

STATE OF MINNESOTA

COUNTY OF RAMSEY

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

Plaintiffs,

v.

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

Defendant.

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Case Type: Civil Other/Misc.

Case No.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF****INTRODUCTION**

Plaintiffs Robert LaRose, Teresa Maples, Mary Samson, Gary Severson, and Minnesota Alliance for Retired Americans Educational Fund file this Complaint for Declaratory and Injunctive Relief against Defendant Steve Simon, in his official capacity as the Minnesota Secretary of State, and hereby state and allege as follows:

1. A novel coronavirus is sweeping through the country, with known infections well over one million and fatalities already exceeding the number of Americans killed in the Vietnam War. No states are being spared. In Minnesota as of the date of this filing, there are at least 12,917 confirmed cases and 638 people have died—numbers which surely represent an undercount given the limited testing that has taken place (approximately 122,035 tests performed to date for a population of approximately 5.6 million). There is no clear end in sight. Projections by the federal government indicate the virus will persist at

least into the fall, if not longer. And while the country still has not reached its “peak” of infections, public health officials are already warning about a likely “second wave” of the virus in the fall, which because of its interaction with flu season, could be even worse than the first.

2. The pandemic’s impact is not limited to Minnesotans’ health; it also endangers their right to vote as guaranteed by the Minnesota and U.S. Constitutions. Defendant Minnesota Secretary of State Steve Simon (the “Secretary”) recognizes the serious threat that this unprecedented public health crisis poses to the State’s coming elections. He has described the April 7th spring election in Wisconsin—which saw an historic increase in mail voting alongside a substantial decrease in the availability of in-person voting that nearly crippled the local election apparatus—as “an urgent warning for Minnesota.” As a result, the Secretary backed a bill that would permit a shift to all vote-by-mail elections during public health crises like the current pandemic, explaining that without such changes Minnesota is “in for a real disaster of an election season.”

3. The Secretary is right to be concerned. The chair of the Minnesota Association of County Officers recently reported to the Legislature that, as it was in Wisconsin, in-person voting in Minnesota will be severely compromised in the coming August 11th primary (“August Primary”) and the November 3rd general election (“November Election”) (collectively, the “upcoming elections”) due to limited availability of statewide polling places, concerns about COVID-19 exposure expressed by “a significant number of election judges”—many of whom fall into high-risk categories—and challenges with maintaining social distancing at available polling locations.

4. Although many states have long had a substantial number of their voters cast their ballots by mail, Minnesota is traditionally an in-person voting state, with over 2.3 million of the 2.6 million voters who participated in the 2018 general election voting in person either early or on Election Day, and 2.6 million out of the 2.9 million voters who voted in the 2016 general election doing the same. Thus, as voters transition to absentee voting by mail to protect their safety and the health and safety of their community, the majority will be navigating a system of voting that is new to them. As a result, they are at significantly higher risk of being disenfranchised by unduly burdensome laws regulating the absentee voting process.

5. The anticipated influx of absentee by-mail voters in Minnesota in the upcoming elections is certain to exacerbate the disenfranchising effects of two Minnesota laws in particular: (1) Minnesota's requirement that each absentee ballot be witnessed by a registered Minnesota voter, a notary, or person otherwise authorized to administer oaths ("Witness Requirement"), Minn. Stat. § 203B.07, and (2) its requirement that absentee ballots be received by either 3:00 p.m. (if hand-delivered) or 8:00 p.m. (if delivered by mail) on Election Day (the "Election Day Receipt Deadline"), *id.* § 203B.08 subd. 3; Minn. R. 8210.2200 subp. 1 (collectively, the "Challenged Provisions").

6. The Challenged Provisions cannot survive judicial scrutiny under any circumstances. Even under normal circumstances, the Witness Requirement substantially burdens Minnesotans seeking to vote by mail, some severely so, by increasing both the transaction and monetary costs associated with voting. Not only must voters find a witness to sign and certify their absentee ballot before they can send it, they must specifically find

a witness who is registered to vote in Minnesota or who is specially authorized to administer oaths. Those unable to find a registered Minnesota voter willing to witness their ballot are forced to seek out a notary and, in many instances, pay a fee to exercise their right to vote. This challenge may very well prove insurmountable for certain types of voters, including those temporarily living out of state or with disabilities, as well as those who live alone, a significant portion of whom are senior citizens at high risk of contracting COVID-19. In the context of a pandemic these burdens become entirely unjustifiable, requiring these voters to risk their health to obtain another registered voter's or notary's signature, or forfeit their right to vote.

7. Minnesota's Election Day Receipt Deadline disenfranchises thousands of voters who complete and mail their ballot prior to Election Day but whose ballots—in many cases through no fault of their own—are not received by elections officials through the mail by 8:00 p.m. on Election Day. See Minn. Stat. § 203B.08 subd. 3; Minn. R. 8210.2200 subp. 1. In 2018 alone, Minnesota discarded over 7,519 absentee ballots, nearly half for no other reason than they arrived after the Election Day Receipt Deadline. While this is unconstitutional under any circumstances, in the current context—where the pandemic will lead to a significant increase in mail voting while at the same time severely burdening an already compromised U.S. Postal Service (“USPS” or the “postal service”)—it is all the more unjustifiable. If left in place, the Election Day Receipt Deadline is certain to disenfranchise tens of thousands more voters this year than in years past. As a result, the Court should order the Secretary to adopt the same remedy that the U.S. Supreme Court accepted in Wisconsin for its recent spring election—a postmark deadline. *See Republican*

*Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). Due to that change, in the Wisconsin election alone, over 140,000 ballots that would have been rejected under that state's Election Day receipt deadline were counted.

8. Plaintiffs bring this case to ensure that all eligible Minnesota voters have a fair and safe opportunity to exercise their right to vote. This Court should strike down the Challenged Provisions to ensure that Minnesota's absentee by-mail regime fully complies with the Minnesota and U.S. Constitutions.

### **PARTIES**

9. Plaintiff Robert LaRose is a U.S. citizen and registered Minnesota voter who temporarily resides in New Haven, Connecticut while he attends Yale University. He is 24 years old. In 2016, Mr. LaRose voted absentee by-mail while at school. Mr. LaRose received his absentee ballot a week prior to Election Day and promptly mailed it back to the election office in Waconia, Minnesota, where he is registered to vote. Weeks later, he received a notice from the county informing him that his vote was not counted because it arrived after the Election Day Receipt Deadline. Based on this experience, Mr. LaRose is concerned that he will similarly be disenfranchised in the upcoming elections. In particular, Mr. LaRose is concerned that, like in 2016, he will receive his ballot with insufficient time before the election to ensure that it is returned in time to meet the Election Day Receipt Deadline, through no fault of his own. Given the anticipated problems with USPS, Mr. LaRose believes that this is even more likely this year than in years prior. Mr. LaRose is also concerned that he will not be able to comply with the Witness Requirement. He does not know any registered Minnesota voters in Connecticut who could witness his ballot and,

even if he were to pay for a notary, due to COVID-19 and the stay-at-home order in Connecticut, many notaries' offices are currently closed. As a result, Mr. LaRose fears that he will be unable to vote in the upcoming elections.

