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State of Minnesota
7/29/2024 3:28 PM

STATE OF MINNESOTA

IN COURT OF APPEALS

Minnesota Alliance for Retired Americans Educational Fund, et al.,

Respondents,

vs.

Steve Simon,

Petitioner.

File No. A24-1134

SECRETARY'S REPLY MEMORANDUM SUPPORTING DISCRETIONARY REVIEW

As established in Petitioner Minnesota Secretary of State Steve Simon's petition for discretionary review, the district court decided important, fundamentally legal questions by holding that Minnesota's absentee-ballot witness requirement violated the Voting Rights Act (VRA) and Civil Rights Act (CRA). In doing so, the district court effectively disposed of the case. As reflected by Respondents Minnesota Alliance for Retired Americans Education Fund, Teresa Maples, and Khalid Mohamed's response to the Secretary's petition, these issues are important, have a broad impact, and are unsettled both nationally and in Minnesota. And Respondents do not identify any fact issues needing further development in the district court. They nevertheless oppose discretionary review. The Court should grant review because the issues are purely legal, have already been decided by the district court, and would not be further illuminated by additional district court proceedings. Further, the resolution of these legal issues will have a statewide impact.

Although the Secretary believes that the district court left open revisiting a preliminary injunction before the election, based on Respondents' representation to the

Filed in District Court
State of Minnesota
7/29/2024 3:28 PM

Court that they do not intend to seek further relief from the district court before the 2024 election, the Secretary withdraws his request that the Court expedite the case should it grant discretionary review. (Resp'ts' Br. 1, 6.) But given the significance and statewide impact of the legal issues and the recurring nature of elections in some form every year, the case remains appropriate for appellate review now.

ARGUMENT

Respondents agree that discretionary review is appropriate when a district court order is nearly dispositive, addresses important legal questions that apply broadly, and is either questionable or involves unsettled law. (Resp'ts' Br. 5.) And they do not dispute that the Court should also consider the likelihood of reversal. *Doe 175 ex rel. Doe 175 v. Columbia Heights Sch. Dist., ISD No. 13*, 842 N.W.2d 38, 47 (Minn. Ct. App. 2014). Where Respondents disagree is in whether these factors are present. But the order functionally disposes of all claims, which address important, fundamentally legal questions, in an area of law that has not been affirmatively addressed in Minnesota but where persuasive caselaw from multiple other jurisdictions suggests the district court erred. Accordingly, the Court should grant discretionary review.

I. THE RULING IS NEARLY DISPOSITIVE.

The district court decided fundamentally legal issues: does Minnesota's witness requirement violate the VRA or the CRA, and do Respondents have standing? Thus, by holding that Respondents' claims have a legal basis and denying the Secretary's motion to dismiss, the district court all but disposed of the case. Respondents contend that discretionary review will somehow "hinder" the disposition of the case as a whole.

Filed in District Court
State of Minnesota
7/29/2024 3:28 PM

(Resp'ts' Br. 6.) But no further district court proceedings are needed to elucidate the record on them. Indeed, unless the district court changes its mind, it effectively decided the case by holding that the witness requirement violates the VRA and CRA. That ruling is thus "nearly dispositive," and the Court should grant discretionary review.

Respondents frame the district court's decision at a high level, simply holding that the complaint stated a claim. (Resp'ts' Br. 6.) While technically accurate, this broad framing ignores the court's predicate holdings. In deciding that Respondents stated a claim, the court held that "the witness requirement appears to violate the [VRA]" and that it "violat[es] the [CRA]." (Pet'r's Add. 2.) That decision did not rely on any ambiguity of how the statutes might apply to certain facts, but by comparing the federal laws with the applicable state statutes and rules. Indeed, although the district court's order contemplates discovery, neither it nor Respondents identify *any* fact questions that would alter these conclusions. And this Court has previously granted discretionary review when "the facts in [the] case are not significantly disputed" and all that remained was for the trial court to determine "a legal issue." *Gilchrist v. Perl*, 363 N.W.2d 904, 906 (Minn. Ct. App. 1985); *see also, e.g.*, *Beatty v. Ellings*, 173 N.W.2d 12, 16 (Minn. 1969) (exercising discretionary review where "claims are as a matter of law without substantial merit" and further district court proceedings would constitute "an unwarranted imposition upon both litigants and the public").

