STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

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

Plaintiffs,

vs.

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

62-CV-20-3149

ORDER

The above named matter came before this Court on July 31, 2020 on Proposed Intervenors the Republican Party of Minnesota, the Republican National Committee, and the National Republican Congressional Committee's motion to intervene, and Plaintiffs' and Defendant's requests that the Court enter the Proposed General Election Consent Decree.

Based on the pleadings, arguments and submissions of counsel, the Court makes the following:

Order

1. The motion of the Republican Party of Minnesota, the Republican National Committee, and the National Republican Congressional Committee's ("the Committees") to intervene as a matter of right is **denied.**
2. The motion of the Committees to intervene on a permissive basis is **granted.**
3. The request by the Committees to vacate the primary election consent decree is **denied.**
4. The request by the Plaintiffs and the Defendant to enter the General Election Consent Decree is **granted.**
5. The attached memorandum is incorporated herein.

Dated: August 3, 2020

BY THE COURT:

Sara Grewing

Grewing, Sara (Judge)
Aug 3 2020 3:05 PM

Sara Grewing
Judge of District Court

Plaintiffs Robert LaRose, Teresa Maples, Mary Samson, Gary Severson, and Minnesota Alliance for Retired Americans Educational Fund, have sued Secretary of State Steve Simon alleging that Minnesota's witness requirement for absentee ballots as well as the postmark rule for receipt of absentee ballots are unconstitutional burdens on the right to vote as applied during the COVID-19 pandemic.

BACKGROUND

1. **The COVID-19 pandemic**

A novel coronavirus has killed more than 154,471 Americans and continues to spread throughout the country. Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/us-cases-deaths.html. As of this writing, more than 56,560 Minnesotans have been infected with COVID-19 and 1,616 have died. Minnesota Dept. of Health https://www.health.state.mn.us/diseases/coronavirus/situation.html (last visited August 3, 2020).

The virus spreads through interpersonal contact and through respiratory droplets spread by a carrier of the virus. *See* Troisi Expert Decl. ¶¶ 10, 17–19. COVID-19 is highly contagious, and these numbers likely underrepresent the virus's spread. *Id.*

Americans will need to take extensive precautions to protect themselves from COVID-19, including by social distancing, until a vaccine is developed and made available for mass distribution, which will not be until 2021 at the earliest. Troisi Expert Decl. ¶¶ 22–26; Ex. 4, at 4. In the meantime, the CDC estimates 92 to 95 percent of Americans remain susceptible to the virus. Ex. 5; *see also* Troisi Expert Decl. ¶¶ 12–13. The CDC Director predicts that this fall—right when Americans start heading to the polls to vote in the general election—is likely to see another wave of infections "even more difficult than the one we just went through." Ex. 6, at 1; *see also* Troisi

Expert Decl. ¶¶ 22, 28.

2. Minnesota's response

Governor Tim Walz anticipates that Minnesota might be one of the last states to reach a peak of infections, and the first peak is expected to come at the same time other states begin to see a second wave of illnesses this fall. Ex. 7, at 3. In the meantime, 34 states—including Minnesota—are currently experiencing an increase in cases as states begin to reopen from shelter-in-place orders. Troisi Expert Decl. ¶¶ 9, 21–22.

On March 13, 2020, Governor Tim Walz declared a peacetime state of emergency in response to the public health threat posed by COVID-19, "to protect all Minnesotans by slowing the spread of COVID-19" in Executive Order 51 20-01. On March 25, Governor Walz directed all Minnesotans to remain in their homes subject to some limited exceptions, pursuant to Executive Order 20-20. Governor Walz extended that order's restrictions on April 13 in Executive Order 20-35, on May 13 in Executive Order 20-53, on June 12 in Executive Order 20-75, and again on July 13 in Executive Order 20-78. The current peacetime state of emergency is set to expire on August 12, 2020.

In addition, the Minnesota Department of Health ("MDH") has issued guidance urging all Minnesotans to "[s]tay home as much as possible, stay at least 6 feet from other people." Moran Decl., Ex. 15. The MDH further recommends against large public gatherings, especially indoor gatherings, because when groups of people gather in places like churches, schools, or other public buildings, transmission can be "particularly effective." *Id.*, Ex. 17.

According to the 2014-2018 American Community Survey, between 26 and 28.4% of households in Minnesota consist of an individual living alone. Maples Decl. ¶¶ 10–11. Nearly 40% of those living alone are age 65 or older. *Id.* Another 175,000 households consist of a single

parent with children under the age of 18. *Id.* In total, over 36% of individuals in Minnesota live in a household without another person who may be able to serve as a witness for a mail absentee ballot. *Id*.

Two of the named Plaintiffs here, Teresa Maples and Mary Samson live alone and are immunocompromised with mobility issues. Maples ¶ 10; Samson ¶ 6. Plaintiffs assert that these voters and others like them must not only find someone to witness their ballot, but they must leave their home or invite someone into it to obtain the witness's signature, risking exposure to the virus and diminishing the safety benefits of voting by mail. *See* Troisi Expert Decl. ¶¶ 10, 17–20, 29–31.