10. Plaintiff Teresa Maples is a U.S. citizen and registered Minnesota voter in Red Wing, Minnesota. Ms. Maples is a retired secretary and a member of the Minnesota Alliance for Retired Americans Educational Fund. She is a lifetime voter who has not missed voting in a midterm or general election since first becoming eligible to vote in 1972. Ms. Maples is in her late 60s, lives alone, and suffers from several health conditions—lupus, rheumatoid arthritis, osteoarthritis, osteoporosis, Sjogren's syndrome, dystonia, fibromyalgia, pernicious anemia, and Hashimoto's disease—that contribute to difficulty walking, standing, and completing daily tasks. To address her conditions Ms. Maples takes medications which suppress her immune system. As a result, Ms. Maples has been strictly observing social distancing and has been isolated in her home, alone, for weeks. She does not know when it will be safe to end her isolation. Although Ms. Maples typically votes early in person, due to her mobility issues and increased risk of exposure to and complications from COVID-19, she intends to vote by mail in the upcoming elections. Because Ms. Maples lives alone and must strictly observe social distancing, however, she will be unable to safely meet the Witness Requirement. She is also concerned that even if she meets the Witness Requirement, she may still be disenfranchised by the Election Day Receipt Deadline. She has had problems with mail service in the past and fears that such problems could keep her ballot from arriving in time to be counted.

II. Plaintiff Mary Sansom is a U.S. citizen and registered Minnesota voter in Newport, Minnesota. Ms. Sansom is a retired employee of Northwest Airlines, a former recording secretary of the International Association of Machinists and Aerospace Workers, and a current member of the Minnesota Alliance for Retired Americans Educational Fund. Ms. Sansom first became eligible to vote in 1973 and has consistently voted in both primary and general elections since. Due to health conditions she has a strong preference for voting by mail. Ms. Sansom has had two knee replacements and open-heart surgery, all of which make walking and standing in line for extended periods of time difficult. Due to both her age and her heart conditions, Ms. Sansom is also at high risk for contracting and experiencing complications from COVID-19. Despite her preference for voting by mail, Ms. Sansom, who lives alone, has previously struggled to find a witness for her absentee ballot and, as a result, has been forced to vote in-person. She is concerned that she will encounter the same difficulties in the upcoming elections and, given the risks to her health from COVID-19, may not be able to vote in-person at all and may not be able to safely obtain a witness for her absentee ballot.

12. Plaintiff Gary Severson is a U.S. citizen and registered Minnesota voter in Chaska, Minnesota. Mr. Severson is a 72-year-old board member of the Minnesota Alliance for Retired Americans Educational Fund. He is a retired teacher and former member of the Minneapolis Federation of Teachers. Mr. Severson taught high school social studies and civics for 37 years until his retirement in 2012. As a retired civics teacher, Mr. Severson is passionate about the right to vote and has always made every effort to exercise that right, voting in-person in almost every election he has been eligible to vote in since he first

registered. For the upcoming elections, however, Mr. Severson will have to vote absentee due to health issues as well as related concerns about contracting COVID-19. In particular, Mr. Severson has difficulty standing due to arthritis in his knee and an infection that has left his foot numb. This makes standing in line difficult. He also has diabetes, placing him at a heightened risk for complications if exposed to COVID-19. Mr. Severson does not want to put his health and life at risk by exercising his right to vote; nonetheless, he is concerned that the increased volume of absentee ballots as well as potentially decreased capacity of the postal service will put his own ballot at an increased risk of being rejected for arriving after the Election Day Receipt Deadline.

13. Plaintiff Minnesota Alliance for Retired Americans Educational Fund (the “Alliance”) is incorporated in Minnesota as a domestic nonprofit corporation under chapter 317A of the Minnesota Statutes and is a 501(c)(4) nonprofit, social welfare organization under the Internal Revenue Code. The Alliance has 84,282 members in Minnesota, including over 9,000 members in Ramsey County, comprising of retirees from public and private sector unions, community organizations, and individual activists. It is a chartered state affiliate of the Alliance for Retired Americans. The Alliance’s mission is to ensure social and economic justice and full civil rights that retirees have earned after a lifetime of work. The Alliance achieves its mission by grassroots advocacy, contributions to state and federal labor and electoral campaigns, and participation in “get out the vote” campaigns, including retiree phone banks and door-to-door campaigning, the creation of educational material, presentations, letter writing campaigns, and email and internet outreach activities.

14. The Challenged Provisions frustrate the Alliance's mission because they deprive individual members of the right to vote and to have their votes counted and threaten the electoral prospects of Alliance-endorsed candidates whose supporters will face greater obstacles casting a vote and having their votes counted. Because of the burdens on mail-in voting created by the Challenged Provisions, the Alliance must devote time and resources to educating its members about these requirements and assisting them in complying with the Challenged Provisions so that their mailed absentee ballots are counted. These efforts reduce the time and resources the Alliance has to educate its members and legislators on public policy issues critical to the Alliance's members, including the pricing of prescription drugs and the expansion of Medicare and Medicaid benefits. The Alliance brings this action on its own behalf as well as on behalf of its members who face burdens on their right to vote because of the Challenged Provisions. Because all of the Alliance's members are of an age that place them at a heightened risk of coronavirus complications, its members are overwhelmingly likely to vote by mail this year and consequently to face the burdens that the Challenged Provisions place on mail voters. The Alliance's members, for example, are voters who are likely to face difficulty in finding someone to safely witness their absentee ballots or in delivering the mail ballot themselves should they be unable to return it through the mail in sufficient time for their ballot to be counted. Additionally, many of the Alliance's members are likely to be voting by mail for the first time, and thus will be more susceptible to confusion and errors in attempting to comply with the Challenged Provisions, thereby increasing their risk of disenfranchisement.

