N.W.2d 183, 192 (Minn. 2020) (internal quotation marks omitted).

Here, the Secretary challenges only the injury-in-fact element of standing. Because the individual voter Plaintiffs are undisputedly subject to the witness requirement as absentee voters, they have suffered the necessary injury in fact. And the Minnesota Alliance similarly has standing to assert the rights of its members—including Plaintiff Teresa Maples—as well as its own rights as an organization.

A. The individual Plaintiffs have standing.

The individual Plaintiffs have each alleged a concrete and particularized injury because they are qualified Minnesota voters who have routinely voted by absentee ballot in the past and intend to do so again in future elections. Am. Compl. ¶¶ 11, 12. When they do so, they are each subject to Minnesota's unlawful witness requirement. That is all that is required to establish standing. *See, e.g.*, *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (holding voters who would be required to present photo identification to vote suffered sufficient injury for standing). But Plaintiffs go further, explaining in detail the reasons why the witness requirement makes it harder for them to vote—including, e.g., living alone, having difficulty driving, not knowing any neighbors, and past difficulties finding a witness. Am. Compl. ¶¶ 11–12. "The standing doctrine requires that a party have a sufficient stake in a justiciable controversy to seek relief from a court." *Garcia-Mendoza*, 852 N.W.2d at 663. Nobody has a stronger stake in a controversy over absentee voting rules than the individual voters who are subject to those rules.

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The Secretary is wrong to suggest that Plaintiffs must establish a risk of complete disenfranchisement to establish standing. *See* Def.'s Mem. in Supp. of Mot. to Dismiss at 10, Index No. 39 ("MTD Br."). Courts have routinely and repeatedly rejected that view in the context of challenges to voting rules. *E.g.*, *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) ("A plaintiff need not have the franchise wholly denied to suffer injury."). The burden of complying with the witness requirement is enough to establish the minimum injury required for standing, even if an individual voter is not ultimately prevented from voting. *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) (holding voters were injured by violation of federal voting statutes "[e]ven though they were ultimately not prevented from voting"); *see also, e.g.*, *Stringer v. Hughs*, No. SA-20-CV-46-OG, 2020 WL 6875182, at *9 (W.D. Tex. Aug. 28, 2020) (same); *Gonidakis v. LaRose*, 599 F. Supp. 3d 642, 655 (S.D. Ohio 2022) (same). There is nothing "speculative" or "hypothetical" about those burdens—the individual Plaintiffs have suffered them in the past, and they will be subject to them in every future election in which they vote absentee in Minnesota. And, should they fail to comply with the witness requirement, the individual Plaintiffs *will* be completely disenfranchised.

The Secretary's remaining standing arguments conflate standing with the merits. MTD Br. at 9. "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). "For standing purposes, [the court] accept[s] as valid the merits" of Plaintiffs' causes of action. *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 298 (2022). Here, the Secretary's argument that Plaintiffs "are not in imminent danger of having to prove their qualifications to vote to a witness as a prerequisite to voting," MTD Br. at 9, goes to the merits and has no bearing on standing. And, in any event, that understanding of the witness requirement is wrong for the reasons described more fully below.

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B. The Minnesota Alliance has standing.

The Minnesota Alliance also has standing to bring this action to protect both the rights of its members and its own rights. "[A]n organization may sue to redress injuries to itself or injuries to its members." *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 497–98 (Minn. 1996). The Alliance has identified at least one member—Teresa Maples—who, for the reasons explained above, has standing to bring this action. Am. Compl. ¶ 11. In addition to Ms. Maples, Plaintiffs allege that many of the Alliance's 84,282 members in Minnesota "rely heavily on absentee voting," many of whom live alone and have mobility challenges, meaning that they often struggle to identify and travel to potential witnesses in order to successfully vote absentee. *Id.* ¶ 9. These allegations—which this Court must accept as true—more than satisfy Minnesota's broad interpretation of the associational standing doctrine, which the Minnesota Supreme Court has found is "relax[ed]. . . where the relief sought is equitable only." *See Humphrey*, 551 N.W.2d at 498. Indeed, the Minnesota Supreme Court has routinely concluded that even organizations without formal members have associational standing. *Id.*

