

From: FOIArequests, CRT (CRT) CRT.FOIArequests@usdoj.gov 
Subject: CRT FOIA Request #21-00154-F Question
Date: August 5, 2024 at 3:12 PM
To: foia@americanoversight.org
Cc: Winters, Angela (CRT) Angela.Winters@usdoj.gov



Dear Mr. McGrath:

This is an interim response to your Freedom of Information Act request (attached), sent to the Civil Rights Division on March 11, 2021, seeking access to 1) all email communications sent to a list of provided public organizations from Maureen Roirdan and 2) all internal communications containing any of a list of provided keywords also from Maureen Roirdan.

In reviewing the potentially responsive documents to the 2nd prong of your request, we have come across over 150 attachments that contain one or more of the listed keywords in publicly filed pleadings. There are no keywords found in the parent email. I have attached two examples of the documents I'm describing.

CRT would like to propose marking these documents as non-responsive as they do not reveal any specific thoughts or opinions of Ms. Roirdan. As many of these 150+ publicly available filed documents are very long, narrowing this set of records to exclude them would go a long way to reducing the number of pages CRT would have to process and the length of time required to process them.

Please let us know if you are in agreement on this proposal at your earliest convenience. Once we have heard back from you, we will continue to process these potentially responsive documents.

Thank you,

Angie

Angela Winters
Attorney Adviser
Civil Rights Division
U.S. Department of Justice
Angela.Winters@usdoj.gov

21-00154-F Request.pdf
341 KB



21-00154-F Pleadings Example
1_Redacted.pdf
1.4 MB



21-00154-F Pleadings Example
2_Redacted.pdf
843 KB



To: McNamara, Frank (CRT)(b) (6) : Daukas, John (CRT)(b) (6)
From: Riordan, Maureen (CRT)(b) (6)

Sent: Fri 11/13/2020 11:28:01 AM (UTC-05:00)

Subject: New cases filed

[PACase.pdf](#)

[Michigan.pdf](#)

[Michigan2.pdf](#)

In the United States District Court
For the Middle District of Pennsylvania
Williamsport Division

**LAMARR PIRKLE, THEODORE
DANNERETH, LAUREN DANKS, and
CASEY FLYNN,**

Plaintiffs,

v.

**GOVERNOR THOMAS W. WOLF,
in his official capacity, KATHRYN
BOOCKVAR, secretary of the
Commonwealth of Pennsylvania,
in her official capacity,**

Defendants

Case No.:

**Verified Complaint for Declaratory and
Injunctive Relief**

Verified Complaint for Declaratory and Injunctive Relief

Plaintiffs LaMarr Pirkle, Theodore Dannereth, Lauren Danks, and Casey Flynn
(collectively “Voters”) complain as follows:

Introduction

1. This is a civil action for declaratory and injunctive relief concerning violations of Voters’ voting and equal-protection rights by election officials’ inclusion of illegal Presidential Elector results in certain counties, which inclusion unlawfully dilutes Voters’ lawful votes and requires invalidation of those presidential-election results in counties with evidence that sufficient illegal ballots were included in the results to change or place in doubt the results of the November 3, 2020 presidential election in this state.

2. Voters seek a remedy excluding presidential election results from such counties in the certification activities for Presidential Electors described in **3**

U.S.C. § 6:

It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.

Jurisdiction and Venue

3. This action arises under **42 U.S.C. § 1983** and the First and Fourteenth

Amendments to the U.S. Constitution.

4. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343(a), 2201, and 2202.

5. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claim occurred or will occur in this District.

Parties

6. All Plaintiffs are eligible registered voters in this State and were qualified to, and did, vote for a presidential candidate in the November 3, 2020 presidential election in this State.

7. Plaintiff LaMarr Pirkle is a retired pastor who resides in Centre County.

8. Plaintiff Theodore Dannerth is a farmer who resides in Centre County.

9. Plaintiff Lauren Danks has been a nurse anesthetist for 13 years and resides in Centre County.

10. Plaintiff Casey Flynn is a corrections officer who resides in Montour County.

11. All Defendants are persons authorized by federal and state law to be involved in the process of certifying Presidential Electors as described in 3 U.S.C. § 6.

12. Defendant Governor Thomas W. Wolf, sued in his official capacity, is

required as the state “executive” to finalize, execute, and send required certificates for Presidential Electors under **3 U.S.C. § 6**.

13. Defendant, Kathryn Boockvar, sued in her official capacity, is the Secretary of the Commonwealth of Pennsylvania. Under 25 **P.S. § 3159**, Boockvar is responsible for tabulating, computing, and canvassing all ballots cast in any primary and general election and for certifying and filing the tabulation of all votes. Under 25 **P.S. § 3166**, Boockvar is responsible for receiving and tabulating the returns of the election of the presidential elections and for delivering those results to the Governor for review and certification.

Facts

14. The state certification of Presidential Electors prescribed in **3 U.S.C. § 6**, will occur this year by December 8, and the Electoral College votes on December 14. Voters seek a decision from this Court well before then to allow for possible appeal as necessary, as set out in a separate motion for expedited consideration.

15. Accordingly, Defendants must certify the results of the election of Presidential Electors by December 8, 2020.

Presidential-Election Results in Key Counties

16. The current Presidential election results count 3,362,873 ballots cast for

Joe Biden and 3,317,943 ballots cast for Donald Trump, a difference of 44,930 ballots. *2020 Presidential Election*, Department of State, <https://www.electionreturns.pa.gov/General/SummaryResults> (last visited Nov. 9, 2020). In Philadelphia county, 570,708 ballots were cast for Joe Biden and 127,813 ballots were cast for Donald Trump, a difference of 442,895 ballots. *2020 Presidential Election: Philadelphia*, Department of State, <https://www.electionreturns.pa.gov/General/CountyResults?countyName=Philadelphia&ElectionID=83&ElectionType=G&IsActive=1> (last visited Nov. 9, 2020). In Montgomery county, 313,543 ballots were cast for Joe Biden and 182,907 ballots were cast for Donald Trump, a difference of 130,636 ballots. *2020 Presidential Election: Montgomery*, Department of State, <https://www.electionreturns.pa.gov/General/CountyResults?countyName=Montgomery&ElectionID=83&ElectionType=G&IsActive=1> (last visited Nov. 9, 2020). In Delaware county, 200,911 ballots were cast for Joe Biden and 116,216 ballots were cast for Donald Trump, a difference of 84,695 ballots. *2020 Presidential Election: Delaware*, Department of State, <https://www.electionreturns.pa.gov/General/CountyResults?countyName=Delaware&ElectionID=83&ElectionType=G&IsActive=1> (last visited Nov. 9, 2020). And in Allegheny county, 415,861 ballots were cast for Joe Biden and 274,348 ballots were cast for Donald Trump, a difference of 141,513 ballots. *2020 Presidential Election: Allegheny*,

Department of State, <https://www.electionreturns.pa.gov/General/CountyResults?countyName=Allegheny&ElectionID=83&ElectionType=G&IsActive=1> (last visited Nov. 9, 2020).