15. Defendant Steve Simon is the Secretary of State of Minnesota and is named as a Defendant in his official capacity. The Secretary is the State's chief elections administrator and is responsible for the administration and implementation of election laws in Minnesota. Among other duties, he is granted broad powers to "adopt rules establishing the form, content, and type size and style for the printing of blank applications for absentee ballots . . . certificates of eligibility to vote by absentee ballot . . . and directions for casting an absentee ballot." Minn. Stat. § 203B.09. The Secretary is also responsible for "adopt[ing] rules establishing procedures to be followed by county auditors and municipal clerks to assure accurate and timely return of absentee ballots." *Id.* § 203B.08 subd. 4. He is empowered to "authorize procedures and methods of [ballot] return in addition to those specified in [Minn. Stat. § 203B.08]," which includes the Election Day Receipt Deadline. *Id.* He also has a duty to furnish instructional materials to each county containing the options available to voters who need assistance in voting and to develop general materials to train local election officials and election judges on the state's election administration procedures. *See id.* § 204B.27 subd. 1, 4, II. Finally, the Secretary has the power to develop a state elections emergency plan. *Id.* § 204B.18I. The Secretary has acted under color of state law at all times relevant to this action.

#### JURISDICTION AND VENUE

16. Plaintiffs bring this action under the Minnesota Constitution, the United States Constitution, and the laws of Minnesota and the United States. As a court of general jurisdiction, this Court has authority to hear these claims. *See* Minn. Const. art. VI, § 3; Minn. Stat. § 484.01.

17. This Court is authorized to grant declaratory relief pursuant to the Declaratory Judgments Act. *See Minn. Stat. § 555.01*; Minn. R. Civ. P. 57. This Court also has the authority to grant injunctive relief under the Minnesota Rules of Civil Procedure. *See Minn. R. Civ. P. 65*.

18. Venue in Ramsey County is proper because the cause of action arose in part in Ramsey County, and Defendant's official residence is in Ramsey County. *See Minn. Stat. §§ 542.03, 542.09*. The Alliance also has a substantial membership in Ramsey County, including members who are, will be, or are likely to be impacted by the Challenged Provisions, and performs a significant amount of its work in Ramsey County.

### **FACTUAL ALLEGATIONS**

#### **A. Absentee By-Mail Voting in Minnesota**

19. Minnesota has conferred the right for any voter to vote absentee by mail without an excuse since 2014. *Id. § 203B.02* subd. 1. Voters may request an absentee ballot for any particular election and also may request "permanent absentee voter status" to receive an absentee ballot application in each election without specifically requesting one. *Id. § 203B.04* subd. 5. In addition, outside of metropolitan counties, Minnesota authorizes towns of any size and cities having fewer than 400 registered voters to elect to vote entirely by mail, providing voters in those towns a designated mail ballot. *Id. § 204B.45*.

20. Nevertheless, most Minnesotans vote in-person. In 2018, only 221,000 Minnesotans voted absentee by mail, while over 2.3 million voted in person either before or on Election Day. Only 77,000 voters voted by mail via a designated mail ballot from their city or town under § 204B.45.

21. In 2016, nearly 214,000 Minnesotans voted absentee by mail, while over 2.6 million voted in person either before or on Election Day. Only 59,000 voted by a designated mail ballot. Thus, the vast majority of Minnesotans have never voted by mail.

22. And there is good reason for that. Minnesota provides a robust in-person voting regime that includes over a month of in-person early voting, *id.* § 204B.081 subd. 1, same day registration while early voting, *id.* § 201.054 subd. 1-3, and election day registration, *id.*

23. As compared to in-person voting, absentee voting requires additional steps that must be taken deliberately and well in advance of Election Day to ensure that a voter's ballot is counted.

24. To vote absentee, a voter must correctly complete the absentee ballot application and request an absentee ballot by the statutory deadline.

25. Next, the voter must receive the absentee ballot in the mail, complete the required information, and obtain a witness signature from another registered Minnesota voter, a notary, or person otherwise authorized to administer oaths.

26. Finally, a voter must mail the absentee ballot with sufficient time for it to arrive at the local election office by the Election Day Receipt Deadline.

27. The steps described above, which are required to successfully vote absentee, are not insubstantial, often requiring voters to expend significant time, effort, and sometimes money to complete. A misstep at any point—including by elections officials or the USPS, not just the voter—can result in complete disenfranchisement.

**(i) Witness Requirement**

28. Unless a voter receives a designated mail ballot, a voter must submit an application for an absentee ballot in writing or electronically up to one day before Election Day to vote absentee by mail. *Id.* § 203B.04.

29. Once the application is received, the county auditor or clerk transmits a ballot to the voter which includes, among other things, a return envelope with an eligibility certificate. *Id.* § 203B.07 subd. 3.

30. The eligibility certificate requires the voter to provide identifying information and to provide a signed and sworn statement that the voter meets the requirements established by law for voting by absentee ballot. *Id.*

31. The certificate also requires that a (1) registered Minnesota voter, (2) notary public, or (3) other person otherwise authorized to administer oaths witness the completion of the ballot and provide a signed statement. *Id.*

32. The witness must specifically attest that: (1) the absentee ballot was displayed to the witness unmarked, (2) the voter marked the ballot in the witness's presence, and (3) if the voter was not previously registered, the voter provided the witness with proof of residence. *Id.*

33. An absentee ballot submitted under these rules is rejected if the witness has not signed the certificate.<sup>1</sup> *Id.* § 203B.121 subd. 2 (b)(5), (c)(l); § 203B.07 subd. 3.

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<sup>1</sup> The process outlined above reflects Minnesota's laws governing General Absentee Voting, which apply to all voters requesting an absentee ballot. See *id.* §§ 203B.07-203B.121 subd. 2(b)(5). It also applies to individuals voting by a designated mail ballot. See Minn. R.

34. Minnesota's Witness Requirement imposes a substantial burden on all Minnesota voters by increasing the transaction and monetary costs of voting absentee by mail.

35. By restricting voters to only three limited categories of acceptable witnesses, all would-be absentee voters face substantial transaction costs, as they must seek out one of these qualified individuals to vote. If a voter is unable to find a registered Minnesota voter willing to witness their ballot, they are limited only to notaries and other persons authorized to provide an oath, some of whom will only do so for a fee.

36. For Minnesota voters who are temporarily living out of state, many of whom are college students, this burden is severe, as it is far less likely that another registered Minnesota voter will be available to witness their ballots. As a result, they are more likely to have to obtain a signature from a notary and be forced to pay a fee to vote.

37. Similarly, voters with disabilities are severely burdened by the Witness Requirement. At least 13% of the voting age population in Minnesota are disabled. While absentee voting is often recognized as a mechanism to ensure that more individuals with disabilities are able to vote, one study found that in 2018, only 45.7 percent of Minnesotans with disabilities voted, while 65.2 percent of non-disabled Minnesotans cast ballots—the

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8210.3000. This process does not, however, apply to voters voting under the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. §§ 20301–20310. In general, UOCAVA voters are members of the military or Minnesota residents temporarily living overseas. *See Minn. Stat. § 203B.16-27* (implementing UOCAVA). It also does not apply to "presidential-only voters," i.e., voters who have moved from Minnesota within thirty days of a presidential election but are not eligible to vote where they currently reside who may vote absentee on a federal presidential-only ballot. *See Minn. R. 8210.0100.*

largest gap between disabled and non-disabled voters in the country. This is unsurprising, as the Witness Requirement necessitates that disabled individuals find, communicate with, and meet with a person eligible to serve as their witness. *Id.* § 203B.121 subd. 2 (b)(5), (c)(1); 203B.07 subd. 3. For those who live alone, this is particularly challenging as persons with disabilities may have a more difficult time traveling to have their ballot witnessed or notarized.