All of this demonstrates that the district court's order is nearly dispositive of the case. Accordingly, further district court proceedings are unnecessary, and the Court should grant discretionary review.

Filed in District Court
State of Minnesota
7/29/2024 3:28 PM

II. THE LEGAL QUESTIONS IN THIS CASE ARE IMPORTANT AND UNSETTLED.

Minnesota leads the nation in voter turnout, and absentee voting is an important contributor to that leading position. This case thus clearly presents an important question that affects millions of Minnesotans: what can the state require to effectively cast an absentee ballot? For decades, this was a settled question in Minnesota. But now the district court's order throws that settled issue into doubt.

Since at least 1862, part of the answer to this question has been that the state may require a witness to vote absentee. 1862 Minn. Laws Spec. Sess. ch. 1, § 1, at 1314. And the current witness requirement has been the law for 75 years. 1949 Minn. Laws ch. 368, § 2, at 606. Respondents therefore unsurprisingly agree that whether Minnesota's longstanding requirement violates federal law is "doubtless important." (Resp'ts' Br. 7.) Indeed, they do not dispute that a decision in this case will likely impact millions of Minnesotans. But a holding that Minnesota's longstanding election procedures have violated federal law since 1964 is a significant and potentially disruptive holding. Though the district court stopped short of issuing a temporary injunction, the gravity of its order demands the clarity that only prompt review can provide. Moreover, should the Court conclude changes to the law are needed, it is important to have a decision now, as opposed to after further district court proceedings and the appeals that would follow, to give the legislature time to respond before the next major election year.

Respondents also appear to agree that the VRA's and CRA's impact on absentee-voting procedures is unsettled both nationally and—after the district court's order—in Minnesota. (*See, e.g.*, *id.* at 11-12 (noting disagreement among federal courts).) Taken

Filed in District Court
State of Minnesota
7/29/2024 3:28 PM

together, the now unsettled and important nature of the issues in this case supports discretionary review. Minnesota voters and election officials need clarity as to whether Minnesota's witness requirement violates federal law or not. This Court should provide that clarity by granting discretionary review.

III. THE DISTRICT COURT'S ORDER IS LIKELY TO BE REVERSED.

Respondents contest the likelihood of reversal if the Court grants review. Of course, as Respondents correctly note, the merits of the appeal (though relevant) are not properly the focus when deciding whether to grant discretionary review. *Bricklayers & Allied Craftworkers Serv. Corp. v. St. Paul Lodge, No. 3*, No. A24-0123, 2024 WL 632516, at *2 (Minn. Ct. App. Feb. 13, 2024). But the Secretary's petition establishes a significant likelihood that the district court will be reversed. The court fundamentally misunderstood the roles that witnesses serve in the absentee voting process, and it departed from statutory language and from well-reasoned, recent decisions in other jurisdictions on the same issues. Respondents echo the court's misunderstanding by divorcing the text of the witness requirement from its actual application.

With respect to the VRA, Respondents boldly state that "it does not matter what information the witness attests or vouches for." (Resp'ts' Br. 14.) This is flatly contradicted by the VRA, which prohibits only vouching to "prove [one's] qualifications" to vote. 52 U.S.C. § 10501(b). The witness's certification that the voter showed some document—the veracity of which the witness did *not* verify—is a far cry from "proving qualifications," which includes a host of other requirements not determinable from the documents a voter

Filed in District Court
State of Minnesota
7/29/2024 3:28 PM

may show to a witness, such as being a Minnesota resident for at least 20 days and not being subject to an order revoking voting rights.