Sufficient Evidence Exists to Place in Doubt Presidential-Election Results in Key Counties

17. There exists sufficient evidence to place in doubt the November 3 presidential-election results in identified key counties. Some of that evidence follows.

18. In Philadelphia county, some voters were advised they needed to cure ballot defects while others were not. (Trump Compl., attached as Ex. 1, at ¶¶ 133-34, 136.) Poll watchers were excluded from access to canvassing locations. (*Id.* at ¶¶ 142, 145.)

19. In Montgomery county, a poll watcher overheard unregistered voters being advised to return later to vote under a different name that was registered in the poll book. (*Id.* at ¶ 117.) Voter turnout was 88.5%, 19% higher than statewide turnout of 69.3%. See *2020 Voter Registration Statistics – Official*, Department of State, <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/2020%20Primary%20VR%20Stats%20%20FINAL.pdf> (last visited Nov. 10, 2020) (showing 574,403 registered voters in Montgomery

County); *Unofficial Election Results*, Montgomery County, Pennsylvania, <https://electionresults-montcopa.hub.arcgis.com/> (last visited Nov. 10, 2020) (showing 508,442 ballots received in Montgomery County); *2020 turnout is on pace to break century-old records*, The Washington Post, <https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/> (last visited Nov. 10, 2020) (showing a 69.3% voter turnout statewide).

20. In Delaware county, voters that were recorded to have received mail-in ballots were given regular ballots and not required to sign the registration book. (*Id.* at ¶ 125.) Poll watchers were granted extremely restricted access to a back room counting area. (*Id.* at ¶ 143.) And ballots received on Election Day were not separated from ballots received after 8 p.m. that day. (*Id.* at ¶ 151.) Voter turnout was 75.87%, compared to statewide turnout of 69.3%. *General Election Unofficial Results*, Delaware County, Pennsylvania, https://election.co.delaware.pa.us/eb/November_2020/index.html (last visited Nov. 10, 2020).

21. In Allegheny county, voters were required to vote provisionally because the records indicated they had requested to vote by mail when they had not. (*Id.* at ¶ 116.) Poll workers were reported to be close enough to voters so as to observe the actual vote. (*Id.* at ¶ 120.) Voter turnout was 74.54%, compared to statewide turnout of 69.3%. *Unofficial Results*, Allegheny County, PA,

<https://results.enr.clarityelections.com/PA/Allegheny/106267/web.264614/#/summary> (last visited Nov. 10, 2020).

22. Throughout the state, voters received mail-in ballots without applying for them, in some cases receiving more than one. (*Id.* at ¶ 111.)

23. Throughout the state, in-person voters were advised they must vote provisionally because they had asked for and received a mail-in ballot, when no such request was made. (*Id.* at ¶ 112.) In some cases, they were outright denied the right to vote. (*Id.* at ¶ 113.)

24. It is estimated that over 680,000 ballots were processed without observation in Allegheny and Philadelphia counties. (*Id.* at ¶ 148.)

25. This verified evidence, and the other verified evidence detailed in Trump Complaint, (*id.* at ¶¶ 51-61, 107-152), suffices to place in doubt the November 3 presidential-election results in identified counties and/or the state as a whole.

Further Evidence To Be Provided From Relevant Records

26. In addition to the foregoing evidence, Voters will provide evidence, upon information and belief, that sufficient illegal ballots were included in the results to change or place in doubt the November 3 presidential-election results. This will be in the form of expert reports based on data analysis comparing state

mail-in/absentee, provisional, and poll-book records with state voter-registration databases,¹ United States Postal Service (“USPS”) records, Social Security records, criminal-justice records, department-of-motor-vehicle records, and other governmental and commercial sources by using sophisticated and groundbreaking programs to determine the extent of illegal voters and illegal votes, including double votes, votes by ineligible voters, votes by phantom (fictitious) voters, felon votes (where illegal), non-citizen votes, illegal ballot harvesting, and pattern recognition to identify broader underlying subversion of the election results. Plaintiffs have persons with such expertise and data-analysis software already in place who have begun preliminary analysis of available data to which final data, such as the official poll list, will be added and reports generated.

27. Upon information and belief, the expert report will identify persons who cast votes illegally by casting multiple ballots, were deceased, had moved, or were otherwise not qualified to vote in the November 3 presidential election, along with evidence of illegal ballot stuffing, ballot harvesting, and other illegal voting. This evidence will be shortly forthcoming when the relevant official documents are final and available, for which discovery may be required, and the result of the analysis and expert reports based thereon will show that sufficient illegal ballots

¹ This includes lists of voters using a Federal Postcard Application to register and

were included in the results to change or place in doubt the November 3 presidential-election results.

Claims

Count I

Certifying Presidential Electors Without Excluding Certain Counties Would Violate Voters' Fundamental Right to Vote by Vote-Dilution Disenfranchisement.

(42 U.S.C. § 1983; U.S. Const. amends. 1 and 14)

28. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

29. Certifying Presidential Electors without excluding certain counties would violate voters' fundamental right to vote by votedilution disenfranchisement.

30. The counties at issue are those identified in the Facts where sufficient illegal ballots were included in the results to change or place in doubt the November 3 presidential-election results.

31. The right to vote, with the included right to have one's vote counted, is protected by the First and Fourteenth Amendments and is fundamental, *Harper v.*

vote, and any reports documenting voters contacted to cure rejected ballots.

Va. State Bd. of Elections, 383 U.S. 663, 667 (1966), and well-established:

“Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections” and to have that vote counted, *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

32. “The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing.” *Id.* at 555 (internal citations omitted). “And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Id.*

33. If Defendants certify presidential-election results from counties where sufficient illegal ballots were included in the results to change or place in doubt the November 3 presidential-election result, Voters valid, legal votes will be unconstitutionally diluted by illegal votes.