The Alliance also has standing in its own right as an organization. The Minnesota Supreme Court has "adopted a liberal standard for organizational standing," *All. for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 913 (Minn. App. 2003), holding that "impediments to an organization's activities and mission as an injury sufficient for standing," *Rukavina v. Pawlenty*, 684 N.W.2d 525, 533 (Minn. App. 2004). Plaintiffs' allegations that the witness requirement "harms the Alliance directly" by frustrating its mission—which the Secretary does not dispute—more than suffice to meet that standard. Am. Compl. ¶ 10. The Alliance's mission is to ensure social and economic justice and full civil rights that retirees have earned after a lifetime of work. Critical to achieving that mission is ensuring its members can vote and that their votes are counted, which the Alliance does through "get out the vote" campaigns, such as phone banks and door to

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door canvassing. *Id.* ¶ 8. Because the Alliance's members face the risk of disenfranchisement due to the witness requirement, the Alliance must divert limited resources and volunteer time away from its efforts to mobilize voters and towards efforts to educate its members about the witness requirement and how to comply with it. *Id.* ¶ 10.

II. This is not an administrative challenge to rulemaking.

The Secretary argues briefly that this court lacks jurisdiction because Plaintiffs have challenged administrative rules promulgated by the Secretary. That is wrong. This is not a rulemaking challenge brought under Minnesota's Administrative Procedure Act. *See* Minn. Stat. § 14.44, *see also id.* § 14.45 ("In proceedings under section 14.44, the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rulemaking procedures."). Plaintiffs make no such claim. Instead, Plaintiffs claim that Minnesota Statutes § 203B.07 violates federal law. And rules promulgated by the Secretary under the authority of that statute therefore also violate federal law. This case is thus unlike *Minnesota Voters Alliance v. Office of the Minnesota Secretary of State*, where the plaintiff brought a declaratory judgment action under Section 14.44, arguing "that the challenged rule subparts conflict with the statute" and thus "exceed[ed] the statutory authority of the agency." 990 N.W.2d 710, 716 (Minn. 2023) (quoting Minn. Stat. § 14.45). As a court of general jurisdiction, this Court may hear Plaintiffs' federal statutory claims. *See* Minn. Const. art. VI, § 3; Minn. Stat. § 484.01.

III. Plaintiffs have stated a claim under Section 201 of the Voting Rights Act.

The VRA's prohibition on vouchers squarely prohibits restrictions like the witness requirement. Section 201 of the VRA provides that:

> (a) No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.

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> (b) As used in this section, the term 'test or device' means any requirement that a person as a prerequisite for voting or registration for voting . . . **(4) prove [their] qualifications by the voucher of registered voters or members of any other class**.

52 U.S.C. § 10501 (emphasis added). The voucher rule thus prohibits requirements that: (i) serve as a prerequisite for voting, (ii) compel voters to prove qualifications by voucher of a third party, and (iii) limit the pool of potential vouchers to registered voters or members of another class. *See id.* The Secretary's argument that the witness requirement is not, in fact, a "voucher of qualifications" misses the mark. And, if correct, that argument further demonstrates why the witness requirement violates the Civil Rights Act's materiality provision, as explained further below.

A. The witness requirement forces registered voters to prove qualifications by voucher before voting absentee.

Minnesota law requires absentee voters who are already registered to vote to prove their qualifications by voucher. The Secretary's argument that witnesses "simply do not certify the voter's eligibility," MTD Br. at 14, ignores the plain language of the challenged statute and the VRA itself. Section 203B.07 of the Minnesota Statutes requires "a certificate of eligibility to vote by absentee ballot" to be printed on the back of every absentee ballot signature envelope. Minn. Stat. § 203B.07, subdiv. 3. That "certificate" must contain a "space for a statement signed by" a qualified witness. *Id.* This witness statement is thus part and parcel of the voter's "certificate of eligibility," which Minnesota law demands for the purposes of establishing that the person submitting the absentee ballot is in fact an "eligible voter" under Section 201.014 of the Minnesota Statutes.

Moreover, the Secretary contends that the attestations of the witness are properly understood as a tool for "confirming that the same person who applied for, received, and returned an absentee ballot also marked the ballot." MTD Br. at 14. And elsewhere, the Secretary argues

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that identity verification—"confirming that *the voter* (as opposed to someone else) was the one who completed the registration and showed proof of residence in a form provided by law"—is in fact material to determining the voter's qualifications. *See* MTD Br. at 23; *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 841 (S.D. Ind. 2006) ("[V]erifying an individual's identity is a material requirement."). The Secretary cannot have it both ways.