38. These burdens only grow more severe in the current public health crisis. Disabled voters, elderly voters, voters who are immunocompromised or have other high-risk factors for COVID-19, and/or voters who live alone or with others who are ineligible or unregistered to vote must now risk their health and, in some instances, their life to venture out to find a witness. As such, the Witness Requirement is highly likely to prevent an ever-increasing number of eligible Minnesota voters from voting altogether in the upcoming elections.

39. Even where a voter can overcome the burdens imposed by the Witness Requirement, their risk of disenfranchisement remains high, as voters who fail to complete all of the steps outlined above in time to have their ballot delivered by Election Day will not have their votes counted.

#### **(ii) Election Day Receipt Deadline**

40. Minnesota law requires that, for a mail-in absentee ballot or designated mail ballot to be counted, it must be received by either 3:00 p.m. (if hand-delivered) or 8:00 p.m. (if delivered by mail) on Election Day. Minn. Stat. §§ 203B.08 subd. 3, 204B.25 subd. 2; Minn. R. 8210.2200 subp. 1, 8210.3000 subp. 8.

41. Ballots that arrive after the Election Day Receipt Deadline—regardless of whether they were completed and mailed by the voter prior to or on Election Day—are not counted.

42. In 2018 alone, Minnesota discarded over 3,500 absentee ballots, 47% of all rejected ballots, simply because they arrived after the Election Day Receipt Deadline.

43. Many voters are unaware of the Election Day Receipt Deadline or how to ensure their ballots arrive by the Deadline. Many local election authorities also fail to accurately direct voters as to how many days before Election Day voters should mail in their ballots. For example, some suggest allowing seven days between *requesting* an absentee ballot and completing the voting process. Others direct voters to submit an *application* by mail “at least four days before the election.”

44. But according to the USPS, completed ballots must be mailed at least one week before Election Day to ensure timely arrival. *See, e.g., USPS, State and Local Election Mail: User’s Guide* at 19 (Jan. 2020), <https://about.usps.com/publications/pub632.pdf> (“[T]he Postal Service recommends that voters mail their marked return ballots at least 1 week before the due date.”).

45. Cost cutting measures, weather, and a shrinking USPS workforce have led to delivery delays in Minnesota in the past, especially in November, when package and mail volumes are already increased in anticipation of the holidays.

46. Duluth, for example, has reported delays in times of bad weather and during instances when it has had to move large volumes of mail.

47. A consistent labor shortage has left residents of the Twin Cities to go days, weeks, and up to a month without receiving their mail, a problem that some say stretches back five to six years.

48. Some populations in Minnesota, including, in particular, Minnesota's Native American population, have limited access to mail. Many residents living on native lands do not have home mail delivery and instead rely on P.O. boxes at post offices many miles from their homes for mail service. As a result, it often takes far longer to send mail, particularly given that transportation is needed (and often hard to come by), and the hours for post offices are limited. As a result, the overall process of sending and receiving mail is slowed, which translates directly into challenges meeting the Election Day Receipt Deadline.

49. Accordingly, a voter who receives their absentee ballot less than a week before Election Day faces a substantial risk of missing the Election Day Receipt Deadline.

50. These types of mailing delays are likely to become more common, as the public health crisis exacerbates both the pressures on the postal service as well as election officials' abilities to keep up with mailing absentee ballots at the volume and clip requested, and as thousands more voters—many of whom will be unaware of the Witness Requirement, the Election Day Receipt Deadline, or the steps or time required to comply with both—attempt to navigate the absentee by-mail voting process for the first time.

51. The Election Day Receipt Deadline is certain to disenfranchise thousands more voters during the upcoming elections as absentee voting by-mail skyrockets.

**B. The COVID-19 pandemic exacerbates the burdens that the Witness Requirement and Election Day Receipt Deadline place on voters.**

52. COVID-19, the severe and sometimes deadly disease caused by the novel coronavirus, has been spreading through Minnesota for several months.

53. To date, there are 12,917 confirmed cases of the novel coronavirus in the state, and 638 Minnesotans' deaths have been officially attributed to COVID-19. The state remains under a stay-at-home order, and Minnesotans across the state are engaging in social distancing to protect their health and slow the spread of the virus, although infections remain on the rise.

54. The federal government is preparing for the COVID-19 crisis to last 18 months and has warned that the pandemic could come in "multiple waves."

55. The White House's coronavirus advisor and the Director of the National Institute of Allergy and Infectious Diseases, Dr. Anthony Fauci, was asked at a White House press conference whether the United States was "prepared for [coronavirus] to strike again, say, in the fall." Dr. Fauci responded, "In fact I would anticipate that that would actually happen because of the degree of transmissibility."

56. The Director of the Centers for Disease Control and Prevention ("CDC") recently warned that the country may encounter a second, more deadly wave of COVID-19 in the fall, which will "be even more difficult than the one we just went through."

57. Similarly, the Director of the National Center for Immunization and Respiratory Diseases at the CDC, Dr. Nancy Messonnier, said on March 10, 2020 that she expected the virus to continue spreading in the United States through next year.

58. These sentiments are also shared by scientists outside the United States government. The COVID-19 Response Team at the Imperial College of London has estimated that social distancing and other preventative measures will be required until a vaccine is developed and distributed widely, which they predict could take “18 months or more.”

59. Minnesota Governor Tim Walz has said Minnesota may be one of the last states in the country to even reach a peak and, in fact, Minnesota’s peak could come at the same time other states begin to see a second wave of illnesses this fall.

60. There is thus little question that the spread of COVID-19 in Minnesota will continue this fall and, in particular, during Minnesota’s upcoming elections.

61. Even if Minnesota has already passed its peak when the elections are held, CDC guidelines recommend that individuals still take meaningful social distancing measures even if the threat of community transmission of COVID-19 in the area is only “minimal.”

62. This guidance is necessitated by the reality that asymptomatic carriers appear to be contributing significantly to community spread, and until there is a vaccine or “herd immunity” (i.e., at least 60% of the population has been infected and recovered), Americans will remain at serious risk of contracting the virus.