34. As recognized in *Donald J. Trump for President v. Bullock*, 2020 WL 5810556 (D. Mont. Sept. 30, 2020), individual voters have standing to bring a vote-dilution disenfranchisement claim, *id.* at *7 & n.4. “[T]he Supreme Court has repeatedly enumerated the principle that claims alleging a violation of the right to vote can constitute an injury in fact despite the widespread reach of the conduct at issue.” *Id.* at 7. See also *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (“[A]

person’s right to vote is ‘individual and personal in nature,’” so “‘voters who allege facts showing disadvantage to themselves as individuals have standing to sue’ to remedy that disadvantage” (citations omitted)). Under the generalized-grievance formulations in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), this claim is not a generalized grievance. *Lujan* said it turns on whether a plaintiff (i) is merely asserting “citizen” standing, i.e., the same claim that could be asserted by “every citizen,” and (ii) just trying to make the government do its job. *Id.* at 560-61. Voters don’t bring their claims under mere “citizen” standing but rather assert personal harms from the violation of their own fundamental right to vote. Their claim is particularized, challenging only what violates their rights. Their harm is not the same as for every “citizen.” “[D]enying standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.” *United States v. SCRAP*, 412 U.S. 660, 686-68 (1973); *see also*, *FEC v. Akins*, 524 U.S. 11, 24 (1998). Voters’ harm is four levels more specific than “every citizen[’s]” for their claim: (1) within “citizens” are those eligible to register as voters—only they have the potential to become registered voters; (2), within eligible voters are registered voters—only they have a right to vote; (3) within eligible, registered voters are those who actually voted—only they have a vote

subject to vote-dilution disenfranchisement; and (4) within these eligible, registered, voters who actually voted are those in a jurisdiction where there are counties with evidence that sufficient illegal ballots were included in the results to change or place in doubt the results of the November 3 presidential election. Those very specific voters with a very specific claim don't assert a generalized grievance, and they include Voters. Thus, Voters have standing.

35. As established in the Facts discussion, existing and forthcoming evidence establish that in identified counties illegal voting has occurred in connection with the presidential-election results, which establishes that Voters' votes have been unconstitutionally diluted. So the presidential-election elections in those counties should be invalidated and not included in the certification of votes for selecting Presidential Electors.

36. The relevant standard for invalidating election results from a particular jurisdiction generally is that “the party contesting the election demonstrates an irregularity or illegality sufficient to change or place in doubt the result.” 26 Am. Jur. 2d Elections § 389 (quoting *Gore v. Harris*, 772 So.2d 1234 (Fla. 2000), *rev'd on other grounds*, *Bush v. Gore*, 531 U.S. 98 (2000)). “Ordinarily, an election may be contested only for matters that would impeach the fairness of the result.” *Id.* (citing *Duncan v. McMurray*, 249 S.W.2d 156 (Ky. 1952); *Appeal of Soucy*, 649

A.2d 60 (N.H. 1994); *Fielding v. South Carolina Election Com'n*, 408 S.E.2d 232 (S.C. 1991). “An election will not be invalidated unless the party contesting the election demonstrates an irregularity or illegality sufficient to change or place in doubt the result.” *Id.* (citing *Middleton v. Smith*, 539 S.E.2d 163 (Ga. 2000)).

37. In *Harris*, the Florida statute included as grounds for contesting an election “Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.” 772 So.2d at 1250 (citation and emphasis omitted). *Harris* summarized the standard thus: “It is not enough to show a reasonable possibility that election results could have been altered by such irregularities, or inaccuracies, rather, a reasonable probability that the results of the election would have been changed must be shown.” *Id.* at 1255.

38. This generally recognized standard is reflected in this State’s laws. In *In re Ctr. Twp. Democratic Party Supervisor Primary Election*, 4 Pa. D. & C.4th 555 (Pa. Com. Pl. 1989), a county trial court, applying 25 P.S. 3464, held that when “the electoral process has been undermined by fraudulent and perhaps criminal conduct, [the court’s] duty to act is overwhelming, particularly where, as here, the fraud may have altered the outcome of the election,” *id.* at 560-61, and invalidated a township election based on evidence of 15 fraudulently cast absentee ballots. In *Bright’s Contested Election*, 292 Pa. 389 (1928), the Pennsylvania

Supreme Court affirmed the order of a trial court which, finding massive fraud, intimidation, and illegal voting had occurred at one polling place, concluded that it could not determine which of the votes cast at that polling place were lawful and which were not, and threw out the entire ballot count. *Id.* The Supreme Court affirmed its authority “to throw out the entire poll of a district upon a proper showing.” *Id.* at 394. *See also In re Ctr. Twp. Democratic Party Supervisor Primary Election*, 4 Pa. D. & C.4th at 560 (“The Supreme Court specifically held that when it is not possible to separate the lawful ballots from the unlawful or fraudulent ballots, then the entire vote must be rejected and thrown out); *Gollmar's Election, Case of*, 316 Pa. 560, 567, 175 A. 510, 513 (1934) (“There is no doubt that where such glaring fraud and illegality exists as to make it impossible to purge the ballot boxes with any degree of accuracy, the court may reject the whole vote of any or of several districts.”).

39. Regarding evidence for invalidating election results in a jurisdiction, *Harris* established that the required showing could be made (inter alia) by “credible statistical evidence” establishing a changed election outcome “by a preponderance of a reasonable probability,” *id.*:

In this case, there is no credible statistical evidence, and no other competent substantial evidence to establish by a preponderance of a reasonable probability that the results of the statewide election in the State of Florida would be different from the result which has been certified by

the State Elections Canvassing Commission.

40. In addition to *states* routinely providing for invalidating election results, including in the Presidential Electors context, the U.S. Supreme Court *itself* in *Bush*, 531 U.S. 98, required that partial recounts in some counties (that unconstitutionally employed different and unclear standards for determining voter intent) be excluded from the final count in the Florida 2000 presidential election because of the constitutional flaws identified, *id.* at 107-12.

41. The foregoing articulations of the standard for invalidating election results in a particular jurisdiction—including proof of reasonable probability by credible statistical evidence—should be applied here to determine whether the election results in certain counties should be excluded for purposes of certifying Presidential Electors. In some situations where election results are invalidated, a new election is ordered. *See, e.g., Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004). But with the Electoral College scheduled to be certified by December 8 and to meet and vote on December 14, 2020, there is insufficient time for a new election in the counties involved. Moreover, the Electoral College is unique and statutory provisions provide special procedures for moving the Electoral College vote along expeditiously since the presidency is at issue. So the proper remedy here is to exclude the results from jurisdictions meeting the standard for disqualifying

elections from the final results that are certified and reported for Presidential Electors.

42. Because illegal votes dilute legal votes, the evidence establishes, and will establish, that the rights of Voters have been violated by votedilution disenfranchisement. Consequently, the presidential-election results from the counties identified should not be included in certified and reported totals for Presidential Electors from this state.

Prayer for Relief

1. Declare that the inclusion of illegal votes in identified counties violates Voters' right to vote under the First and Fourteenth Amendment by votedilution disenfranchisement.

2. Declare that the proper remedy for this constitutional violation as applied to presidential-election results is to exclude presidential-election results from those counties for the Presidential Elector certification under **3 U.S.C. § 6** for this state.