4. Minnesota's absentee ballot requirements

Under Minnesota law, any eligible voter may vote by absentee ballot. *See* Minn. Stat. § 203B.02, subd. 1. A voter may apply for an absentee ballot at any time at least one day before the election. Minn. Stat. § 203B.04. When the county auditor or municipal clerk receives an absentee ballot application, the registrar mails the applicant a sealed envelope containing the unmarked ballot, instructions for completing the ballot, and an envelope for resealing the marked ballot. Minn. Stat. § 203B.07, subd. 1–3.

The resealing envelope has "[a] certificate of eligibility to vote by absentee ballot printed on the back" on which the voter must include personal identification information, such as the last four digits of their social security number, or their driver's license number, or state identification number. This certificate "must also contain a statement to be signed and sworn by the voter indicating that the voter meets all the requirements established by law for voting by absentee ballot." *Id*. at subd. 3.

After a voter marks her ballot, she must (1) seal the ballot in its envelope, (2) sign the eligibility certificate on the back, and (3) have a witness sign the eligibility certificate. *Id*. at subd 3. The witness must be "registered to vote in Minnesota [or be] a notary public or other individual authorized to administer oaths." *Id*. By signing the eligibility certificate, the witness attests that the ballot was shown to him "unmarked," that "the voter marked the ballot in [his] presence without showing how they were marked," or if unable to physically mark the ballot, "that the voter directed another individual to mark them." *Id.*

When absentee ballots are counted, two or more election officers form a "ballot board" to examine each absentee ballot envelope. As relevant here, a ballot will be deemed accepted if a majority of the ballot board is satisfied that: (1) the voter's name and address match her application; (2) the signed envelope matches the identification number on the application; (3) the envelope includes a "certificate [that] has been completed," including a witness signature; and (4) the voter has not voted twice in that election. Minn. Stat. § 203B.121, subds. 2(b)(1–6).

A ballot must be rejected if any of these criteria – including lacking a witness signature – are not satisfied. Minn. Stat. § 203B.121, subd. 2(c)(1). Moreover, a ballot must be received on Election Day by 8:00 pm in order to be counted. §§ 203B.08 subd. 3; 204B.45; 204B.46, Minn. R .8210.2200, subp. 1 & 8210.3000.

5. Post Office Concerns in Minnesota and Nationwide

Based on data from other states, as well as Minnesota's historically high voter turnout rate, experts anticipate that as many as 1.5 million Minnesotans may cast their ballots via mail in November 2020. Mayer Aff ¶ 66. More than 500,000 ballots have been requested so far for Minnesota's August 11 primary, compared with 54,000 requests made by this time in 2018. *See*, Kim Hyatt, *COVID-19 Sparks 'Tidal Wave' of Mail-In Ballots Across Minnesota*, Minneap. Star-

Trib. (August 2, 2020), https://www.startribune.com/covid-19-sparks-tidal-wave-of-mail-in-ballots-across-minnesota/571982202/.

Other states across the country have seen the increase in absentee balloting due to COVID-19 stretch the capacity of their election officials and the U.S. Postal Service. *See* Michelle Ye Hee Lee and Jacob Bogage, *Postal Service Backlog Sparks Worries that Ballot Delivery Could be Delayed in November*, Wash. Post, (July 30, 2020), https://www.washingtonpost.com/politics/postal-service-backlog-sparks-worries-that-ballot-delivery-could-be-delayed-in-november/2020/07/30/cb19f1f4-d1d0-11ea-8d32-1ebf4e9d8e0d_story.html. In states that held primary elections between April and June, the number and percentage of votes cast by mail increased dramatically. Mayer Aff. at ¶ 25. In Wisconsin's April 7, 2020 primary, over 60% of ballots were cast by mail, compared to 5.5% in 2018 (Wisconsin Elections Commission 2020). In Kentucky's June 24, 2020 presidential primary, 80% of voters cast a mail ballot (Gardner, Lee, and Viebeck 2020), compared to 1.5% in 2018. In Nebraska, 84.2% voted by mail in the May 12, 2020 primary, compared to 24% in 2018 (Nebraska Secretary of State 2020). And in Georgia, 57% voted by mail in the June 9, 2020 primary, compared to 5.6% in 2018. *Id.*

In both Ohio and Wisconsin, the increase in mail volume stretched the capacity of the U.S. Postal Service. Mayer Aff. at ¶ 32. In Ohio, voters expressed frustration with delays in obtaining and submitting their absentee ballots. *Id.* Five days before the April 28 postmark deadline, the Ohio Secretary of State Frank LaRose wrote the Ohio congressional delegation, informing them that problems with mail delivery were affecting absentee voting:

> As Ohioans rush to submit their vote-by-mail requests, and our boards work overtime to fulfill them, we are finding that the delivery of the mail is taking far longer than what is published by the United States Postal Service (USPS) as expected delivery times. Instead of first-class mail taking 1-3 days for delivery, we have heard wide reports of it taking as

> long as 7-9 days. As you can imagine, these delays mean it is very possible that many Ohioans who have requested a ballot may not receive it in time.