63. The Secretary has recognized as much, explaining to the Legislature that without action Minnesota's election system is "in for a real disaster of an election season," while backing a bill supporting all mail voting during a pandemic.<sup>2</sup>

64. The Secretary is right to forecast these problems. The CDC, anticipating difficulties in conducting elections during the COVID-19 crisis, has now recommended that jurisdictions encourage voting by mail and reduce methods of voting that lead to direct contact with other voters or poll workers.

65. Other federal, state, and local officials have increasingly come to the same realization. Congress, for example, recently authorized \$400 million to help states transition to voting-by-mail.

66. The chair of the Minnesota Association of County Officers recently reported to the Legislature that in-person voting will be severely compromised in August and November due to limited availability of statewide polling places, concerns about COVID-19 exposure expressed by "a significant number of election judges"—many of whom fall into high-risk categories—and challenges with maintaining social distancing at available polling locations.

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<sup>2</sup> Relevant to this litigation, a new bill, House File 3429 ("HF 3429"), has passed the Minnesota Senate and is expected to pass in the House of Representatives. HF 3429, which applies only to elections in 2020, appropriates money for election-related purposes that include administration, security, accessibility, training, public health and safety, and public outreach. In relevant part, the bill allows for late-designation of polling places; generally disallows the use of schools as polling places; extends the period during which absentee ballots are processed (but not the Election Day Receipt Deadline); and requires absentee ballots to be processed 14 days prior to the day of the election. None of these provisions alleviates the burdens imposed by the Challenged Provisions.

67. The April 7, 2020 Wisconsin primary demonstrates that these concerns are warranted. Milwaukee was forced to reduce its polling locations from 180 to just five locations because of a severe shortage of poll workers.

68. Despite the fact that Wisconsin has no-excuse absentee voting, a substantial number of voters had no choice but to vote in person, including those who did not receive absentee ballots in time to cast and return them by Wisconsin's Election Day receipt deadline. Those voters were forced to decide whether to risk their health to cast their ballots.

69. Ultimately, thousands of Wisconsin citizens stood in long lines for hours to cast their ballots, many wearing masks, gloves, and other protective gear as they congregated together to vote in person.

70. On April 28, three weeks after the election, the Wisconsin Department of Health Services reported that 52 people who voted in person or worked the polls on April 7 have tested positive for COVID-19 thus far. These numbers may grow.

71. The inherent challenges to voting in-person during this pandemic led voters in Wisconsin to request absentee ballots at unprecedented rates, with more than one million voters requesting absentee ballots for the recent primary, four times the number who did so in the 2016 general election.

72. This increased interest in voting by mail, combined with social distancing efforts and decreases in available elections staff, placed a significant strain on local election boards, several of which were not able to send voters a ballot in time for it to be returned—or even delivered to them—by Wisconsin's normal Election Day deadline.

73. This crisis ultimately necessitated federal litigation that reached the U.S. Supreme Court and resulted in the implementation of a postmark rule, whereby ballots postmarked by Election Day could be counted as long as they are received within six days of Election Day. *See Republican Nat'l Comm.*, 140 S. Ct. at 1207.

74. Over 140,000 ballots in Wisconsin were postmarked by, but arrived after, Election Day.

75. Florida similarly experienced significant shortages in poll workers and polling locations, with 800 poll workers withdrawing from Palm Beach County alone in its primary election held on March 17, 2020.

76. Likewise, Arizona's most populous county, Maricopa, was forced to close over 80 polling locations at the last minute in its March 17, 2020 primary, as poll workers in locations serving high-risk communities backed out.

77. Arizona also experienced an uptick in absentee voting by mail in its March primary as well as a higher rate of mail-in ballots arriving after Arizona's Election Day receipt deadline.

78. It is all but certain that Minnesota, like states across the nation, will experience a substantial increase in absentee by-mail voting in the August Primary and November Election as well as substantial challenges administering the system.

79. An increase in absentee voting in the upcoming elections also means that a significant number of voters who typically vote in person will be voting by mail, and many of those will be voting by mail for the first time. These voters differ from current absentee

voters in important respects that make them even more likely to be burdened by the Witness Requirement and Election Day Receipt Deadline.

80. Many voters who switch to absentee voting by mail will be doing so precisely because they are immunocompromised, have conditions placing them at high risk for COVID-19, or are generally concerned about their health or the health of their family and friends. As such, they will be far less likely and less able to venture out to find a witness to sign their ballot if they do not already have a ready witness in their home.

81. Over 630,779 persons in Minnesota live alone—244,096 of whom are 65 years-old and over, the age group that is most at risk from COVID-19.

82. Moreover, at least 169,548 Minnesotans have no spouse present, living solely with children under the age of 18. These voters are among the countless Minnesota voters who, as a direct result of the Witness Requirement, will face the “excruciating dilemma” between whether to “either venture into public spaces, contrary to public directives and health guidelines or stay at home and lose the opportunity to vote.” *Democratic Natl. Comm. v. Bostelmann*, 20-CV-249-WMC, 2020 WL 1320819, at \*5 (W.D. Wis. Mar. 20, 2020).

83. Even if these voters do take the risk to venture out and are able to find a witness, it is unlikely that the certification can be signed safely while maintaining social distancing standards as it requires at least two exchanges of the ballot.

84. A witness must attest first that they have reviewed the voter’s blank ballot, necessarily requiring them to review (and likely touch) the ballot before the voter

completes it. *See Minn. Stat. § 203B.07 subd. 3.* The witness must then sign the ballot after the voter has completed it, requiring an additional exchange of the ballot. *Id.*

85. Studies have found that COVID-19 can remain on surfaces for several hours to days. Thus, merely exchanging a ballot even where voters are able to maintain a six-foot distance is extremely risky.

86. Those voters transitioning to absentee voting from Election Day voting also tend to be “late deciders”; that is, they decide who they will vote for later in the election cycle. Because of that, they are more likely to cast an absentee ballot at the end of the voting process with only a few days to go until Election Day.

87. It is unremarkable that these voters would be more likely to cast their absentee ballots later given that they are also likely to be less familiar with the absentee voting process, including the Witness Requirement and the Election Day Receipt Deadline. Nor would it be unreasonable for them to think their ballots can be mailed later in the election cycle as long as they are postmarked by Election Day, as many other deadlines in Minnesota voters’ lives are postmark deadlines. *See, e.g., Minn. Stat. § 270C.395* (applying a postmark deadline to tax filings); *id.* § 276.017 (applying a postmark deadline as proof of timely mailing for property taxes).

88. Finally, as mail balloting increases, USPS is facing a \$13 billion budget shortfall and could see a 50 percent reduction in total mail volume by the end of June, compared with the same period last year. This raises particular concerns for Minnesota, which has experienced slow and unreliable mail service in the past. When the postal

service has faced budget crises, it has responded by closing hundreds of processing centers.