In any event, without a witness's attestation and signature, the "certificate of eligibility" is invalid and the ballot will be rejected. Thus, the witness is required for absentee voters to prove their eligibility under Minnesota law. That the substance of the witness's statement is irrelevant to eligibility, as the Secretary suggests, simply confirms that errors or omissions on the witness's attestation are by definition immaterial in determining the voter's qualifications but result in denial of the voter's ballot—which separately violates the materiality provision of the Civil Rights Act, as explained further below. *See infra* IV.

B. The witness requirement requires new registrants to prove their qualifications by voucher.

The Secretary rightly recognizes that voters who are registering for the first time when casting an absentee ballot, or who must update their registration, are differently situated. For such voters, the witness is required to confirm that "the voter has provided proof of residence," choosing from among a list of acceptable forms of proof. Minn. Stat. § 203B.07, subdiv. 3(3); Minn. R. 8210.0600, subp. 1b. "Residence" is unquestionably a "qualification" for voting in Minnesota. *See* Minn. Stat. § 201.014, subdiv. 1 (defining an "eligible voter" as someone who, among other things, has maintained "residence in Minnesota for 20 days immediately preceding the election"). So, for such voters, Minnesota law requires the witness to attest that the voter has proved his or her "qualifications."

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The Secretary attempts to avoid this conclusion by arguing that the law merely "deputizes" the witness to "confirm[] that the voter provided a document permitted by law" as proof of residency. MTD Br. at 15. That is a distinction without a difference. Proof of residence is proof of the witness's eligibility to vote. Minnesota law requires a witness to vouch that he or she has seen such proof. And to the extent that the witness is *not* vouching for the voter's eligibility, then, once again, the witness's attestation is immaterial to voter qualifications, and enforcement of the witness requirement would also violate the materiality provision.

C. The witness requirement may be satisfied only by a registered voter or member of a class.

Section 201 prohibits requiring a voter to prove his [or her] qualifications by the voucher of "registered voters or members of any other class"—without limiting the definition of "class" to particular categories of individuals. 52 U.S.C. § 10501(b). Minnesota's witness requirement does precisely that. It limits the class of permissible witnesses to (1) those registered to vote in Minnesota, or (2) notary publics and other individuals authorized to administer oaths. Minn. Stat. § 203B.07, subdiv. 3. The VRA does not define the term "class," so the Court "should look to the dictionary definition[]" of the word to determine its "plain and ordinary meaning." *State v. Haywood*, 886 N.W.2d 485, 488 (Minn. 2016); *see also Iverson v. United States*, 973 F.3d 843, 848 (8th Cir. 2020) ("Because the term is not statutorily defined, we consider its ordinary dictionary definition."). Here, the relevant definition of "class" is "a group, set, or kind sharing common attributes." *Class*, Merriam-Webster, https://www.merriam-webster.com/dictionary/class (last updated May 5, 2024); *see also, e.g.*, *Class*, Black's Law Dictionary (11th ed. 2019) ("A group of people, things, qualities, or activities that have common characteristics or attributes."). The phrase "notary public or other individual authorized to administer oaths" refers to a single class of individuals who share a common characteristic or

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attribute: they are authorized to administer oaths. And a notary public is a member of that class. *See Notary Public*, Black's Law Dictionary (11th ed. 2019). Thus, by its plain terms, the statute requires the voucher "of registered voters or members of any other class." 52 U.S.C. § 10501(b).[2]

D. The witness requirement denies the right to vote.

The availability of in-person voting does not change the fact that rejecting an absentee ballot that fails to comply with the witness requirement is a "denial" of the right to vote. It is axiomatic that "[t]he right to vote includes the right to have the ballot counted." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (quotation omitted). Once a state elects to offer a manner of voting to some class of voters—as Minnesota has offered absentee voting to all Minnesota voters—it must do so in a way that complies with federal law. *See Voto Latino v. Hirsch*, Nos. 1:23-CV-861 & -862, 2024 WL 230931, at *26 (M.D.N.C. Jan. 21, 2024) ("[T]he State, having offered the option of *voting* during [same-day registration], cannot discard [same-day registrants'] *ballots* due to governmental error and without notice and an opportunity to be heard simply on the ground that the voters should have known not to take such a risk."); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) ("Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted.").