Id.

In addition, the Deputy Assistant Inspector General for the United States Postal Service has noted that Minnesota's voters are at "high risk" of their ballots not being delivered to voters before an election. Pl Ex. 2.

Procedural History

On May 13, 2020, Plaintiffs Robert LaRose, Teresa Maples, Mary Samson, Gary Severson, and the Minnesota Alliance for Retired Americans Educational Fund sued Minnesota Secretary of State Steve Simon seeking to enjoin both the enforcement of Minnesota's witness requirement for absentee ballots, as well as the requirement that all absentee ballots be received by 8:00 pm on Election Day.

On June 16, 2020, the Plaintiffs and the Defendant entered into a consent decree in which the Defendant agreed, for the August 11 primary, that he would not enforce the witness requirement for absentee ballots. Primary Consent Dec. at 7. The Defendant further agreed to accept any otherwise validly cast ballot so long as it was postmarked and received at least one day prior to the county canvas (*i.e.* within two days of the Election Day for the August Primary.) *Id.*

On June 18, the Republican Party of Minnesota, the Republican National Committee, and the National Republican Congressional Committee ("the Committees") filed their motion to intervene and request for an expedited hearing to be heard on the merits of their opposition to the primary consent decree. The Court denied the Committees request for an expedited hearing since they were not parties to the litigation, but allowed the Committees to provisionally participate in briefing and argument on July 31, 2020.

On July 2, Plaintiffs filed their motion for a temporary injunction seeking essentially the same relief in the Primary Consent Decree for the general election. On July 17, Plaintiffs and the Defendant filed a stipulation and partial consent decree and asked the Court to enter the agreement as it pertains to the November 2020 general election. The parties sought immediate entry of their consent decree, which the court denied, given the pending intervention motion. The Court then heard all pending matters for argument on July 31, 2020.

ANALYSIS

The Republican Committees' Motions to Intervene

The Proposed Intervenors moved to intervene as a matter of right under Minn. R. Civ. P. 24.01, or in the alternative for permissive intervention under Minn. R. Civ. P. 24.02

A. The Republican Committees are not entitled to intervene as a matter of right

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Rule 24.01 provides:

> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Specifically, a party seeking intervention of right must demonstrate: (1) the application for intervention was timely; (2) an interest relating to the property or transaction which is the subject of the action; (3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and (4) the party is not adequately represented by the existing parties. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W. 2d 197, 207 (Minn. 1986) (citing Minn. R. Civ. P. 24.01). Would-be intervenors must satisfy all of these factors. *Luthen v. Luthen*, 596 N.W.2d 278, 280–81 (Minn. App. 1999).

1. The Republican Committees' attempted intervention was timely

The Republican Committees contend that they acted with diligence in filing their motion. They contend that they sought intervention less than two days after the Plaintiffs and the Defendant filed their proposed consent decree eliminating the witness and Election Day receipt requirements for the Primary Election. The Committees assert that discovery has not begun, no scheduling order has been entered by the Court, and "no rights have yet been adjudicated between the original parties and no new issues have been introduced which will prejudice either of the original parties." *Engelrup v. Potter*, 224 N.W.2d 484, 489 (Minn. 1974) (allowing intervention 10 months after action commenced, though not in an elections case); *Lamb-Weston/RDO v. Cnty. of Hubbard*, No. C5-97-187, C5-98-183, 1998 WL 321023, at *2 (Minn. Tax Ct. June 15, 1998) (motion for intervention timely where "discovery had just begun").

Plaintiffs strongly urge the Court to find that the Committees were not timely in their motion to intervene that came five weeks after the filing of the summons and complaint. Plaintiffs assert that the need for expediency is obvious, and their month-long delay in attempting to intervene is untimely.

Because the notice to intervene was filed at the earliest stage of this litigation, before discovery began and the Court heard the motions for injunctive relief, the court finds that the Republican Committees made a timely application.

2. The Republican Committees have not demonstrated a sufficient enough interest in the enforcement of the absentee ballot statute to justify intervention

The second factor directs this Court to evaluate whether the Republican Committees have an interest relating to the property or transaction which is the subject of this action. *Schumacher*, 392 N.W. 2d at 197. In order to intervene as a matter of right, Proposed Intervenors must claim "an interest relating to the property or transaction which is the subject of the action." *Miller v.*

Astleford Equip. Co., 332 N.W.2d 653, 654 (Minn. 1983). They "must show an interest in the litigation and that [they] will either gain or lose by the judgment between the original parties." *Veranth v. Moravitz*, 284 N.W. 849, 851 (Minn. 1939). Interests that are "speculative" are insufficient; they must be "direct, substantial and legally protectable." *Standard Heating & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 571 (8th Cir. 1998). Similarly, "[a]n undifferentiated generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right." *Dalton v. Barrett*, No. 2:17-CV-04057, 2019 WL 3069856, at *4 (W.D. Mo. July 12, 2019).