89. The postal service has already asked voters to mail their ballots up to a week before Election Day even before COVID-19. Yet even when that advice is followed, there is simply no guarantee that ballots will arrive on time. Together, these circumstances guarantee that as the COVID-19 crisis continues, Minnesota voters will find it increasingly difficult to ensure that their ballots arrive before the Election Day Receipt Deadline.

**C. The State Has No Legitimate Interest in the Challenged Provisions Under Any Circumstances, and Even Less So During the Pandemic**

90. The State has no legitimate interest in the Witness Requirement. Voter fraud is virtually nonexistent in Minnesota. And adequate protections are already in place to protect against even the perception of it. For example, the ballot board is already required to determine whether another ballot has been previously accepted for a voter and to confirm their identity, address, name, and registration. Minn. R. 8210.2450. And the voter themselves must sign a sworn statement to complete the ballot, subject to Minnesota's perjury statute. Minn. Stat. §§ 203B.07, 609.48 subd. 2.

91. Moreover, Minnesota is one of only twelve states that have a witness or notarization requirement. There is no indication that the absentee voting systems of the 38 other states without a witness or notarization requirement are plagued with more voter fraud than the twelve that do. In fact, Minnesota does not even employ a Witness Requirement for UOCAVA or presidential-only voters, and it has not had any fraud reported for either set of voters. For both sets of voters Minnesota law requires only self-certification.

92. The justifications for the Election Day Receipt Deadline also cannot hold water. While Minnesota may set a reasonable deadline for receiving ballots to ensure the finality of election results, the Election Day Receipt Deadline is not reasonable. Voters do not reasonably expect that they must submit their ballots a week or more in advance of Election Day.

93. And the Election Day Receipt Deadline is also unnecessary to ensure that all ballots are received and counted within a reasonable time as Minnesota law permits ballots to be counted and canvassed well after Election Day.

94. History proves that the Election Day Receipt Deadline disenfranchises voters for reasons entirely outside their control, even when the country is *not* in the grip of an unprecedented public health crisis.

95. During the current pandemic, with its consequent increase in the number of mail voters and the increased pressures it imposes on elections officials and the post office, the numbers of voters disenfranchised by the Election Day Receipt Deadline is certain to grow exponentially.

96. Absent relief from this Court, the individual and cumulative impacts of the Witness Requirement and Election Day Receipt Deadline will impose a severe burden on Minnesota voters, deterring them from participating in the franchise and in some cases disenfranchising them entirely.

97. If these laws stand, particularly during the upcoming elections, many Minnesota voters will find themselves faced with the same unconscionable choice that Wisconsin voters faced on April 7—their health and safety versus their right to vote. The

state and federal constitutions not only empower the Court to ensure that both are protected, they require it.

### **CLAIMS FOR RELIEF**

#### **COUNT I**

##### **Violation of the Minnesota Constitution, Art. I, § 2, and Art. VII, § 1 Unconstitutional Burden on the Right to Vote (Witness Requirement & Election Day Receipt Deadline)**

98. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

99. Article I, Section 2 of the Minnesota Constitution provides in relevant part: "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers."

100. Article VII, Section 1 of the Minnesota Constitution provides in relevant part: "Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote in that precinct."

101. Together, these provisions guarantee the right to vote to eligible Minnesota residents. Minnesota courts have long held that the right to vote and the right to participate in the political franchise is a fundamental right. *See, e.g., Kahn v. Griffin*, 701 N.W.2d 815, 831 (Minn. 2005).

102. Minnesota courts have historically applied the *Anderson-Burdick* test in evaluating whether state election laws unconstitutionally infringe on the right to vote. *See id.* at 832-33. Under that standard, which was developed by the U.S. Supreme Court for

challenges to facially neutral, generally applicable voting laws under the federal constitution, courts must carefully balance the character and magnitude of injury to the rights that the plaintiff seeks to vindicate against the precise justifications put forward by the state for the burdens imposed by the rule. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *see also Kahn*, 701 N.W.2d at 833 (evaluating whether a state election law violates the right to vote under the Minnesota Constitution by “weigh[ing] the character and magnitude of the burden imposed on voters’ rights against the interests the state contends justify that burden,” “consider[ing] the extent to which the state’s concerns make the burden necessary”).

103. The Minnesota Supreme Court has recognized that absentee voting is crucial to participation in the franchise: “The purpose of the absentee ballot is to enfranchise those voters who cannot vote in person.” *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 734 (Minn. 2003). Minnesota’s Witness Requirement and Election Day Receipt Deadline, by imposing severe burdens on Minnesota voters who vote by mail, fail to effectuate this purpose.

104. The Witness Requirement imposes substantial burdens on all Minnesota voters by requiring them to incur additional transaction costs and, in some cases, monetary costs to exercise their right to vote. For voters who temporarily live out of state, are disabled, are seniors, or live alone, these burdens are severe even in more ordinary times. In the context of the current public health crisis, where obtaining a suitable witness requires these voters to risk their health and safety to exercise their right to vote, the severity of that burden will only intensify. The Witness Requirement will thus not only

serve as a strong deterrent to voting, but in many cases will prevent voters from voting altogether.

105. The Election Day Receipt Deadline also poses a severe burden on voters' right to vote. Voters must first learn about the Election Day Receipt Deadline and accurately guess when their ballot must be mailed for it to be counted, assuming they even receive their ballot in time to mail it. For those voters who, through no fault of their own, misjudge how long it will take for their ballot to be returned to elections officials through the mail, or for those whose ballots do not even reach them until close to Election Day, the consequences of the Election Day Receipt Deadline are absolute and severe: total disenfranchisement.

106. Minnesota's Election Day Receipt Deadline severely burdens all voters who vote by mail, even if those voters' ballots are successfully counted. The Election Day Receipt Deadline forces Minnesota voters to cast their ballots without the benefit of accounting for, or opportunity to consider, information about the election or the candidates that arise in the final week leading up to Election Day. It thus deprives voters of the ability to engage in this robust period of civic engagement, because it effectively requires them to have already cast their vote for it to be counted.

107. The number of individuals burdened by the Election Day Receipt Deadline is certain to rise in the upcoming elections in light of the current public-health emergency, due to increased numbers of absentee by-mail voters, increased mail delays, and increased processing times needed for supervisors to send ballots out to absentee voters.

108. There is no justification for the Witness Requirement or Election Day Receipt Deadline that can fairly outweigh the burdens that the Challenged Provisions impose in voters. This is particularly so given the unprecedented strains on voters and election officials that have resulted during the COVID-19 pandemic. Thus, even if the Court were to find that the burdens were not severe and were subject to a less searching level of scrutiny than that applied when a law imposes a severe burden on voters, the Challenged Provisions would still violate the Minnesota Constitution.