3. Under that remedy, declare that there is sufficient evidence that illegal votes were counted in the identified county or counties to change or place in doubt the results of the November 3, 2020 presidential election results in contested counties, so that the county's presidential-election results must be invalidated.

4. Enjoin Defendants from preparing and conducting the certification activities for Presidential Electors described in 3 U.S.C. § 6 (and applicable state law implementing the federal provision) without excluding the presidential-election results from the identified counties.

5. Award Voters their costs and attorneys fees under 42 U.S.C. § 1988 and any other applicable authority; and

6. Grant any and all other such relief as this Court deems just and equitable.

Date: November 10, 2020

Respectfully Submitted,

/s/ Walter S. Zimolong, Esq.

Walter S. Zimolong III, Esq.

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Validate the Vote Project

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Lead Counsel for Plaintiffs

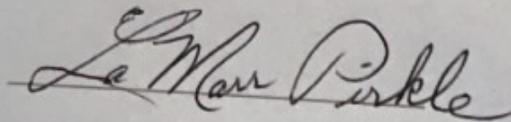
** Pro Hac Vice application forthcoming*

Verification

I, LaMarr Pirkle, declare as follows:

1. I am a resident of Pennsylvania.
2. If called upon to testify, I would testify competently as to the matters set forth in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Verified Complaint for Declaratory and Injunctive Relief* concerning me and my past and intended activities are true and correct to the best of my knowledge and understanding. 28 U.S.C. § 1746.

Executed on November 09, 2020.



Verification

I, Theodore Dannerth, declare as follows:

1. I am a resident of Pennsylvania.
2. If called upon to testify, I would testify competently as to the matters set forth in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Verified Complaint for Declaratory and Injunctive Relief* concerning me and my past and intended activities are true and correct to the best of my knowledge and understanding. 28 U.S.C. § 1746.

Executed on November 10th, 2020.

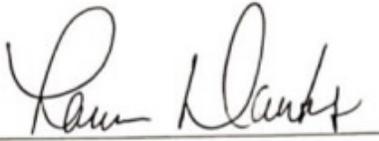
A handwritten signature in black ink, appearing to read "Theodore Dannerth", is written over a horizontal line.

Verification

I, Lauren Danks, declare as follows:

1. I am a resident of Pennsylvania.
2. If called upon to testify, I would testify competently as to the matters set forth in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Verified Complaint for Declaratory and Injunctive Relief* concerning me and my past and intended activities are true and correct to the best of my knowledge and understanding. 28 U.S.C. § 1746.

Executed on November 10, 2020.

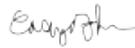


Verification

I, Casey Flynn, declare as follows:

1. I am a resident of Pennsylvania.
2. If called upon to testify, I would testify competently as to the matters set forth in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Verified Complaint for Declaratory and Injunctive Relief* concerning me and my past and intended activities are true and correct to the best of my knowledge and understanding. **28 U.S.C. § 1746**.

Executed on November ____, 2020.



In the United States District Court
For the Western District of Michigan
Lansing Division

**Lena Bally, Steven Butler, Gavriel
Grossbard, and Carol Hatch,**
Plaintiffs,

v.

Gretchen Whitmer, in her official capacity as Governor of Michigan, **Michigan Board of State Canvassers, Jeanette Bradshaw**, in her official capacity as Chair of the Board of State Canvassers, **Aaron Van Langevelde**, in his official capacity as Vice-Chair of the Board of State Canvassers, **Norman D. Shinkle**, in his official capacity as a member of the Board of State Canvassers, **Julie Matuzak**, in her official capacity as a member of the Board of State Canvassers, **Wayne County Board of County Canvassers, Monica Palmer**, in her official capacity as Chair of the Wayne County Board of Canvassers, **Jonathan C. Kinloch**, in his official capacity as Vice-Chair of the Wayne County Board of Canvassers, **William Hartmann**, in his official capacity as a member of the Wayne County Board of Canvassers, **Allen Wilson**, in his official capacity as a member of the Wayne County Board of Canvassers, **Washtenaw County Board of Canvassers, Mary Hall-Thiam**, in her official capacity as a member of the Washtenaw County Board of Canvassers, **Malcom Doug Scott**, in his official capacity as a member of the Washtenaw County Board of Canvassers, **Dan Smith**, in his official capacity as a member of the Washtenaw County Board of Canvassers,

Case No.: 1:20-cv-1088

**Verified Complaint for
Declaratory and Injunctive Relief**

Verified Complaint

1

Teena Weaver-Gordon, in her official capacity as a member of the Washtenaw County Board of Canvassers, **Ingham County Board of Canvassers, Ted Lawson**, in his official capacity as a member of the Ingham County Board of Canvassers, **Rebecca Bahar-Cook**, in her official capacity as a member of the Ingham County Board of Canvassers, **Joe Groff**, in his official capacity as a member of the Ingham County Board of Canvassers, **Jude Wells**, in his official capacity as a member of the Ingham County Board of Canvassers, **Barb Byrum**, in her official capacity as a clerk of the Ingham County Board of Canvassers,

Defendants.

Verified Complaint for Declaratory and Injunctive Relief

Plaintiffs Lena Bally, Steven Butler, Gavriel Grossbard, and Carol Hatch (collectively “Voters”) complain as follows:

Introduction

1. This is a civil action for declaratory and injunctive relief concerning violations of Voters’ voting and equal-protection rights by election officials’ inclusion of illegal Presidential Elector results in certain counties, which inclusion unlawfully dilutes Voters’ lawful votes and requires invalidation of those presidential-election results in counties with evidence that sufficient illegal ballots were included in the results to change or place in doubt the results of the November 3, 2020 presidential election in this state.

2. Voters seek a remedy excluding presidential-election results from such counties in the certification activities for Presidential Electors described in 3 U.S.C. § 6:

Verified Complaint

2

It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.

Jurisdiction and Venue

3. This action arises under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the U.S. Constitution.
4. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343(a), 2201, and 2202.
5. Venue is proper under 28 U.S.C. § 1391(b) because one or more Defendants to this action resides in this District and all Defendants reside in this State. Alternatively, venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claim occurred or will occur in this District.

Parties

6. All Plaintiffs are eligible registered voters in this State and were qualified to, and did, vote for a presidential candidate in the November 3, 2020 presidential election in this State.

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7. Plaintiff Lena Bally is an eligible and registered voter, who was qualified to, and did, vote for a presidential candidate in the November 3, 2020 presidential election in this State. She is a resident of Oakland County, Michigan.

8. Plaintiff Steven Butler is an eligible and registered voter, who was qualified to, and did, vote for a presidential candidate in the November 3, 2020 presidential election in this State. He is a resident of Jackson County, Michigan.

