STATE OF MINNESOTA

IN COURT OF APPEALS

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

Respondents,

v.

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

Petitioner.

Case No. A24-1134

RESPONSE TO PETITION FOR DISCRETIONARY AND EXPEDITED REVIEW

District Court Case No. 62-cv-24-854

Date of Filing of Order: June 14, 2024

Secretary of State Steve Simon offers no compelling reason to disrupt the course of this litigation with a costly and time-consuming interlocutory appeal. The Petition rests on a false premise—that the district court's denial of a motion to dismiss, which granted no relief and effected no change in Minnesota law, will affect the upcoming 2024 general election—and it obscures the fact that the district court expressly declined to issue a temporary injunction based on the court's belief that the election is too close in time to do so. Even if Plaintiffs were inclined to seek another injunction before the 2024 election—which they are not—the district court made clear that it would not grant relief. This Court should decline to entertain a disfavored piecemeal appeal and await a final decision definitively resolving Plaintiffs' claims before weighing the merits of this case.

STATEMENT OF FACTS

In Minnesota, an "eligible voter" must be (1) at least 18 years of age, (2) a United States citizen, and (3) a Minnesota resident who has maintained residence in the state for 20 days immediately preceding the election. Minn. Stat. § 201.014, subd. 1. All eligible voters are entitled to vote by absentee ballot. Minn. Stat. § 203B.02, subd. 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).

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, subd. 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 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 the ballot board for compliance with the witness requirement, and to determine whether "the voter is registered and eligible to vote." Minn. Stat. § 203B.121, subd. 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* Add. at 5. 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, subd. 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. 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* Sec'y Add. 38–39. As a result, an overwhelming majority of the Alliance's members vote by mail. *Id*. Plaintiff Teresa 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.* at 39.

In February 2024, Plaintiffs sued the Secretary to enjoin enforcement of Minnesota's witness requirement because it unlawfully requires absentee voters to "prove [their] qualifications by the voucher of registered voters or members of any other class," in violation of the federal Voting Rights Act, 52 U.S.C. § 10501(b). Plaintiffs further allege that, to the extent that the "certificate of eligibility" can be construed as something other than a voucher of the voter's "qualifications," the requirement runs headlong into another federal law: the materiality provision of the Civil Rights Act. That provision prohibits

denying the right to vote based on an error or omission on paperwork "relating to any . . . act requisite to voting, if such error or omission is not material in determining" the voter's qualifications. 52 U.S.C.A. § 10101(a)(2)(B).

The Secretary moved to dismiss the Complaint, and Plaintiffs subsequently filed an Amended Complaint and temporary injunction motion. Sec'y Add. 7–8. The Secretary opposed the temporary injunction motion and renewed his motion to dismiss as to the Amended Complaint. *Id.* The district court denied both motions in an order filed on June 14, 2024. *Id.* at 8, 35. The district court agreed that Plaintiffs have standing and that the Amended Complaint states a claim that Minnesota's witness requirement violates both the Civil Rights Act and the Voting Rights Act. *Id.* at 2. But, noting that "[a]bsentee voting begins September 20, 2024," and that the Secretary "would incur substantial expense" if relief were granted at this stage, the court concluded that "the balance of harms does not support temporary injunctive relief." *Id.* at 29.

STATEMENT OF ISSUES

1. Do Plaintiffs' allegations state a claim under the Voting Rights Act's prohibition on vouchers?
2. Do Plaintiffs' allegations state a claim under the Civil Rights Act's materiality provision?
3. Do Plaintiffs' allegations establish standing to challenge burdensome absentee voting requirements at the motion to dismiss stage?