The Republican Committees assert the following factors as the basis for their intervention:

1) The Committees' support of free and fair elections for all Minnesotans;
2) The preservation of existing state laws; and
3) The interest in ensuring that the Committees are not subject to a broader range of competitive tactics than state law would otherwise allow. *See* PO MTI 11, 12

a. The support of free and fair elections for all Minnesotans and the preservation of existing law are interests too generalized to support intervention

Supporting free and fair elections is a laudable goal, and one that all Minnesotans should share. The Republican Committees' assertion of this goal as a particularized right to support intervention is misplaced. Generalized interests are insufficient to support intervention under Rule 24. *See Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997) (intervention improper where proposed intervenors asserted "a generalized interest in the public benefits" of enforcing an ordinance).

Similarly, an interest in preserving the statutory status quo is a goal that could be shared by millions of Minnesotans. A general ideological interest in enforcing the current law is insufficient to support intervention, particularly when the statutes at issue do not involve the

regulation of a party's conduct. *See Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007).

b. The preservation of a competitive environment is not sufficient as a matter of law to support intervention as a matter of right in a case involving the witness and Election Day receipt deadline requirements

The Republican Committees rely primarily on *Shays v. Fed. Election Comm'n*, in support of their argument that protecting the competitive electoral environment is sufficient to justify intervention. 414 F.3d 76, 85 (D.C. Cir. 2005). In *Shays*, the United States Court of Appeals for the District of Columbia recognized that candidates for public office had standing to challenge Federal Election Commission's regulations under the Bipartisan Campaign Finance Reform Act of 2002. *Id.*at 83. The court reasoned that, as candidates for office, the proposed plaintiffs were among those who benefit from BCRA's restrictions on practices Congress believed to be corrupting. *Id.* Moreover, the court surmised that no one would suffer more directly than candidates if political rivals were to get elected using illegal financing. *Id.*

The Court finds the Committees' reliance on *Shays* is somewhat misplaced. This case involves a determination of who is allowed to vote safely, not the regulation of political parties' expenditure of resources. The Committees did not address *how* they would allocate their resources differently, for example, if Ms. Maples or Ms. Samson voted without the signature of a witness or had their ballots postmarked on Election Day. When pressed at the hearing, the Committees did not claim that a change to the absentee voting requirements would directly harm their electoral prospects, cause them to spend more money, or burden the campaign activity, as was at issue in *Shays*. *Id.*

c. The Republican Committees are not the "mirror image" of the Plaintiffs

The Committees also allege that their intervention is justified as a matter of right because they are the "mirror image" of the Plaintiffs. The Committees rely on *Democratic Nat'l Comm. v. Bostelmann*, in which the U.S. District Court for the Western District of Wisconsin granted intervention to the Republican National Committee and Republican Party of Wisconsin in a case brought by the Democratic National Committee and Democratic Party of Wisconsin. No. 20-cv-249, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020).

The Plaintiffs in *Democratic National Committee* are different than the parties at issue here. Clearly, if the Plaintiffs in this case were the opposing committees for President or the Democratic National Committee in general, there would be no doubt that the Committees would be entitled to intervention as a matter of right, as "mirror image" parties. That is not the case here – organizational Plaintiffs are a 501(c)(4) nonprofit made up of mostly retirees from public and private sector unions. There is nothing in the record to suggest that the Committees' interest "mirrors" that of the Plaintiffs or their members.

3. The Republican Committees have not demonstrated an interest that would be impaired or impeded by the non-enforcement of the witness requirements

The third factor directs this Court to consider the circumstances revealing that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest. *Schumacher*, 392 N.W.2d 197 at 207. This factor should be viewed from a practical standpoint rather than one based on strict legal criteria. *Id*.

The Committees argue that if the Plaintiffs' action succeeds, then the witness requirements and the Election Day receipt deadline, and their safeguards against voter fraud, ballot tampering, and undue influence in voting will be upended in the run-up to a general election. The Committees argue that Plaintiffs' lawsuit and the parties' proposed consent decree aims to "'short circuit the democratic process'" by enjoining in their entirety two state laws that "'embody[] the will of the

people'" and reflect the Legislature's appropriate effort to uphold the integrity of Minnesota's elections. *See* Committees' Br. (citing *Voting for Am., v. Steen*, 732 F.3d 382 (5th Cir. 2013).

The Court remains concerned that the Committees have not demonstrated *how* the waiver of the witness requirement or the Election Day receipt deadline would undermine electoral integrity. There is nothing of note in the record that suggests that waiving the witness requirement or counting otherwise valid ballots postmarked by Election Day would result in fraud. Certainly, there are safeguards in place to prevent such fraud, which is punishable as a felony in Minnesota.

Moreover, the Committees' interest in Minnesota holding "free and fair elections" is indistinguishable from the interest of any Minnesota voter. The relief sought by the Plaintiffs and contemplated in part by the consent decree are non-partisan: a suspension of the witness requirement and the Election Day receipt deadline during the pendency of the COVID-19 epidemic. The benefits of the relief sought will accrue equivalently to all voters, whether they cast their votes for Democrats, Republicans, Independents, or the Green Party—no voters would be obligated to endanger themselves and their community to exercise their right to vote, and those who cast their ballots on Election Day would be counted. The Committees present no evidence that the outcome of this litigation will specifically disadvantage their candidates or the voters they represent.