9. Plaintiff Gavriel Grossbard is an eligible and registered voter, who was qualified to, and did, vote for a presidential candidate in the November 3, 2020 presidential election in this State. He is a resident of Oakland County, Michigan.

10. Plaintiff Carol Hatch is an eligible and registered voter, who was qualified to, and did, vote for a presidential candidate in the November 3, 2020 presidential election in this State. She is a resident of Eaton County, Michigan.

11. All Defendants are persons authorized by federal and state law to be involved in the process of certifying Presidential Electors as described in 3 U.S.C. § 6.

12. Defendant Governor Gretchen Whitmer, sued in her official capacity, is required as the state “executive” to finalize, execute, and send required certificates for Presidential Electors under 3 U.S.C. § 6. Additionally, state law provides that:

[a]s soon as practicable after the state board of canvassers has, by the official canvass, ascertained the result of an election as to electors of president and vice-president of the United States, the governor shall certify, under the seal of the state, to the United States secretary of state, the names and addresses of the electors of this state chosen as electors of president and vice-president of the United States. The governor shall also transmit to each elector chosen as an elector for president and vice-president of the United States a certificate, in triplicate, under the seal of the state, of his or her election.

Mich. Code § 168.46.

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13. Defendant Michigan Board of State Canvassers is

required to canvass the returns and determine the result of all elections for electors of president and vice president of the United States . . . [and u]pon making the determination, the board of state canvassers shall immediately prepare a certificate of determination and deliver the properly certified certificate of determination to the secretary of state.

Mich. Code § 168.841(1).

14. Defendant Jeannette Bradshaw, in her official capacity as Chair of the Board of State Canvassers, is responsible for determining and certifying the results of the election “for electors of president and vice president of the United States.” Mich. Code § 168.841(1).

15. Defendant Aaron Van Langevelde, in his official capacity as Vice-Chair of the Board of State Canvassers, is responsible for determining and certifying the results of the election “for electors of president and vice president of the United States.” Mich. Code § 168.841(1).

16. Defendant Norman D. Shinkle, in his official capacity as a member of the Board of State Canvassers, is responsible for determining and certifying the results of the election “for electors of president and vice president of the United States.” Mich. Code § 168.841(1).

17. Defendant Julie Matuzak, in her official capacity as a member of the Board of State Canvassers, is responsible for determining and certifying the results of the election “for electors of president and vice president of the United States.” Mich. Code § 168.841(1).

18. Defendant Wayne County Board of Canvassers is responsible for canvassing the returns and certifying the results of the election for Wayne County. Mich. Code § 168.821, *et seq.*

19. Defendant Monica Palmer, in her official capacity as Chair of the Wayne County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Wayne County. Mich. Code § 168.821, *et seq.*

20. Defendant Jonathan C. Kinloch, in his official capacity as Vice-Chair of the Wayne County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Wayne County. Mich. Code § 168.821, *et seq.*

21. Defendant William Hartmann, in his official capacity as a member of the Wayne County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Wayne County. Mich. Code § 168.821, *et seq.*

22. Defendant Allen Wilson, in his official capacity as a member of the Wayne County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Wayne County. Mich. Code § 168.821, *et seq.*

23. Defendant Washtenaw County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Washtenaw County. Mich. Code § 168.821, *et seq.*

24. Defendant Mary Hall-Thiam, in her official capacity as a member of the Washtenaw County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Washtenaw County. Mich. Code § 168.821, *et seq.*

25. Defendant Malcom Doug Scott, in his official capacity as a member of the Washtenaw County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Washtenaw County. Mich. Code § 168.821, *et seq.*

26. Defendant Dan Smith, in his official capacity as a member of the Washtenaw County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Washtenaw County. Mich. Code § 168.821, *et seq.*

27. Defendant Teena Weaver-Gordon, in her official capacity as a member of the

Washtenaw County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Washtenaw County. Mich. Code § 168.821, *et seq.*

28. Defendant Ingham County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Ingham County. Mich. Code § 168.821, *et seq.*

29. Defendant Ted Lawson, in his official capacity as a member of the Ingham County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Ingham County. Mich. Code § 168.821, *et seq.*

30. Defendant Rebecca Bahar-Cook, in her official capacity as a member of the Ingham County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Ingham County. Mich. Code § 168.821, *et seq.*

31. Defendant Joe Groff, in his official capacity as a member of the Ingham County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Ingham County. Mich. Code § 168.821, *et seq.*

32. Defendant Jude Wells, in his official capacity as a member of the Ingham County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Ingham County. Mich. Code § 168.821, *et seq.*

33. Defendant Barb Byrum, in her official capacity as a member of the Ingham County Board of Canvassers, is responsible for canvassing the returns and certifying the results of the election for Ingham County. Mich. Code § 168.821, *et seq.*

Facts

34. The state certification of Presidential Electors prescribed in 3 U.S.C. § 6, will occur this year by December 8 (if done by the “Safe Harbor” deadline, *see* 3 U.S.C. § 5), and the Electoral

College will vote on December 14. Voters seek a decision from this Court well before then to allow for possible appeal as necessary, as set out in a separate motion for expedited consideration.

35. By the law of this state, the Board of County Canvassers started meeting on November 5, 2020 to canvass returns. Mich. Code §§ 168.821(1), 168.822(1). The Board of County Canvassers must complete this canvass by November 17, 2020. *Id.* at 168.822(1). Within 24 hours of completion, the clerk of the Board of County Canvassers shall deliver the results to the Secretary of State. *Id.* at 168.828.

36. If the Board of County Canvassers fails to certify the results by November 17, 2020, they must “immediately deliver to the secretary of the board of state canvassers all records and other information pertaining to the election.” Mich. Code § 168.822(2). The Board of State Canvassers must then “meet immediately and make the necessary determinations and certify the results within the 10 days immediately following the receipt of the records from the board of county canvassers.” *Id.*

37. The Board of State Canvassers will begin meeting on November 23, 2020 to canvass the returns, and ascertain and determine the result of the election. Mich. Code § 168.842(1). This canvass must be completed by December 13, 2020. *Id.*

38. As soon as practicable after the Board of State Canvassers has determined the results, the Governor must certify the presidential electors. Mich. Code § 168.46.

39. If the results of the presidential election have a vote differential of less than 25,000 votes, an expedited schedule may be enforced. Mich. Code § 168.842(2).

Presidential-Election Results in Key Counties

40. The presidential-election results for Michigan are 2,794,822 votes for Joseph R. Biden (“Biden”) and 2,647,832 votes for Donald J. Trump (“Trump”). *2020 Michigan Election Results*, The Office of Secretary of State Jocelyn Benson, https://mielections.us/election/results/2020GEN_CENR.html# (last visited on November 11, 2020).