ARGUMENT

"Generally, interlocutory appeals are disfavored and, ordinarily, only 'final judgments' are appealable." *Gordon v. Microsoft Corp.*, 645 N.W.2d 393, 398 (Minn. 2002). Discretionary review of non-final orders under Minn. R. App. P. 105.01 is available only in the "rare case in which there is compelling reason for immediate appeal," *Emme v. C.O.M.B., Inc.*, 418 N.W.2d 176, 179 (Minn. 1988), and is generally limited to "important legal questions that have broad applicability," *Lillie v. Minn. Prop. Holdings LLC*, No. A24-0805, 2024 WL 3321092, at *1 (Minn. App. July 2, 2024). In deciding whether to grant discretionary review, this Court asks: "whether the district court ruling is nearly dispositive because it sounds the 'death knell' for plaintiff's case or 'places inordinate pressure on the defendant to settle,' and whether the district court ruling involves an 'important legal issue that is also important to the particular litigation.'" *Doe 175 ex rel. Doe 175 v. Columbia Heights Sch. Dist., ISD No. 13*, 842 N.W.2d 38, 47 (Minn. App. 2014) (quoting *Gordon*, 645 N.W.2d at 401–02). The Court may also consider other factors as it finds appropriate, including "whether the ruling is questionable or involves an unsettled area of the law, the impact of the ruling on the petitioning party's ability to proceed, the importance of the legal issue presented, whether the legal issue would evade review if review is deferred until the underlying case has been decided, and any special circumstances presented by the case." *Lunzer v. State*, 874 N.W.2d 819, 823 (Minn. App. 2016). None of these factors is present here.

I. The district court's narrow order does not warrant discretionary review.

The Petition seeks review of an order denying a motion to dismiss but offers no compelling reason to depart from the ordinary course and disrupt these proceedings with piecemeal appeals. The district court did not "upend" settled law "shortly before an election," as the Secretary claims, Pet. at 9, nor did it grant any relief whatsoever. Instead, the district court *denied* Plaintiffs' motion for a temporary injunction, citing concerns about the feasibility of altering Minnesota's absentee ballot requirements before the looming 2024 election. Sec'y Add. 29. At most, the district court merely concluded that the motion to dismiss should be denied because the allegations in Plaintiffs' Amended Complaint suffice to state a claim.

The Secretary is simply wrong to suggest that the district court "left open revisiting an injunction closer to the election." Pet. at 16. The court noted that absentee voting begins on September 20, 2024, and "agree[d] with [the *Secretary's*] concerns regarding the balance of harms." Sec'y Add. 29. While the district court was open to revisiting this conclusion after "the parties have completed discovery and, presumably, moved for summary judgment," the court expressly *declined* to alter the state of the law before the 2024 election. *Id.* Even if Plaintiffs were inclined to seek further relief from the district court before the 2024 election—which they have no intention of doing—the district court's order makes clear that it will not grant such relief. The Secretary's manufactured fire drill does not warrant this Court's review.

If anything, an interlocutory appeal at this early stage in the proceedings is more likely to *hinder* the expeditious and efficient resolution of this case. While the Secretary

argues that "a reversal would end the litigation," Pet. at 16, the more likely outcome is an affirmance—for the reasons explained below. And if the district court *does* grant relief after the election, the Secretary would then be able to take a procedurally appropriate appeal from the district court's final order. The Minnesota Supreme Court has repeatedly "emphasized that the policy of our state is to avoid" such "piecemeal appeals" that "interrupt and delay litigation." *Gordon*, 645 N.W.2d at 403.

None of the remaining considerations support the Secretary's extraordinary request. The underlying issues are doubtless important, but the district court's order denying the motion to dismiss does not resolve any of them; it simply allows the case to proceed to discovery and final adjudication *after* the November 2024 election. Nor is there any "inordinate pressure on the defendant to settle." *Gordon*, 645 N.W.2d at 402: Plaintiffs seek no monetary relief, only declaratory and injunctive relief, and "avoiding the expense of litigation is not a basis to grant discretionary review." *Bricklayers & Allied Craftworkers Serv. Corp. v. St. Paul Lodge, No. 3 of St. Paul*, No. A24-0123, 2024 WL 632516, at *2 (Minn. App. Feb. 13, 2024). The ruling appealed from, moreover, will have no "impact" on the Secretary's "ability to proceed," and would not "evade review if review is deferred" until final judgment. *Lunzer*, 874 N.W.2d at 823. And, for the reasons explained below, the decision rests on solid legal footing and is unlikely to be reversed. In sum, there is nothing to be gained here by departing from the ordinary course of litigation.