4. The Secretary of State does not adequately represent the Committees' interest

The final factor for consideration by this Court relates to the adequacy of the representation of the Republican Committees' interest by the Defendant. *Schumacher*, 392 N.W.2d 197 at 207. The inquiry here is whether the Secretary of State and its representation by the Office of the Minnesota Attorney General would sufficiently represent the interests of the Republican Committees.

The Committees argue that they have a minimal burden of showing that the existing parties may not adequately represent their interests. *Faribo Farms v. County of Dodge*, 464 N.W.2d 568, 570 (Minn. App. 1990). The Committees argue that two decisions made recently by the Secretary to abandon any defense of the witness requirements without notice to the public or the Committees are enough to justify a finding that the Secretary's representation is insufficient. Further, the Committees argue that, as discussed below, there are courts across the country that have found the witness requirement constitutional.

As the Committees have plainly stated, they should not be forced to rely on "doubtful friends" to represent their interests. Broadly, the Committees maintain that courts express skepticism over government entities serving as adequate advocates for private parties, "often conclud[ing] that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003).

The Defendant contends that courts presume that the defense of a statute from a state official is adequate as a matter of law "because in such cases the government is presumed to represent the interests of all its citizens." *N.D. ex rel. Stenehjem v. United States*, 787 F.3d 918, 921 (8th Cir. 2015). The Secretary maintains that he is providing an adequate defense to the challenged laws and argues that this Court need look no further than his aggressive defense of the ballot request statute in this case and his opposition to Plaintiffs' motion for injunctive relief.

Plaintiffs advance a similar argument, and argue that the Committees bear a heavier burden on this factor because the Secretary has a constitutional and statutory mandate to support the Committees' interests. *Swinton v. SquareTrade, Inc.*, 960 F.3d 1001, 1005 (8th Cir. 2020); *see also Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 620 (9th Cir. 2020) ("To establish inadequate representation, Intervenors needed to make a "very compelling

showing" because: (1) a governmental entity (Oakland) was already acting on behalf of their interests in this action: and (2) Intervenors and Oakland share the same ultimate objective of upholding the Ordinance and Resolution.").

This Court is persuaded by the authority advanced by Plaintiffs which raises the bar for demonstrating inadequacy when one of the parties is an arm or agency of the government and the case concerns a matter of sovereign interest. *Stenehjem,* 787 F.3d 918 at 921. The Court is further persuaded, however, that the Committees have sufficiently demonstrated that inadequacy because the Secretary has twice conceded the witness requirement in *LaRose* as well as in United States District Court. *See League of Women Voters v. Simon*, No. 20-1205, Tr.1–13 (D. Minn. Jun. 23, 2020). For these reasons, the Court finds that the Committees' interests are not sufficiently represented by the Secretary of State.

The Committees' have failed to demonstrate factors two and three under Minn. R. Civ. P. 24.01 and *Schumacher.* Because the Committee must satisfy all four factors to succeed, their motion to intervene as a matter of right is denied. *Luthen*, 596 N.W.2d 278, at 281.

B. The Republican Committees are entitled to permissive intervention

Under Rule 24.02, a court may grant intervention "upon timely application . . . when an applicant's claim or defense and the main action have a common question of law or fact." Minn. R. Civ. P. 24.02. Moreover, in exercising its discretion under Rule 24.02, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*

As discussed above, the Committees' application to intervene is timely under both 24.01 and 24.02. *See, e.g., State ex rel. Lucero v. CSL Plasma, Inc.*, No. 27-CV-19-3629, 2020 WL 807356, at *10 (Minn. Dist. Ct. Feb. 12, 2020).

Second, it is undisputed that the Committees will raise defenses that share many common questions with the claims and defenses of the parties. Plaintiffs allege that the disputed statutes surrounding absentee balloting are unconstitutional. The Committees contend that these state election laws are valid and enforceable.

Third, the Committees argue that allowing their intervention will not lead to delay or prejudice. This case is in the earliest of stages, and Committees' participation will add no additional delay.

In considering the Committees' motion for permissive intervention, this Court is mindful of the arguments advanced by the Plaintiffs and the Defendant that the Court should evaluate whether granting permissive intervention would prompt other similarly situated non-parties to seek intervention. *Ohio Valley Environmental Coalition v. McCarthy*, 313 F.R.D. 10, 30 (S.D. W. Va. 2015). Certainly the risk of opening the door to a parade of would-be intervenors is significant, particularly when considering the general election is 92 days away. A strict adherence to the timeliness requirement of 24.02 should address the parties' very valid concerns.

In making its narrow ruling that permissive, though not mandatory, intervention is appropriate, this Court is mindful of the fact that public trust in government remains at an all-time low. *See* i.e. Matt Stevens, *Falling Trust in Government Makes It Harder to Solve Problems, Americans Say*, N.Y. Times, July 22, 2019 https://www.nytimes.com/2019/07/22/us/politics/pew-trust-distrust-survey.html. The once-in-a-century global pandemic and the attendant societal unease likely only exacerbates that anxiety and distrust. The Court is concerned that the denial of a seat at the litigation table to the Committees would only erode public confidence in the electoral process in this unique global moment. The Committees' motion for permissive intervention is granted.