41. The presidential-election results for Ingham County, Michigan are 94,221 for Biden and 47,640 for Trump. *Unofficial Summary Results November 3, 2020 General Election Ingham County*, Ingham County, available at [file:///C:/Users/court/Downloads/November2020ElectionSummaryReportRPT%20\(1\).pdf](file:///C:/Users/court/Downloads/November2020ElectionSummaryReportRPT%20(1).pdf) (last visited November 11, 2020).

42. The presidential-election results for Washtenaw County, Michigan are 157,130 for Biden and 56,241 for Trump. *Unofficial Election Results November 3, 2020 General Election*, Washtenaw County, available at <https://electionresults.ewashtenaw.org/electionreporting/nov2020/index.jsp> (last visited November 11, 2020).

43. The presidential-election results for Wayne County, Michigan are 587,074 for Biden and 264,149 for Trump. *Election Summary Report November 3, 2020 - General Election Wayne County, Michigan*, Wayne County, available at <https://www.waynecounty.com/elected/clerk/election-results.aspx> (last visited November 11, 2020).

Sufficient Evidence Exists to Place in Doubt Presidential-Election Results in Key Counties

44. There exists sufficient evidence to place in doubt the November 3 presidential-election results in identified key counties, including issues with transparency, fraudulent changing of dates, a software glitch, clerical errors, illegal votes, and many other issues and irregularities. Some of that evidence follows:

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45. A credentialed poll challenger was excluded from the absentee counting process, contrary to Michigan law. *See, e.g., Trump v. Benson*, Case No. 20-000225-MZ. Moreover, it has been alleged that absentee counting boards conducted counts without inspectors from each party being present and that challengers were denied access to video of ballot boxes, contrary to Michigan law. *Id.* This lack of transparency casts significant doubt into the validity of votes.

46. “[N]umerous issues of fraud and misconduct” from Wayne County were noted in *Costanino v. City of Detroit*, Case No. 20-014780-AW, available at <https://greatlakesjc.org/wp-content/uploads/Complaint-Costantino-FINAL-With-Exhibits.pdf?x44644> (last visited November 11, 2020). Complainants, represented by the Great Lakes Justice Center, summarized the following issues:

- a. Defendants systematically processed and counted ballots from voters whose name failed to appear in either the Qualified Voter File (QVF) or in the supplemental sheets. When a voter’s name could not be found, the election worker assigned the ballot to a random name already in the QVF to a person who had not voted.
- b. Defendants instructed election workers to not verify signatures on absentee ballots, to backdate absentee ballots, and to process such ballots regardless of their validity.
- c. After election officials announced the last absentee ballots had been received, another batch of unsecured and unsealed ballots, without envelopes, arrived in trays at the TCF Center. There were tens of thousands of these absentee ballots, and apparently every ballot was counted and attributed only to Democratic candidates.
- d. Defendants instructed election workers to process ballots that appeared after the election deadline and to falsely report that those ballots had been received prior to November 3, 2020 deadline.
- e. Defendants systematically used false information to process ballots, such as using incorrect or false birthdays. Many times, the election workers inserted new names into the QVF after the election and recorded these new voters as having a birthdate of 1/1/1900.
- f. On a daily basis leading up to the election, City of Detroit election workers and employees coached voters to vote for Joe Biden and the Democrat party. These workers and employees encouraged voters to do a straight Democrat ballot. These election workers and employees went over to the voting booths with voters in order to watch them vote and coach them for whom to vote.
- g. Unsecured ballots arrived at the TCF Center loading garage, not in sealed ballot boxes, without any chain of custody, and without envelopes.

- h. Defendant election officials and workers refused to record challenges to their processes and removed challengers from the site if they politely voiced a challenge.
- i. After poll challengers started discovering the fraud taking place at the TCF Center, Defendant election officials and workers locked credentialed challengers out of the counting room so they could not observe the process, during which time tens of thousands of ballots were processed.
- j. Defendant election officials and workers allowed ballots to be duplicated by hand without allowing poll challengers to check if the duplication was accurate. In fact, election officials and workers repeatedly obstructed poll challengers from observing. Defendants permitted thousands of ballots to be filled out by hand and duplicated on site without oversight from poll challengers.

Id. More information about each allegation and evidence to support the allegations are contained within their complaint and accompanying exhibits. *See id.*

47. “Election officials in Wayne County refused to permit statutorily designated challengers to observe the conduct of the election and the processing of ballots.” *See Donald J. Trump for President, Inc. v. Benson*, Case No. 1:20-cv-01083, available at https://cdn.donaldjtrump.com/public-files/press_assets/1.-11-10-20-trump-v.-benson-w.d.-mich.-complaint-final.pdf (last visited November 11, 2020). This included being denied meaningful opportunity to observe the counts; denial of access to the facility; denial of re-entry; lack of replacement of Republican challengers; social distancing enforced in a partisan manner; blocking by election officials; being forced to observe at unreasonable distances; windows being covered to prevent viewing; and intimidation, threatening, and harassment by election officials. *See id.* at ¶¶ 26-37.

48. Election officials also ignored and disregarded valid challenges. *Id.* at ¶¶ 38-41.

49. Challengers were prohibited from observing the ballot duplication process, which were only performed by Democrats. *Id.* at ¶¶ 42-44.

50. Officials counted ineligible ballots. *Id.* at ¶¶ 45-53. This includes ballots being repeatedly run through tabulation machines, mismatched ballots being counted, illegal addition of vot-

ers into poll books, counting of ballots with no voter record, ballots counted without signature or postmark, ballots counted that all contained the same signature, ballots being “corrected” then counted, the counting of provisional ballots, officials changing ballots, harvested ballots being dropped off, counting of deceased voters, etc. *Id.*

51. Moreover, “[s]ome election officials pre-dated ballots that were not eligible to be counted by altering the date the ballot was received.” *Id.* at ¶¶ 54-55.

52. Ballots were allowed to be dropped into unattended drop boxes, contrary to Michigan law. *Id.* at ¶¶ 56-59.

53. Michigan postal workers were issued a directive to collect an ballots, separate them, and hand stamp them with the previous day’s date. *Michigan USPS Whistleblower Details Directive From Superiors To Back-Date Late Mail-In-Ballots Nov 3*, Project Veritas, available at <https://www.youtube.com/watch?v=fS6xOuhSiJw> (last visited November 11, 2020). This directive was given on November 4, 2020, the day after the election. *Id.* Michigan law requires that votes be received “before the close of the polls on election day.” Mich. Code § 168.764A. This directive was an obvious attempt to circumvent Michigan law and count late votes. It is unclear how many illegal ballots were accepted and counted as a result of this scheme.