Minnesota therefore cannot offer no-excuse absentee voting, induce voters to vote absentee, and then disqualify their ballots based on a state-law requirement that violates federal law. Minnesota's decision to allow in-person voting *without* a voucher does not immunize its

[2] *Davis v. Gillinghouse*, 246 F. Supp. 208 (E.D. La. 1965) did not read any limitations into the class of individuals to which the voucher rule applies. That case was a challenge to a general requirement that voters produce documentary proof of residency to register to vote. *Id.* at 217. And the court merely held that requiring such documentation is not equivalent to a voucher. *Id.* In this respect, *Davis* underscores one of the problems with the witness requirement as it applies to new registrants. If Minnesota law gave voters the *option* of submitting a copy of a document proving their residence in lieu of obtaining a witness signature, that would likely alleviate the problem.

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absentee balloting regime from compliance with the VRA. Consider the reverse scenario: could Minnesota require any voter who wished to vote at the polls to pass a literacy test—another "test or device" barred by Section 201—so long as it offers absentee voting without the need to comply with any such "test or device"? Plainly not. *See United States v. Logue*, 344 F.2d 290, 292–93 (5th Cir. 1965).

The argument that Section 201 of the VRA does not apply to absentee voting *at all* would also lead to absurd results. In addition to vouchers, the definition of "test or device" in Section 201 includes literacy tests and "good moral character" requirements. 52 U.S.C. § 10501(b). Under that view, such discriminatory tactics—long thought consigned to the ash heap of history by the VRA—are perfectly legal so long as they are applied only to absentee voters. Plaintiffs are aware of no authority that has embraced such limitations on the bans against literacy tests and vouchers, and for good reason.

IV. Plaintiffs have stated a claim under the materiality provision of the Civil Rights Act.

The Secretary's arguments concerning the materiality provision are internally inconsistent and unsound. The Civil Rights Act prohibits denying the right to vote based on "errors or omissions" that are not "material in determining" a voter's qualifications. 52 U.S.C. § 10101(a)(2)(B). The Secretary appears to admit that the witness requirement is *not* material in determining a voter's qualifications when applied to registered voters, but argues that the materiality provision does not apply in that instance. MTD Br. at 22. Then, for unregistered voters, the Secretary appears to admit that the materiality provision *does* apply, but argues that the witness requirement is material in determining an unregistered voter's qualifications. *Id*. at 23. But both scenarios concern the same document: the absentee signature envelope which bears the "certificate of eligibility." The "certificate of eligibility" is a creation of Minnesota statute that refers to both

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the voter certification and the witness certification and is used for both registered and unregistered voters. Minn. Stat. § 203B.07, subdiv. 3.

The Secretary's reading of the Civil Rights Act is also irreconcilable with the text of the law. Although the Secretary attempts to conflate the signature envelope with the act of voting itself, the absentee signature envelope is not a ballot. Instead, it is plainly a "paper or record relating to [an] . . . act requisite to voting", and election officials are currently required to disenfranchise absentee voters "because of an error or omission" on the witness certification section of that paper. 52 U.S.C. § 10101(a)(2)(B); Minn. Stat. § 203B.121, subdiv. 2. The Secretary's misplaced policy arguments do not justify departing from the plain meaning of the plain text of the materiality provision. Because the materiality provision applies to the absentee signature envelope in all instances—and the Secretary admits that the witness requirement is immaterial in at least some circumstances—Plaintiffs have properly stated a claim under the Civil Rights Act.

A. The materiality provision applies to errors or omissions on the absentee signature envelope.

The Secretary's contrived distinction between "eligibility" documents and "vote-casting" documents has no basis in the text of the statute. MTD Br. at 16. The materiality provision prohibits the denial of the right to vote based on "an error or omission on any record or paper," and the only limitation in terms of *which* records or papers are covered immediately follows: the statute covers all papers "relating to any application, registration, or other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). Those terms provide no distinction between papers "requisite to voting" related to eligibility and those "requisite to voting" related to the process of casting a vote.