The Plaintiffs' and Defendant's Motion to Approve the Consent Decree

At the outset, the Plaintiffs and Defendants disagree with the Committees on the legal standard under which this Court should review the proposed General Election Consent decree.[1] It is undisputed that a consent decree is the product of a negotiated agreement. *City of Barnum v. Sabri*, 657 N.W.2d 201, 205 (Minn. App. 2003); *see also Elsen v. State Farmers Mut. Ins.*, N.W.2d 652, 655 (Minn. 1945) (describing a consent decree as a "mere agreement of the parties under sanction of the court" to be interpreted as an agreement). While this Court may assess the fairness of such an agreement before approving it, "the court does not, in a consent decree, judicially determine the rights of the parties." *Hentschel v. Smith*, 153 N.W.2d 199, 206 (Minn. 1967) (quoting *Hafner v. Hafner*, 54 N.W.2d 854, 858 (Minn. 1952)). Plaintiffs and Defendant argue that a trial court's power to set aside a consent decree is limited to three instances: fraud, mistake, or the absence of real consent. *Hafner*, 54 N.W.2d at 857.

The Committees argue that the judicial review of a consent decree requires a far more thorough inquiry and fairness finding as articulated by the federal court, namely whether the plaintiff has made an adequate showing of a likelihood of success on the merits of the claim. *See Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975). Courts can gauge "the fairness of a proposed compromise" only by "weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).[2]

[1] The Committees did not address the primary election consent decree at argument, nor did they petition any higher court for relief via writ following the Court's entry of the primary election consent decree. Therefore, it is the Court's position that primary election consent decree remains in place as entered, and that similar analysis regarding fairness applies to both agreements.

[2] As discussed above, this Court allowed the Committees to participate in the argument regarding the entry of the consent decree in the interest of judicial economy, despite not yet having determined at argument that they would be granted leave to intervene under Rule 24.02.

This Court is required and bound to follow Minnesota law interpreting the Minnesota Statutes. Because the Court would reach the same result under the federal standards, this Court will analyze the proposed entry of the consent decree under both Minnesota and federal law.

1. The entry of the proposed consent decree is appropriate under Minnesota law

Plaintiffs and Defendant assert that the Committees are relying on non-controlling federal law, and Plaintiffs assert that the court need look no further than *Hafner's* permissive language that a court "may look to see that a settlement is fair." 54 N.W.2d at 858. It follows, Plaintiffs assert, that this Court should have no problem entering the Consent Decree, which is fair, preservative of the rights of the citizens of the State of Minnesota, and the agreement of the parties as the result of arms-length settlement negotiations.

It is undisputed that the proposed consent decree is non-partisan and waives the Witness Requirement and Election Day receipt deadline only with regard to the November 2020 election. The Plaintiffs and Defendant came to this agreement due to the fact that COVID-19 related illnesses and deaths in Minnesota continue to rise and have no real possibility of abatement by November. General Election Consent Decree at 2-3. If entered by this Court, Minnesotans will not have to risk their health and safety to comply with the Witness Requirement in order to vote absentee in the general election. The Consent Decree further affords Defendant sufficient time to provide instruction and certainty to voters and local election officials before absentee voting begins on September 18.

Perhaps most notably, the proposed Consent Decree reflects a limited compromise of Plaintiffs' claims, as it does not provide relief to Plaintiffs regarding their claim pertaining to universal mailing of absentee ballots.

The Committees offer no evidence that the Proposed General Election Consent Decree is the product of fraud, neglect or the absence of consent. As such, under Minnesota state law, the proposed consent decree should be entered.

2. The entry of the proposed consent decree is fair and appropriate under the federal standard because the Plaintiffs are likely to succeed on the merits of their claim

a. The U.S. District Court decision

Most significant to this Court, the Committees argue that this Court should decline to enter the proposed consent decree because the United States District Court for the District of Minnesota declined to enter a nearly identical consent decree for the August primary. *League of Women Voters v. Simon*, No. 20-1205, Tr. 1–13 (D. Minn. Jun. 23, 2020). As discussed at argument, this Court is deeply concerned about two courts in Minnesota reaching opposite conclusions, especially on something so essential to a functioning government as the right to vote.

Unlike the claims advanced in the U.S. District Court case, this case relies both on claims raised under the Minnesota Constitution and the U.S. Constitution. Compl. at 16. It is undisputed that Minnesota courts can find greater protections of individual rights than the U.S. Constitution. *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005) (noting "it is now axiomatic that we can and will interpret our state constitution to afford greater protections of individual civil and political rights than does the federal constitution"). Moreover, this Court, unlike the U.S. District Court, is bound by *Erlandson v. Kiffmeyer*, in which the Minnesota Supreme Court found that election officials were required to mail replacement ballots to all voters who requested them following the death of Senator Paul Wellstone. 659 N.W.2d 724, 726 (Minn. 2003).