54. There have been reports that “[m]ore than 10,000 people confirmed or suspected dead have returned their mail-in ballots to vote in Michigan.” *More Than 10,000 Dead People Cast Ballots in Michigan, Analysis Shows*, The Epoch Times, available at https://www.theepochtimes.com/10000-dead-people-returned-mail-in-ballots-in-michigan-analysis-shows_3573209.html?utm_source=news&utm_medium=email&utm_campaign=breaking-2020-11-10-2 (last visited November 11, 2020).

55. GOP Chairwoman Ronna McDaniel detailed “131 affidavits and 2,800 incident reports documenting fraud and other irregularities in the election in Michigan.” *Massive Election Corruption Documented in Michigan*, Powerline, available at <https://www.powerlineblog.com/archives/2020/11/massive-election-corruption-documented-in-michigan.php> (last visited November 11, 2020).

56. In particular, she highlighted “there are thousands of reports of poll watchers being intimidated and unable to do their job” in Wayne County. *Id.*

57. GOP challengers allege that they were prohibited from accessing the absentee ballot counting board in Detroit, creating a serious lack of transparency. *Officials say their claims are weak*, Bridge Michigan, available at <https://www.bridgemi.com/michigan-government/gop-calls-michigan-election-probe-officials-say-their-claims-are-weak> (last visited November 11, 2020).

58. GOP Chairwoman Ronna McDaniel also detailed reports from a whistleblower alleging: “being told by a supervisor to backdate ballots that came in after the legal deadline; witnessing poll workers encouraging voters to vote straight Democrat; and even poll workers going into the booths with voters.” *Massive Election Corruption Documented in Michigan*, Powerline, available at <https://www.powerlineblog.com/archives/2020/11/massive-election-corruption-documented-in-michigan.php> (last visited November 11, 2020); *see also Officials say their claims are weak*, Bridge Michigan, available at <https://www.bridgemi.com/michigan-government/gop-calls-michigan-election-probe-officials-say-their-claims-are-weak> (last visited November 11, 2020) (detailing allegations of Detroit poll workers being ordered to change the date on ballots, contrary to Michigan law which requires that votes be received “before the close of the polls on election day[.]” (Mich. Code § 168.764A)).

59. To further exacerbate the transparency issue, poll workers in Detroit covered the windows of the polling center, preventing challengers and inspectors from viewing the counting process. *WATCH: Allegations of violations fly as Michigan polling centre covers up windows*, PM, available at <https://thepostmillennial.com/watch-allegations-of-violations-fly-as-michigan-polling-centre-covers-up-windows> (last visited November 11, 2020); Republican AGs Tweet, available at https://twitter.com/RepublicanAGs/status/1324360088371552260?utm_source=Sailthru&utm_medium=email&utm_campaign=20201107_Weekend_Jolt&utm_term=Jolt-Smart (last visited November 11, 2020). This lack of transparency, as is required by Michigan law, justifies validation of votes.

60. There is also evidence of suitcases and coolers being moved into a secure voting center in Detroit in the early morning hours of 1 to 5 AM. *VIDEO: Wagons, Suitcases, and Coolers Roll Into Detroit Voting Center at 4 AM*, Texas Scorecard, available at <https://texasscorecard.com/federal/video-wagons-suitcases-and-coolers-roll-into-detroit-voting-center-at-4-am/> (last visited November 11, 2020). This raises significant security concerns that places the validity of votes in question. It also makes clear that reasonable safeguards were not in place in Wayne County.

61. There are reports of “vote dumps” around 4 AM where Biden received almost 100% of those votes. *There is Undeniable Mathematical Evidence the Election is Being Stolen*, The Red Elephants, available at <https://theredelegants.com/there-is-undeniable-mathematical-evidence-the-election-is-being-stolen/> (last visited November 11, 2020).

62. In Antrim County, a software glitch caused at least 6,000 ballots to be counted for Democrats that were actually cast for Republicans. *Michigan GOP chairwoman says software glitch tallied thousands of Republican votes as Democrat*, Fox News, available at <https://www.foxnews.com>

s.com/politics/michigan-gop-chairwoman-says-software-glitch-tallied-thousands-of-republican-votes-as-democrat (last visited November 10, 2020). Similar glitches could have affected many other Michigan counties, as it has been reported that 69 of Michigan’s 83 counties use the same software. *Human error, Dominion voting equipment fuel false fraud claims in Michigan*, Bridge Michigan, available at <https://www.bridgemi.com/michigan-government/human-error-dominion-voting-equipment-fuel-false-fraud-claims-michigan> (last visited November 11, 2020). *See also Donald J. Trump for President, Inc. v. Benson*, Case No. 1:20-cv-01083, at ¶¶ 60-67 available at https://cdn.donaldjtrump.com/public-files/press_assets/1.-11-10-20-trump-v.-benson-w.d.-mich.-complaint-final.pdf (last visited November 11, 2020) (detailing the error and highlighting that “Secretary Benson fail[ed] to address is what would have happened if no one ‘discover[ed] the error,’ for instance, in Wayne County, where the number of registered voters is much greater than Antrim County, and where the tabulators were not individually tested.”).

63. Wayne County uses the same software as Antrim and “tested only a single one of its vote tabulating machines before the election.” *Id.* at ¶ 4.

64. There were also clerical errors which resulted in thousands of ballots being given to Democrats, even though they were republican ballots. *Officials say their claims are weak*, Bridge Michigan, available at <https://www.bridgemi.com/michigan-government/gop-calls-michigan-election-probe-officials-say-their-claims-are-weak> (last visited November 11, 2020).

65. Specifically, in Oakland County, it was initially reported that Adam Kochenderfer lost by a few hundred votes. However, after an error was found and fixed, Kochenderfer was found to have won by over 1,000 votes. *There is Undeniable Mathematical Evidence the Election is Being Stolen*, The Red Elephants, available at <https://theredelegants.com/there-is-undeniable-mathema>

tical-evidence-the-election-is-being-stolen/ (last visited November 11, 2020).

66. A Republican candidate for state legislature initially only received two votes, an error that was later corrected. *Election Program 'Issue' Tallied Only 2 Votes for GOP Candidate, 33 MI Counties Thought To Be Using the Same Software*, The Western Journal, available at https://www.westernjournal.com/election-program-issue-tallied-2-votes-gop-candidate-33-mi-counties-thought-using-software/?ff_source=facebook&ff_medium=huckabee (last visited November 10, 2020). Of particular note, the program that caused the error is used by at least 33 other Michigan counties. *Id.*

67. There are also reports of multiple ballots being sent to a single address. Mark Springer, a Michigan resident, received seven mail-in ballot delivered to his mailbox. *Joint Senate and House Committee move to investigate voting fraud allegations*, WILX10, available at <https://www.wilx.com/2020/11/07/michigan-joint-senate-and-house-committee-move-to-investigate-voting-fraud-allegations/> (last visited November 11, 2020).