II. The district court is unlikely to be reversed.

The district court's decision denying the Secretary's motion to dismiss is unlikely to be reversed by this Court. The Secretary's standing arguments contradict settled

precedent, and his proposed interpretation of the Civil Rights Act and Voting Rights Act would rewrite the plain language of those statutes while ignoring the weight of authority that has applied these landmark civil rights laws to protect absentee voters. Although "the correctness or incorrectness of the ruling sought to be challenged by discretionary review . . . is not the focus of the analysis," *Bricklayers*, 2024 WL 632516, at *2, it further illustrates why a piecemeal appeal is not appropriate here.

A. Plaintiffs sufficiently alleged standing to challenge Minnesota's witness requirement.

The district court's rulings on standing are unlikely to be reversed because some of those holdings are not even challenged by the Secretary. Specifically, the Secretary does not dispute that Plaintiff Minnesota Alliance has standing to challenge the witness requirement because the organization itself has suffered an injury: The requirement impedes the Alliance's get-out-the-vote efforts and forces the organization to divert resources from other programming (i.e., its issue advocacy projects) towards initiatives to help its members comply with the witness requirement (including, for instance, preparing voter information postcards). Sec'y Add. 14. This is an independent basis for standing. *Rukavina v. Pawlenty*, 684 N.W.2d 525, 533 (Minn. App. 2004) (recognizing "impediments to an organization's activities and mission as an injury sufficient for standing"). The Secretary only contests whether the individual plaintiffs—and, as a

corollary, the Alliance's members—have standing to challenge the witness requirement. But the Secretary's arguments suffer from two fundamental misapprehensions.[1]

First, the Secretary incorrectly suggests that a voter can only be injured by the witness requirement if they are unable to find a witness and, as a result, are disenfranchised. This ignores the burden of finding a witness in the first place. The individual plaintiffs and Minnesota Alliance members are subject to Minnesota's unlawful witness requirement and must undertake the burden of complying with its strictures. That is all that is required for standing. *See, e.g.*, *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 382 (2024) ("Government regulations that require or forbid some action by the plaintiff almost invariably satisfy both the injury in fact and causation requirements. So in those cases, standing is usually easy to establish."); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (holding even voters who possessed acceptable identification "would still have standing to challenge [a] statute that required them to produce photo identification" because the requirement creates "an injury sufficient for standing"). Courts have routinely and repeatedly rejected the Secretary's contention that complete disenfranchisement is the only cognizable injury in the context of challenges to voting rules. *E.g.*, *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");

[1] The Secretary incorrectly claims that the district court "recognized that [Plaintiff] Mohamed lacked standing." Pet. at 7 n.2. To the contrary, the district court stated that Plaintiff Mohamed—who was not a focus of the briefing below—"may lack standing" but expressly did not reach the question. Sec'y Add. 14. Nor did the district court need to address it because only one plaintiff need establish standing for a case to proceed. *Horne v. Flores*, 557 U.S. 433, 446 (2009).

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."); *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).

Second, the Secretary's arguments concerning the likelihood of disenfranchisement invites this Court to disregard Plaintiffs' allegations and draw inferences against them. But an appellate court, in reviewing a district court's determination of a motion to dismiss, must accept the pleaded facts as true and construe all reasonable inferences in favor of the nonmoving party. *E.g.*, *Berrier v. Minn. State Patrol*, ___ N.W.3d ___, 2024 WL 3434557, at *1 n.1 (Minn. July 17, 2024). Here, the district court appropriately concluded that Ms. Maples—who is both an individual plaintiff and a member of the Minnesota Alliance—"need not wait until she has been unable to vote absentee before seeking relief," and that the Alliance properly established standing on behalf of unregistered voters because its "membership grows as people retire, and some must register in Minnesota for the first time." Sec'y Add. 13.