Turning to the CRA, Respondents incorrectly argue that it applies at all to vote-casting documents after a registrant's qualifications have been determined. (Resp'ts' Br. 13.) But as noted in the Secretary's petition, both federal circuit decisions addressing that issue support the conclusion that it applies to qualification-determining documents, not to every voting-related document. *See Penn. State Conf. of NAACP Branches v. Sec'y Commonwealth of Penn*., 97 F.4th 120, 127, 134 (3d Cir. 2024), *reh'g denied* (Apr. 30, 2024); *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003). Respondents argue that *Schwier* did not really address the CRA's scope. (Resp'ts' Br. 12.) It did. The Eleventh Circuit held that the materiality provision sought to "address the practice of requiring unnecessary information for voter *registration*." *Schwier*, 340 F.3d at 1294 (emphasis added). Moreover, even if the CRA applies to the witness requirement, that requirement is material to establishing that the person voting is the same eligible voter qualified to vote. The witness provides the otherwise missing link that the voter who signs the ballot envelope (which, pursuant to that person's eligibility certification must be a qualified voter) is the same person who filled out the ballot. This provides assurance of the unity of identity between the person marking the ballot and the person swearing they are eligible by signing the signature envelope's eligibility certification. It is therefore material.

Respondents disingenuously suggest the Secretary conceded this CRA argument, quoting (with omission) a portion of the Secretary's memorandum supporting the motion to dismiss. (Resp'ts' Br. 13. ("The Secretary said so himself: 'witness certifications . . . are

Filed in District Court
State of Minnesota
7/29/2024 3:28 PM

not used "in determining" whether the [registered] voter is eligible to vote.'").) But the portion that Respondents omit is highly significant, as that portion made clear the witness certifications are still material because they "relate to verifying *how* a voter cast the voter's ballot and *who* cast the ballot.") (Resp'ts' Add. 22.) Thus, the Secretary has clearly and consistently argued that even if the materiality provision applies, the witness certifications are material.

Finally, with respect to standing, three of Respondents' arguments merit a particular response. First, Respondents continue to erroneously assert that the Secretary believes that a person must be actually denied the right to vote to have standing. (Resp'ts' Br. 9.) The Secretary has never taken this position. He has consistently relied on traditional standing requirements that an injury be particularized and actual or imminent. (*See generally* Pet. 15-16; Doc. 39 at 9-10.) Respondents' alleged injuries, in contrast, are either hypothetical (being unable to find a witness despite having always done so in the past) or generalized (having to find a witness at all). Second, contrary to Respondents' assertion, the Secretary disputes that the Alliance has independent standing to challenge the witness requirement. (Doc. 78, at 5. *Contra* Resp'ts' Br. 8.) Third, Respondents incorrectly assert that Mohamed's standing "was not the focus of the briefing below." (Resp'ts' Br. 9.) The Secretary affirmatively argued that Mohamed lacked standing. (Doc. 39, at 9-10). In response, Respondents identified no facts suggesting an actual or imminent risk of future harm. (*See generally* Doc. 61, at 11-12.) And while Mohamed's lack of standing "does not require dismissal of all Plaintiffs' claims," it does require dismissal of Mohamed's claims. (Pet'r's Add. 14.) The district court's failure to do so is clearly likely to be reversed.

Filed in District Court
State of Minnesota
7/29/2024 3:28 PM

CONCLUSION

The district court's holdings were nearly dispositive on unsettled issues of statewide importance. The Court should grant the Secretary's petition for discretionary review.

Dated: July 26, 2024

Respectfully submitted,

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State of Minnesota
7/29/2024 3:28 PM

CERTIFICATE OF DOCUMENT LENGTH
Minn. R. Civ. App. P. 105.02

The undersigned certifies that this reply in support of petition for discretionary review contains 1,878 words and also complies with the type/volume limitations of the Minnesota Rules of Civil Appellate Procedure 132.02. This petition was prepared using a proportional-spaced 13-point font. The word count is stated in reliance on Microsoft Word 365, the word processing system used to prepare this response.

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