In writing for the Court, Chief Justice Blatz found as follows:

> The purpose of the absentee ballot is to enfranchise those voters who cannot vote in person. To prohibit mailing of replacement absentee ballots to absentee voters who continue to be unable to vote or pick up a ballot in person disenfranchises the very people the absentee voter

> laws are intended to benefit. In the total absence of any rational explanation, allowing some absentee voters to revote with replacement ballots but denying that opportunity to the very group for which absentee voting is designed by prohibiting the mailing of replacement absentee ballots is a denial of equal protection that requires remedial action.

Erlandson, 659 N.W.2d at 734.

As such, this Court is not bound by the same overbreadth reasoning that drew the federal court to the opposite conclusion.

b. Other federal and state Authority

i. The witness requirement

The Committees next assert that the proposed entry of the Consent Decree should be denied based on the authority from courts across the country that have upheld the witness requirements. The Committees cite one U.S. Supreme Court order and three cases from other jurisdictions that do not reflect the unique procedural posture of this case. *See Merrill v. People First of Ala*., No. 19A1063, Order (S. Ct. July 2, 2020) ("Merrill Order") (Justice Thomas granting a stay without analysis of an 11th Circuit ruling allowing curbside voting and exemptions from some absentee requirements in three counties in Alabama); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-1538, 2020 WL 3619499 (7th Cir. Apr. 3, 2020) (finding that a Wisconsin U.S. District Court exceeded the limitations of appropriate injunctive relief); *Miller v. Thurston*, No. 20-2095, 2020 WL 3240600 (8th Cir. June 15, 2020) (addressing the "wet signature" requirement for Alabama witnesses); *Clark v. Edwards*, -- F. Supp. 3d --, 2020 WL 3415376 (M.D. La. June 22, 2020) (dismissed on standing).[3]

[3] The Committees also offer *Nielsen v. DeSantis* in support of its argument that other courts have found the witness requirement constitutional, but this case. Dealt primarily with ballot deadline issues and ballot access for blind voters. No. 4:20-cv-236 (N.D. Fla. June 24, 2020)

The Plaintiffs in turn offer three cases from other districts that *do* more closely reflect the unique procedural posture of this case, namely *Thomas v. Andino*, - F. Supp. 3d. -, 2020 WL 2617329 (D.S.C. May 25, 2020) (enjoining the South Carolina State Election Commission from enforcing the witness requirement); *League of Women Voters of Va. v. Va. State Bd. of Elections*, - F. Supp. 3d --, 2020 WL 2158249 (W.D. Va. May 5, 2020) (approving a consent decree between the parties that would enjoin the enforcement of Virginia's witness requirement); *Common Cause Rhode Island et al v. Nellie M. Gorbea et al.* 2020 WL 4365608 (D. R.I. July 30, 2020) (approving a consent decree between the parties that would enjoin the enforcement of Rhode Island's witness requirement).

As such, this Court is not persuaded by the Committees' argument that the vast weight of authority rests in the Committee's favor on the witness requirement question: indeed, the three district court cases that address the very same question in other states are conclusions in favor of the Plaintiffs. Moreover, it is reasonable for the Secretary to conclude that the Plaintiffs would be likely to prevail in the instant case.

ii. The Election Day receipt deadline

The Committees next point the Court to the Pennsylvania Supreme Court, which has rejected requests to postpone the Election Day receipt deadline for mail-in and absentee ballots submitted in Pennsylvania's June primary. *See, e.g., Dis. Rights Pa. v. Boockvar*, No. 83 MM 2020 (May 15, 2020) (per curiam); *Dis. Rights Pa. v. Boockvar*, No. 83 MM 2020 (May 15, 2020) (Wecht, J., concurring).

Again, given that dozens of courts around the country are wrestling with this issue, there is sufficient enough inapposite authority to render the Secretary's decision to enter the consent decree reasonable. *See, e.g. Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL

1638374, at *18 (W.D. Wis. Apr. 2, 2020) (extending deadline for the receipt of absentee ballots for the primary election in Wisconsin after the Wisconsin Election Commission agreed to the extension).

c. The alleged speculation regarding what COVID-19 will be in November

The Committees next argue that the consent decree rests on mere speculation that COVID-19 will render voting unsafe in November. The Committees argue that the record is devoid of evidence that COVID-19 will be worse in November, or that guidance will develop that will make in-person voting unconstitutionally unsafe. Further, the Committees argue that following basic social distancing practices will render the witness requirement safe for the Plaintiffs, or alternatively, that the Plaintiffs could secure a Zoom account and somehow have a witness approve their ballot while still complying with social distancing.

This Court is not convinced that the Plaintiffs must demonstrate that in-person voting is unconstitutionally unsafe. Rather, Plaintiffs need only show that Minnesotans' right to vote absentee is burdened by the challenged laws. *Kahn v. Griffin*, 701 N.W.2d 815, 832-33 (Minn. 2005); *see also Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 734 (Minn. 2003) ("The purpose of the absentee ballot is to enfranchise those voters who cannot vote in person.").