To justify this concocted demarcation, the Secretary points to the secondary clause of the materiality provision, which clarifies the type of error or omission that cannot justify disenfranchisement: any "error or omission [that] is not material in determining whether such

individual is qualified under State law to vote." MTD Br. at 16 (quoting 52 U.S.C. § 10101(a)(2)(B)). The Secretary latches onto the phrase "material in determining whether such individual is qualified" and treats it as if it defines which documents fall within the materiality provision; but that statutory phrase modifies "error or omission" in the secondary clause, not "record or paper" in the primary clause. 52 U.S.C. § 10101(a)(2)(B). The Secretary's reading warps the grammar of the statute.

The Secretary's misapplication of the secondary clause to the broader scope of the materiality provision produces two untenable results. *First*, it makes the application of the statute circular and its scope potentially non-existent. In the Secretary's own words, the materiality provision only operates in the paradoxical circumstance where "an error relates to a voter's qualification but is immaterial to determining that voter's qualification." MTD Br. at 17. But this reading would allow states to evade the materiality provision with the same "heads I win, tails you lose" approach that the Secretary has invoked here: either any conceivable requirement is permissible because it *is* material to a voter's qualifications; or the requirement is *so* immaterial that it does not relate to a voter's qualifications in the first place and is therefore exempt from the materiality provision entirely. *Id.* at 22. Under this ouroboric interpretation, the tail doesn't just "wag the dog," it wholly consumes it—leaving nothing for the materiality provision to protect. *See Pa. State Conf. of NAACP v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 136 (3d Cir. 2024) ("Pa. NAACP") (admitting that elevating the "in determining" phrase to define the scope of the materiality provision "is the tail that wags the dog").

Second, the Secretary's elevation of the secondary clause produces the conclusion that the materiality provision only applies at the voter registration stage. MTD Br. at 18. But this would render the phrase "any … act requisite to voting" entirely superfluous alongside the express

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reference to "registration." 52 U.S.C. § 10101(a)(2)(B). In other words, the term "act requisite to voting" could be excised and, in the Secretary's view, the operation of the materiality provision would not change. The Secretary acknowledges that "Courts interpret federal statutes to give effect to every clause and word and presume that Congress deliberately chose those word." MTD Br. at 17. But it is the Secretary's proposed reading that would violate this basic precept of statutory interpretation and render portions of the materiality provision a nullity.

Given the plain meaning of the statutory text, it should be unsurprising that a divided panel of the Third Circuit stands alone as the only court to adopt the Secretary's position.[3] In fact, the Secretary cites only a single case that even applied the materiality provision to the voter registration stage: *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003). MTD Br. at 19. And even there, the Eleventh Circuit did *not* hold that the materiality provision applied *only* to voter registration documents; it merely held that the materiality provision does, in fact, apply to voter registration documents. *Schwier*, 340 F.3d at 1294. The rest of the cases cited by the Secretary support Plaintiffs' position. *See* MTD Br. at 19. Indeed, several of them apply the materiality provision to requisites to voting that are not related to voter registration.[4] And others rejected application of the materiality provision because the requirement complained of was not a paperwork error at all,

[3] The panel majority's reasoning in *Pa. NAACP* is flawed for the reasons stated herein and in Plaintiffs Memorandum in Support of Motion for Temporary Injunction. Index No. 54 at 18-19.

[4] *Vote.org v. Ga. State Election Bd.*, 661 F. Supp. 3d 1329, 1338 (N.D. Ga 2023) (applying materiality provision to document separate from voter registration); *La Union del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 542 (W.D. Tex. 2022) (same); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308 (N.D. Ga. 2018) (same); *Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 803 (W.D. Mo. 2020) (same).

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which further illustrates Plaintiffs' point that existing limitations to the materiality provision's scope are more than adequate.[5]

Finally, neither the surrounding provisions nor the legislative history justify rewriting the terms of the materiality provision. The Secretary points to the statute's exclusive focus on voter registration in neighboring provisions. MTD Br. at 18. But this only proves Plaintiffs' point: Congress knew how to draft a provision exclusively focused on voter registration and, yet they chose not to do so in the materiality provision. Indeed, Congress easily could have done so by simply omitting the phrase "other act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). Similarly, the Secretary's invocation of the legislative history illustrates that although Congress was primarily concerned with voter registration, that was not its exclusive focus. MTD Br. at 20–21. As the Secretary implicitly acknowledges, Congress made it clear that it was concerned with *both* voter registration *and* other "requisite[s] to voting." 52 U.S.C. § 10101(a)(2)(B). In sum, even if one could characterize the application of the materiality provision to a ballot's signature envelope as "unexpected," that is not a legitimate basis to rewrite the "plain terms" of the Civil Rights Act. *Bostock v. Clayton County*, 590 U.S. 644, 676 (2020). Nor can legislative history be used to "create" ambiguity where it doesn't otherwise exist. *Id.* at 674. There is simply no basis to give the phrase "other act requisite to voting" any meaning other than the plain one.