## **COUNT II**

### **Violation of the Minnesota Constitution, Art. I, § 7, Deprivation of Liberty Interest; Due Process (Election Day Receipt Deadline)**

109. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

110. Minnesota law provides that “[n]o person shall be . . . deprived of life, liberty or property without due process of law.” Minn. Const. art. 1, § 7.

111. Minnesota’s “due process protection . . . is identical to the due process [sic] guaranteed under the Constitution of the United States.” *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988); see *McDonald v. City of St. Paul*, 679 F.3d 698, 704 n. 3 (8th Cir. 2012).

112. Minnesota courts have looked to federal law, including the application of the test laid out in *Mathews v. Eldridge*, 424 U.S. 319 (1976), when evaluating whether the state constitution’s due process clause has been violated. See, e.g., *Bendorf v. Comm’r of Pub. Safety*, 727 N.W.2d 410, 415–16 (Minn. 2007) (applying *Mathews* in evaluation of

procedural due process under Minnesota and U.S. Constitutions); *Sartori*, 432 N.W.2d at 453 (discussing federal cases interpreting the U.S. Constitution's due process clause).

ll3. The Minnesota Supreme Court has explained that "due process is flexible and calls for such procedural protections as the particular situation demands." *Bendorf*, 727 N.W.2d at 415–16 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). In evaluating due process, it considers: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* (quoting *Mathews*, 424 U.S. at 335).

ll4. "When an election process reache[s] the point of patent and fundamental unfairness,' there is a due process violation." *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183 (11th Cir. 2008) (quoting *Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995)). Minnesota's Election Day Receipt Deadline, which deprives voters of their most precious liberty interest—their fundamental right to vote—does just that.

ll5. Indeed, many voters are disenfranchised by the Election Day Receipt Deadline through no fault of their own because (1) they do not learn of the Deadline before Election Day, (2) they do not receive their ballot from election officials in time for it to be returned by 8:00 p.m. on Election Day, or (3) mail delays cause their ballot to arrive late, even if mailed by the voter well in advance of the Deadline.

ll6. The Election Day Receipt Deadline further deprives all Minnesota voters who vote by mail of the opportunity to consider information from the final days and week leading up to Election Day by requiring voters to cast their ballots well before Election Day if they wish to ensure that their ballots will actually be counted.

ll7. The burdens imposed on voters by the Election Day Receipt Deadline will only grow more severe in light of COVID-19 and the resultant pressures that it will place on Minnesota's vote-by-mail system as well as the postal service.

ll8. Minnesota's Election Day Receipt Deadline is neither a reliable nor fair way to administer voting by mail. It causes countless voters to cast their ballots before candidates have delivered their final pitches to the voters. And it disenfranchises voters who have no other way to vote except by mail who, through no fault of their own, do not receive their ballot from election officials in time to return it by the Deadline.

ll9. The value of additional or substitute procedural safeguards to ensure that the votes of Minnesota's mail voters are both meaningfully cast and actually counted is readily apparent. A substitute procedure—requiring vote-by-mail ballots to be postmarked on or before Election Day and received by the county within a reasonable period of time after Election Day to be counted—solves the inequities inherent in Minnesota's Election Day Receipt Deadline.<sup>3</sup>

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<sup>3</sup> The term "postmark" refers to any type of imprint applied by USPS to indicate the location and date USPS accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks. Where a ballot does not bear a postmark date, the election official reviewing the ballot should presume that it was mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed later.

120. A postmark date offers a clear, unequivocal, and reliable date to Minnesota voters by which they must cast their ballots, and also ensures that voters who receive their ballots late through no fault of their own are still able to participate in the franchise. A postmark date additionally ensures that all of Minnesota's voters can consider information that may arise and influence voters' choices in the last week of the election cycle in casting their ballots.

121. Requiring Minnesota to accept ballots that are postmarked on or before Election Day and which arrive within a reasonable time period after Election Day imposes minimal, if any, administrative burden on the State; any such burden is outweighed by the severe burden placed on Minnesota voters. As the United States Supreme Court has explained, "administrative convenience" cannot justify the deprivation of a constitutional right. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975).

122. Having allowed its voters to vote by mail, Minnesota must establish adequate procedures to ensure that voters have a reliable, fair, and effective method to cast their ballots. Because Minnesota's Election Day Receipt Deadline is markedly inadequate in all of those respects, and Minnesota is readily capable of instituting a substitute procedure which would protect those voters' rights with minimal burden to the state, the Election Day Receipt Deadline violates Minnesota voters' procedural due process rights.

**COUNT III****U.S. Const. Amend. I and XIV, 42 U.S.C. § 1983, 28 U.S.C. §§ 2201, 2202  
Undue Burden on the Right to Vote  
(Witness Requirement & Election Day Receipt Deadline)**

123. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

124. Under the *Anderson-Burdick* balancing test, a court considering a challenge to a state election law must carefully balance the character and magnitude of injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against “the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). This balancing test utilizes a flexible sliding scale, where the rigorousness of scrutiny depends upon the extent to which the challenged law burdens voting rights.

125. Minnesota’s Witness Requirement and Election Day Receipt Deadline impose a severe burden on Minnesota voters who vote by mail.

126. The Witness Requirement imposes substantial burdens on all Minnesota voters by requiring them to incur additional transaction costs and, in some cases, monetary costs to exercise their right to vote. For voters who temporarily live out of state, are disabled, are seniors, or live alone, these burdens are severe and grow even more severe in the current public health crisis where obtaining a suitable witness requires them to risk their health and safety to exercise their right to vote. The Witness Requirement will thus

not only serve as a strong deterrent to voting, but in many cases will prevent voters from voting altogether.

127. The Election Day Receipt Deadline also poses a severe burden on voters' right to vote. Voters must first learn about the Election Day Receipt Deadline and accurately guess when their ballot must be mailed for it to be counted, if they even receive their ballot in time to mail it. For those voters who, through no fault of their own, misjudge how long it will take for their ballot to arrive back to county election officials, or for those whose ballots reach the voter a day or two before Election Day, the consequences are absolute and severe: total disenfranchisement.

128. The Election Day Receipt Deadline also severely burdens all voters who vote by mail, even if those voters' ballots are successfully counted. The Deadline forces Minnesota voters to cast their mail ballots without the benefit of accounting for, or opportunity to consider, information about the election or the candidates that arise in the final week leading up to Election Day. Minnesota's Election Day Receipt Deadline thus deprives voters of the ability to engage in this robust period of civic engagement, because it effectively requires them to have already cast their vote for it to be counted.