B. Plaintiffs stated a claim under the Civil Rights Act.

Plaintiffs have stated a Civil Rights Act claim because their allegations establish each statutory element of the materiality provision: Minnesota's witness requirement disenfranchises absentee voters (1) based on an error or omission, (2) on a paper requisite to voting, and (3) the error or omission is not material in determining the voter's qualifications. 52 U.S.C. § 10101(a)(2)(B). There is no dispute that the witness certification appears on a paper document; nor is there a dispute whether this paper serves as a requisite

to voting. The Secretary only disputes two points: (1) whether the materiality provision applies at all, and (2) whether the absence of a witness is material in determining the voter's qualifications. Neither point justifies a reversal of the district court.

On the first point, the Secretary asked the district court to interpret the materiality provision as outlined by a divided Third Circuit panel, Pet. at 12 (citing *Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 136 (3d Cir. 2024) ("*Pa. NAACP*")),[2] and a federal district court that followed the Third Circuit's recent aberration. *Id.* (citing *Liebert v. Millis*, No. 23-CV-672-JDP, 2024 WL 2078216, at *17 (W.D. Wis. May 9, 2024)). But the Secretary ignored several other federal cases where this precise argument was rejected. *See La Union del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2023 WL 8263348, at *18–*22 (W.D. Tex. Nov. 29, 2023) ("*LUPE*"), *stayed pending appeal sub nom. United States v. Paxton*, No. 23-50885 (5th Cir. Dec. 15, 2023) (rejecting argument that the materiality provision only applies to voter registration); *In re Georgia Senate Bill 202*, No. 1:21-CV-01259-JPB, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023) (same); *Ford v. Tennessee Senate*, No. 06-2031 D V, 2006 WL 8435145, at *11 (W.D. Tenn. Feb. 1, 2006) (same). Consistent with these rulings, the district court correctly determined that "the CRA's plain language . . . compels the conclusion that paperwork

[2] Notably, the divided panel's decision in *Pa. NAACP* directly conflicts with an earlier Third Circuit decision in *Migliori v. Cohen*, which upheld a materiality provision claim concerning absentee ballot envelopes. *See Migliori v. Cohen*, 36 F.4th 153, 163 (3d Cir. 2022), *cert. granted, judgment vacated sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022). And the Wisconsin federal court's recent decision in *Liebert* is in tension with that same court's previous determination that "the text of §10101(a)(2)(B) isn't limited to . . . voter registration." *Common Cause v. Thomsen*, 574 F. Supp. 3d. 634, 636 (W.D. Wis. 2021).

errors on documents necessary to have a vote counted must be disregarded unless the errors are material to determining the voter's eligibility," and that the Secretary's proposed interpretation would "render meaningless the phrase 'other act requisite to voting,'" in the materiality provision. Sec'y Add. 25 (quoting 52 U.S.C. § 10101(a)(2)(B)); *see also In re Ga. Senate Bill 202*, 2023 WL 5334582, at *10 (rejecting similar interpretation because it "would essentially render the provision meaningless").

To inflate the support for his preferred interpretation, the Secretary mischaracterizes the Eleventh Circuit as "likewise" holding what the Third Circuit held. Pet. at 12 (citing *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003). But that's not correct. The Eleventh Circuit merely explained that the materiality provision applies to voter registration papers—not that this application is exclusive. *Id.* That is why courts in the Eleventh Circuit have not hesitated to apply the materiality provision beyond the voter registration context. *See, e.g.*, *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1309 (N.D. Ga. 2018) (applying materiality provision to absentee ballots); *In re Georgia Senate Bill 202*, 2023 WL 5334582, at *8 (same).