B. The Secretary's atextual policy arguments are unavailing.

The Secretary's invention of the separate "vote-casting" document category is transparently motivated by policy concerns that have nothing to do with the text Congress enacted.

[5] *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1370–71 (S.D. Fla. 2004) (rejecting application of materiality provision to deadline for absentee ballot receipt); *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1358 (N.D. Ga. 2006) (rejecting application of materiality provision to photo ID requirement).

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Rather than defend the utility of the witness requirement, the Secretary tries to make this case about "the state's ability to make reasonable policy choices regarding the absentee-voting process" more broadly. MTD Br. at 21. But the Secretary's exaggerated parade of horrible ignores four key limitations on the scope of the materiality provision.

First, the materiality provision only protects voters from immaterial errors "*on any record or paper*" that serves as a requisite to voting. 52 U.S.C. § 10101(a)(2)(B) (emphasis added). The materiality provision has no application to requisites that do not come within this definition. *See Billups*, 439 F. Supp. 2d at 1358 (holding the materiality provision does not apply to a photo ID requirement because failure to present identification is not an "error or omission on any record or paper").

Second, the materiality provision only protects voters if the paperwork error "is *not* material in determining" the voter's qualifications. 52 U.S.C. § 10101(a)(2)(B) (emphasis added). States are unrestrained in their use of paperwork that *is* material in determining whether someone is qualified to vote.

Third, the materiality provision only limits paperwork requirements if the consequence of failing to comply is denial of the right to vote. *Id.* In other words, states may impose *any* paperwork requirements they see fit—even those that have nothing to do with a voter's qualifications—so long as the consequence of failing to comply with those immaterial requirements is not the denial of the right to vote. For example, states may include additional fields to fill out that ease the administrative burden of implementing elections without violating the materiality provision, but they cannot turn around and disenfranchise voters for paperwork errors in those immaterial fields.

Finally, and most importantly, the materiality provision only applies to papers or records that are *requisites* to voting. Critically, the ballot itself does not fall into that category—every other

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paper is a "requisite to voting" subject to the protections of the materiality provision. 52 U.S.C. § 10101(a)(2)(B). The Secretary's examples of the dangers posed by a supposedly overbroad materiality provision are rules regulating the ballot itself. *See* MTD Br. at 21–22. But none of them are threatened by the materiality provision. Minnesota's ballot counting rules are governed by separate statutes that apply *after* the ballot is separated from the signature envelope and placed in the ballot box. Minn. Stat. §§ 204C.23; 204C.18. By contrast, the witness requirement applies to a separate piece of paper—the signature envelope—which is examined *before* a ballot is placed in the ballot box. Minn. Stat. §§ 203B.121, 203B.07.

C. Even under the Secretary's misreading, Minnesota's witness requirement is subject to the materiality provision.

Even if the Court were inclined to rewrite the materiality provision to impose a distinction between "eligibility" documents and "vote-casting" documents, MTD Br. at 16, Minnesota's witness requirement would still violate the materiality provision because the absentee signature envelope—which includes the witness certification—*is* an eligibility document. Under Minnesota law, the fields printed on the signature envelope are the "certificate of eligibility." Minn. Stat. § 203B.07, subdiv. 3. That term applies to the *entirety* of the fields printed on the signature envelope: those filled out by the voter *and* those completed by the witness. *Id.*

The Secretary's brief essentially ignores the entire top half of the signature envelope. Although the Secretary admits that the witness certifications "are not used 'in determining' whether [a registered voter] is eligible to vote," it would be impossible to argue the same for the voter attestation section of the signature envelope. *See* MTD Br. at 22. The voter section of the signature envelope *expressly* attests that the voter "will meet all the legal requirements to vote." *Id*. at 5. To put it back in the Secretary's own terms, the absentee signature envelope is a paper that "serves a gatekeeping function between qualified and unqualified individuals." *Id.* at 17. And the

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witness certification is part of the same "paper"—which is the unit of analysis for determining whether the materiality provision applies. 52 U.S.C. § 10101(a)(2)(B).