Moreover, as to the question of voter safety, and with deep respect to Committees' counsel, his clients can't have it both ways. As the Defendant noted at argument, the President's own tweets suggest a recognition that voter safety will be compromised in November. The day before this hearing, the President of the United States tweeted "Delay the Election until people can properly, securely and safely vote???" *See* Donald J. Trump (@realDonaldTrump) Twitter (July 30, 2020, 8:46 a.m.).

Counsel said that he had not seen the President's tweets from the previous day but offered, essentially, that if the President had had the opportunity to fully state his point, he would have acknowledged that Minnesota's voter safety standards are so unique as not implicate the President's safety concerns.

The President's own admissions, as well as the prediction of experts that COVID-19 will likely surge in the fall as the election coincides with the return of cold and flu season, lead the Court to conclude that the safety concerns for the ballot box are not so speculative as to render the Secretary's decision to resolve the Plaintiff's complaints unreasonable. *See* Kristine A. Moore et al., *Part 1: The Future of the COVID-9 Pandemic: Lessons Learned from Pandemic Influenza, in COVID-19*: The Cidrap Viewpoint (Ctr. for Infectious Disease Research and Policy, 2020), https://www.cidrap.umn.edu/sites/default/files/public/downloads/cidrap-covid19-viewpoint-part1_0.pdf.; Glen Howatt, *COVID-19 Cases Could Surge in Fall, Last Two Years, University of Minnesota Report Says* Minneap. Star-Trib. (May 3, 2020), https://www.startribune.com/covid-19-cases-could-surge-in-fall-last-2-years-u-report-predicts/570130602/. Indeed, many schools throughout Minnesota will begin the school year remotely over COVID concerns. *See* Erin Adler, *St. Paul Schools Likely to Begin Year With Distance Learning*, Minneap. Star-Trib. (July 30, 2020), https://www.startribune.com/st-paul-schools-likely-to-begin-year-with-distance-learning/571962822/. The fact that school districts across the state have determined that hundreds of thousands of Minnesota children will not return to the classroom in September makes the impact of COVID in November far from speculative.

d. The Plaintiffs' claims that the absentee ballot statutes and the Election Day receipt deadline present an unconstitutional burden

The Committees next argue that the Plaintiffs have failed to demonstrate their likelihood of success on either of their constitutional or Equal Protection claims. The Committee argues that

enforcement of the witness requirement and Election Day receipt deadlines are not the sort of state election laws that raise constitutional questions. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (recognizing that state election laws "will invariably impose some burden upon individual voters"). "[T]o maintain fair, honest, and orderly elections, states may impose regulations that in some measure burden the right to vote." *Kahn v. Griffin*, 701 N.W.2d 815, 832 (Minn. 2005) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

At a minimum, it is reasonable for the Secretary to conclude that the Plaintiffs are likely to succeed on their claim that the witness requirement violates the Equal Protection Clause of the Minnesota and U.S. Constitutions. By requiring voters who live alone to place their lives and health in danger in order to exercise their fundamental right to vote, it is reasonable to conclude that the Witness Requirement impermissibly and irrationally denies the fundamental right to vote to those individuals while there is still ongoing community transmission of COVID-19. As in *Erlandson*, this Court need not resolve whether strict scrutiny or rational basis review is the proper standard here, because in the circumstances of this case the witness requirement would likely not survive even the lowest level of scrutiny. 659 N.W.2d at 734. The Secretary offers no rational basis for the enforcement of the witness requirement, and the Committees' vague references to fraud prevention, without more, are insufficient to suggest a legitimate state interest for enforcing the Witness Requirement during a global pandemic.

Moreover, had the parties not reached a consent decree to suspend the witness requirements for the general election, this Court would have been empowered to grant the preliminary injunction, or *sua sponte*, find that the requirement, as applied in the current pandemic, unconstitutionally limits voting access, and simply order precisely what the consent decree achieves. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (holding that the

constitutionality of election laws depends upon a court's balancing of the character and magnitude of any law burdening the right to vote against the relevant government interest served by the law); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

Similarly, it is reasonable for the Secretary to conclude that the Plaintiffs are likely to succeed on their Election Day receipt deadline motion. In this unusual global crisis, it is more than reasonable to conclude that a ballot placed with the United States Postal Service quite possibly might not be delivered until on Election Day. It is reasonable for the Secretary to conclude that a ballot posted on or before Election Day should be counted.

e. The balancing of the equities

The Committees finally argue that this Court should reject the General Election Consent Decree because waiving the witness requirement is not in the public interest. Certainly, the Plaintiffs and the Secretary of State have sufficiently demonstrated that the consent decree is in the best interests of the people that they represent. It is reasonable for the Secretary to conclude that this waiver of the witness requirement and Election Day deadline is in the best interests of the health, safety, and constitutional rights of Minnesota's voters, and, therefore, in the public interest.

Under either Minnesota or federal law, the proposed General Election Consent Decree is fair and appropriate. The Motion to enter the Consent Decree is granted.