129. The number of individuals burdened by the Election Day Receipt Deadline is certain to rise in the upcoming elections in light of the current public-health emergency, due to what is likely to be a dramatic increase in numbers of voters participating in the elections by casting an absentee by-mail ballot, increased mail delays, and increased processing times needed for supervisors to send ballots out to absentee voters.

130. There is no justification for the Witness Requirement or Election Day Receipt Deadline that can fairly outweigh the burdens that the Challenged Provisions impose in voters. This is particularly so given the unprecedented strains on voters and election officials that have resulted during the COVID-19 pandemic. Thus, even if the Court were to find that the burdens were not severe and were subject to a less searching level of scrutiny than that applied when a law imposes a severe burden on voters, the Challenged Provisions would still violate the First and Fourteenth Amendments.

#### **COUNT IV**

**Due Process**  
**U.S. Const. Amend. XIV, 42 U.S.C. § 1983**  
**Denial of Procedural Due Process**  
**(Election Day Receipt Deadline)**

131. Plaintiffs reallege and reincorporate by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

132. The Due Process Clause of the United States Constitution prohibits the states from depriving “any person of . . . liberty . . . without due process of law.” U.S. Const. amend. XIV, § 1. Which protections are due in a given case requires a careful analysis of the importance of the rights and the other interests at stake. *See Mathews*, 424 U.S. at 334–35; *Nozzi v. Hous. Auth. of City of L.A.*, 806 F.3d 1178, 1192 (9th Cir. 2015).

133. Courts must first consider “the nature of the interest that will be affected” by the government’s action as well as the “degree of potential deprivation that may be created” by existing procedures. *Nozzi*, 806 F.3d at 1192–93. Second, “courts must consider the ‘fairness and reliability’ of the existing procedures and the ‘probable value, if any, of

additional procedural safeguards.” *Id.* at 1193 (quoting *Mathews*, 424 U.S. at 343). Finally, courts must consider “the public interest, which ‘includes the administrative burden and other societal costs that would be associated with’ additional or substitute procedures.” *Id.* (quoting *Mathews*, 424 U.S. at 347). Overall, “due process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews*, 424 U.S. at 334 (quotation and citation omitted).

134. Minnesota’s vote-by-mail procedures must comport with due process. *See Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990). “Such due process is not provided when the election procedures [for voting by mail]” do not adequately protect the right to vote or ensure that an “individual is not continually and repeatedly denied so fundamental a right.” *Id.*; *see also 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.”).

135. “When an election process ‘reache[s] the point of patent and fundamental unfairness,’ there is a due process violation.” *Browning*, 522 F.3d at 1183-84 (quoting *Roe*, 43 F.3d at 580). A state’s elections system, “the specifics of which are not explicitly made known to potential voters, that leaves potential voters in the dark as to its effect on a voter’s [ability to vote] and that fails to give voters a fair opportunity to [participate], is fundamentally unfair and violative of the Due Process Clause of the Fourteenth Amendment.” *Id.* at 1185.

136. The nature of the interest at stake in this case—the right to vote and to have that vote count—is the most precious liberty interest of all because it is preservative of all other basic civil and political rights.

137. The Election Day Receipt Deadline is neither a reliable nor fair way to administer voting by mail. Many voters are disenfranchised by the Election Day Receipt Deadline through no fault of their own because (1) they do not learn of the Election Day Receipt Deadline before Election Day, (2) they do not receive their ballot from the election official in time for it to be returned by 8:00 p.m. on Election Day, or (3) despite mailing their ballot with ample time, mail delays out of their control cause their ballot to arrive late.

138. The Election Day Receipt Deadline further deprives all Minnesota voters who vote by mail of the opportunity to consider information from the final days and week leading up to Election Day by requiring voters to cast their ballots well before Election Day if they wish to ensure that their ballots will actually be counted. This will only get worse in light of COVID-19 and the resultant pressures that it will place on Minnesota's vote-by-mail system as well as the postal service.

139. The value of additional or substitute procedural safeguards to ensure that the votes of Minnesota's mail voters are both meaningfully cast and actually counted is readily apparent. A substitute procedure—requiring vote-by-mail ballots to be postmarked on or before Election Day and received by the county within a reasonable time period after Election Day to be counted—solves the inequities inherent in Minnesota's Election Day Receipt Deadline.

140. A postmark date not only offers a clear, unequivocal, and reliable date to Minnesota voters by which they must cast their ballots, but it also ensures that voters who receive their ballots late through no fault of their own are still able to participate in the franchise. A postmark date additionally ensures that all of Minnesota's voters can consider any information that may arise and influence voters' choices in the last week of the election.

141. Requiring Minnesota to accept ballots that are postmarked on or before Election Day and which arrive within a reasonable time period after Election Day imposes minimal, if any, administrative burden on the State; any such burden is outweighed by the severe burden placed on Minnesota voters. As the United States Supreme Court has explained, "administrative convenience" cannot justify the deprivation of a constitutional right. *See Taylor*, 419 U.S. at 535.

142. Having allowed its voters to vote by mail, Minnesota must establish adequate procedures to ensure that voters have a reliable, fair, and effective method to cast their ballots. Because Minnesota's Election Day Receipt Deadline is markedly inadequate in all of those respects, and Minnesota is readily capable of instituting a substitute procedure which would protect those voters' rights with minimal burden to the state, the Election Day Receipt Deadline violates Minnesota voters' procedural due process rights.

#### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs respectfully request that this Court enter judgment in their favor and against Defendant, and:

- a. Enter a declaratory judgment pursuant to Minn. Stat. § 555.01 and Minn. R. Civ. P. 57 that the Witness Requirement and Election Day Receipt Deadline

- are unconstitutional and invalid because they violate the rights of Plaintiffs under the Minnesota Constitution, Art. I, §§ 2, 7, Art. VII, § 1, and the First and Fourteenth Amendments of the United States Constitution;
- b. Enjoin Defendant and his respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from rejecting ballots that are postmarked on or before Election Day and arrive at the municipal clerk's office within a reasonable period of time after Election Day, subject to the definition of "postmarked" noted herein;
  - c. Enjoin Defendant and his respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from enforcing the Witness Requirement, and from rejecting any ballots for failure to comply with the Witness Requirement, pursuant to Minn. R. Civ. P. 65;
  - d. Award to Plaintiffs their costs and disbursements, pursuant to applicable statutory and common law; and
  - e. Grant Plaintiffs such other and further relief as the Court deems necessary, just, and proper.

Dated: May 13, 2020

**GREENE ESPEL PLLP**

/s/ Sybil L. Dunlop

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**ACKNOWLEDGMENT**

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

/s/ Sybil L. Dunlop

Sybil L. Dunlop

**ACKNOWLEDGEMENT**

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, subdivision 2, to the party against whom the allegations in this pleading are asserted.

/s/ Sybil L. Dunlop  
Sybil L. Dunlop