When applied to unregistered voters, the Secretary essentially admits that the signature envelope is subject to the materiality provision; but, nevertheless, argues that the witness requirement is material in determining the voter's qualifications.[6] MTD Br. at 23. It is strange, then, that the Secretary suggests that different versions of the same signature envelope are fundamentally different types of documents—only one of which is subject to the materiality provision. But there are only two differences between the witness attestation for unregistered and registered voters: (1) there is a section for identifying the proof of residence document provided by the voter, and (2) there are two additional statements in the witness attestation concerning the voter's registration and proof of residence. *Id.* It defies logic to suggest that the same piece of paper falls within or without the protections of the materiality provision based on a couple of additional bullet points.

Indeed, it is frankly unclear why the Secretary believes that the signature envelope is not an "eligibility" document when applied to registered voters. At best, Plaintiffs can glean two arguments: *First*, the Secretary suggests that the materiality provision cannot apply to the absentee signature envelope because it is examined after the voter registration stage. MTD Br. at 17–18. But this argument fails because Minnesota has decided to double- and triple-check voters' eligibility after the voter registration stage. When a registered voter requests an absentee ballot, they must submit information concerning their qualifications—including age and residence—

[6] While the Secretary's characterization of the witness requirement, as applied to unregistered voters, is inconsistent, his admission that it is "material to determining voter qualifications," MTD Br. at 23, confirms that it operates to "prove [their] qualifications" in violation of Section 201 of the VRA. 52 U.S.C. § 10501.

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which the Secretary must verify. Minn. Stat. § 203B.04, subdiv. 1. Then, the voter certifies their eligibility again on the absentee signature envelope. Minn. Stat. § 203B.07, subdiv. 3. The materiality provision would be meaningless if it only applied to the first time a voter's eligibility was assessed; otherwise, states could entirely evade its protections with a subsequent, discriminatory double-check of a voter's eligibility. *See Pa. NAACP*, 97 F.4th at 153 n.26 ("[D]etermining whether an individual is qualified to vote does not end after the individual registers.") (Schwartz, J., dissenting).

Second, the Secretary suggests that fundamental civil rights protections—including the Civil Rights Act—do not apply to absentee voting because it is merely "a privilege." MTD Br. at 21. At the outset, this argument ignores the fact that absentee voting is not a choice for several groups of voters, including those with limited mobility, those temporarily absent from the state, and those living in precincts that hold elections *exclusively* by mail. *See* Minn. Stat. §§ 204B.45, 204B.46. The Secretary's argument also departs once again from the materiality provision's text, which defines voting expansively, 52 U.S.C. § 10101(a)(3)(A), (e), and "does not distinguish between . . . 'an act requisite to voting absentee' and an 'act requisite to voting in person,'" *In re Ga. Senate Bill 202*, No. 1:21-mi-55555-JPB, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023); *see also La Union del Pueblo Entero v. Abbott*, No. 5:21-cv-0844-XR, 2023 WL 8263348, at *19 (W.D. Tex. Nov. 29, 2023), *stayed pending appeal sub nom. United States v. Paxton*, No. 23-50885 (5th Cir. Dec. 15, 2023) (applying materiality provision to absentee ballots); *Vote.org*, 661 F. Supp. 3d at 1339 (applying materiality provision to absentee ballot applications). Moreover, even if Minnesota were under no obligation to offer absentee voting in the first place, now that it has offered the franchise, it is obligated to respect federal laws protecting voting rights. *See, e.g.*, *Saucedo*, 335 F. Supp. 3d at 217 ("Having induced voters to vote by absentee ballot, the State must

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provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted."). In the same way that Minnesota cannot subject absentee voters to literacy tests or poll taxes, 52 U.S.C. § 10501, it also cannot violate their rights under the materiality provision.

CONCLUSION

For the foregoing reasons, the Court should deny the Secretary's motion to dismiss.

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ACKNOWLEDGEMENT

The undersigned hereby acknowledges that pursuant to Minn. Stat. § 549.211, subdiv. 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, subdiv. 2.

/s/ Sybil L. Dunlop
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