Even if the materiality provision applied only to "qualification-determining documents," as the Third Circuit suggests, Pet. at 12 (citing *Pa. NAACP*, 97 F.4th at 127, 134), it would still apply to the witness requirement because, unlike the absentee ballot envelopes at issue in Pennsylvania and Wisconsin, Minnesota's signature envelope *is* a document used in determining voter qualifications. Under Minnesota law, the ballot board reviews the signature envelope to determine whether "the voter is registered and eligible to vote," Minn. Stat. § 203B.121, subd. 2(b)(4), and the fields printed on the signature

envelope—including the witness certification—are all part of the "certificate of eligibility." Minn. Stat. § 203B.07, subd. 3. *Compare Pa. NAACP*, 97 F.4th at 135 (holding materiality provision concerns "the process of determining a voter's *eligibility* to cast a ballot"); *Liebert*, 2024 WL 2078216, at *17 (holding materiality provision applies "to determinations of a voter's qualifications"). Because Minnesota has decided to double- and triple-check voters' eligibility after the registration stage, these paper requirements must also comply with the materiality provision—otherwise states could easily evade its protections by imposing the exact same paperwork requirements immediately after the registration process. *See LUPE*, 2023 WL 8263348, at *21 (holding the materiality provision does not allow states to engage in the same prohibited conduct at later stages of the voting process); *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.") (Shwartz, J., dissenting).

Finally, the witness requirement violates the materiality provision because it is not material in determining voter qualifications. The Secretary said so himself: "witness certifications . . . are not used 'in determining' whether the [registered] voter is eligible to vote." Resp't Add. at 22. The witness certifies only two things: (1) the procedure followed by the voter and (2) the witness's eligibility to serve as a witness. *See* Minn. Stat. § 203B.07, subd. 3. These certifications do not provide any information pertinent to the voter's identity, or whether the person who completed the ballot is the same person who requested the absentee ballot, or whether the person satisfies Minnesota's qualifications to vote (age, residency, and citizenship). The Secretary's attempt to reframe the utility of the

witness requirement as confirmation that the same person filled out the ballot and signature envelope reveals nothing about whether *that individual* "is qualified under state law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Indeed, the witness certification does not even identify the person filling out the ballot, which further underscores why it is not "material in determining" any voter's eligibility.[3]

C. Plaintiffs stated a claim under the Voting Rights Act.

Section 201 of the VRA is straightforward: it states that voters cannot be required to obtain a "voucher of registered voters or members of another class" in order to prove their qualifications to vote. 52 U.S.C. § 10501. The district court correctly determined that, for voters registering absentee, Minnesota's requirement does just that. Sec'y Add. 19.

The Secretary's sole objection to Plaintiffs' VRA claim is that the witness does not attest to the voter's qualifications, but rather attests that the voter "provided a document in one of the forms permitted by law." Pet. at 10. But it does not matter what information the witness attests to or vouches for. The application of Section 201 does not turn on the subject of the voucher, but rather the role played by the voucher requirement in the voter registration process—i.e., whether the voter is forced to "prove [their] qualifications *by* the voucher" of another. 52 U.S.C. § 10501 (emphasis added). In this context, absentee registrants have no option to prove their residence *other* than having a witness vouch for a

[3] Even if the witness's presence were conceivably relevant in determining qualifications, materiality is evaluated relative to all the other information provided by the voter. Where that other information establishes the voter's identity, the witness certification is not material. *See LUPE*, 2023 WL 8263348, at *18. Here, the voter has already provided their name, address, and identification number, which is more than sufficient for identification. Minn. Stat. § 203B.07, subd. 3.

residency document they provide. Because a witness's voucher is necessary for absentee registrants to prove their residence, the witness requirement straightforwardly violates Section 201.

CONCLUSION

For the foregoing reasons, the Court should deny the Secretary's Petition for Discretionary and Expedited Review.

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CERTIFICATE OF COMPLIANCE

This document complies with the word limitations of Minn. R. Civ. App. 105.02. This document was prepared with a 13-point proportional font, using Microsoft Word in Office 365, which reports that the brief contains 3,890 words.

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