68. Over 50 Michigan counties, including Wayne and Washtenaw, had “more registered voters than eligible voting-age citizens”. *New Judicial Watch Study Finds 353 U.S. Counties in 29 States with Voter Registration Rates Exceeding 100%*, Judicial Watch, available at <https://www.judicialwatch.org/press-releases/new-jw-study-voter-registration/> (last visited November 11, 2020). Of particular relevance here, Wayne County registration rate was 107% and Washtenaw County was 113%. *Id.* This alone raises suspicion of the accuracy and validity of the election.

69. As a result of the many issues and irregularities, the Michigan Legislature is convening an oversight committee to evaluate the Michigan election and counting procedures. *GOP calls*

for Michigan election probe. *Officials say their claims are weak*, Bridge Michigan, available at <https://www.bridgemi.com/michigan-government/gop-calls-michigan-election-probe-officials-say-their-claims-are-weak> (last visited November 11, 2020); *Michigan Legislature issues subpoena to state election officials in rare Saturday hearing*, Detroit Free Press, available at <https://www.freep.com/story/news/politics/elections/2020/11/07/gop-state-lawmakers-issue-subpoena-michigan-election-records/6203094002/> (last visited November 11, 2020).

70. Additionally, a Joint Senate and House Committee is investigating claims of voting fraud in Michigan. *Joint Senate and House Committee move to investigate voting fraud allegations*, WILX10, available at <https://www.wilx.com/2020/11/07/michigan-joint-senate-and-house-committee-move-to-investigate-voting-fraud-allegations/> (last visited November 11, 2020).

71. Finally, federal investigators are also looking into the State's fraud issues. *Federal Investigators Arrive in Michigan After Voter Fraud Allegation Video Goes Viral*, The Western Journal, available at https://www.westernjournal.com/federal-investigators-arrive-michigan-voter-fraud-allegation-video-goes-viral/?utm_source=facebook&utm_medium=huckabee&fbclid=IwAR2oz7ZNYzd4iujKVnbsF5URQz42xGqRMahRWZ1q8G_Iij4s6o_wWspBh0I (last visited November 11, 2020).

72. This evidence suffices to place in doubt the November 3 presidential-election results in identified counties and/or the state as a whole. Indeed, issues with thousands of votes cast warrants investigation of the rest.

Further Evidence To Be Provided From Relevant Records

73. In addition to the foregoing evidence, Voters will provide evidence, upon information and belief, that sufficient illegal ballots were included in the results to change or place in doubt

the November 3 presidential-election results. This will be in the form of expert reports based on data analysis comparing state mail-in/absentee, provisional, limited ballot, and poll-book records with state voter-registration databases, United States Postal Service (“USPS”) records, Social Security records, criminal-justice records, driver’s license and state ID records, and other governmental and commercial sources by using sophisticated and groundbreaking programs to determine the extent of illegal voters and illegal votes, including double votes, votes by ineligible voters, votes by phantom (fictitious) voters, votes by incarcerated persons, non-citizen votes, illegal ballot harvesting, and pattern recognition to identify broader underlying subversion of the election results. Plaintiffs have persons with such expertise and data-analysis software already in place who have begun preliminary analysis of available data to which final data, such as the official poll list, will be added and reports generated.

74. Upon information and belief, the expert report will identify persons who cast votes illegally by casting multiple ballots, were deceased, had moved, or were otherwise not qualified to vote in the November 3 presidential election, along with evidence of illegal ballot stuffing, ballot harvesting, and other illegal voting. This evidence will be shortly forthcoming when the relevant official documents are final and available, for which discovery may be required, and the result of the analysis and expert reports based thereon will show that sufficient illegal ballots were included in the results to change or place in doubt the November 3 presidential-election results.

75. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm unless the injunctive relief requested herein is granted.

Claims

Count I

**Certifying Presidential Electors Without Excluding Certain Counties Would Violate Voters' Fundamental Right to Vote by Vote-Dilution Disenfranchisement.
(42 U.S.C. § 1983; U.S. Const. amends. 1 and 14)**

76. Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

77. Certifying Presidential Electors without excluding certain counties would violate voters' fundamental right to vote by vote-dilution disenfranchisement.

78. The counties at issue are those identified in the Facts where sufficient illegal ballots were included in the results to change or place in doubt the November 3 presidential-election results.

79. The right to vote, with the included right to have one's vote counted, is protected by the First and Fourteenth Amendments and is fundamental, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966), and well-established: "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections" and to have that vote counted, *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

80. "The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." *Id.* at 555 (internal citations omitted). "And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*

81. If Defendants certify presidential-election results from counties where sufficient illegal ballots were included in the results to change or place in doubt the November 3 presidential-election result, Voters valid, legal votes will be unconstitutionally diluted by illegal votes.

82. As recognized in *Donald J. Trump for President v. Bullock*, 2020 WL 5810556 (D. Mont. Sept. 30, 2020), individual voters have standing to bring a vote-dilution disenfranchisement claim, *id.* at *7 & n.4. “[T]he Supreme Court has repeatedly enumerated the principle that claims alleging a violation of the right to vote can constitute an injury in fact despite the wide-spread reach of the conduct at issue.” *Id.* at 7. *See also Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (“[A] person’s right to vote is ‘individual and personal in nature,’” so “voters who allege facts showing disadvantage to themselves as individuals have standing to sue’ to remedy that disadvantage” (citations omitted)). Under the generalized-grievance formulations in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), this claim is not a generalized grievance. *Lujan* said it turns on whether a plaintiff (i) is merely asserting “citizen” standing, i.e., the same claim that could be asserted by “every citizen,” and (ii) just trying to make the government do its job. *Id.* at 560-61. Voters don’t bring their claims under mere “citizen” standing but rather assert personal harms from the violation of their own fundamental right to vote. Their claim is particularized, challenging only what violates their rights. Their harm is not the same as for every “citizen.” “[D]enying standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.” *United States v. SCRAP*, 412 U.S. 660, 686-68 (1973); *see also, FEC v. Akins*, 524 U.S. 11, 24 (1998). Voters’ harm is four levels more specific than “every citizen[’s]” for their claim: (1) within “citizens” are those eligible to register as voters—only they have the potential to become registered voters; (2), within eligible voters are registered voters—only they have a right to vote; (3) within eligible, registered voters are those who actually voted—only they have a vote subject to vote-dilution disenfranchisement; and (4) within these eligible, registered,

voters who actually voted are those in a jurisdiction where there are counties with evidence that sufficient illegal ballots were included in the results to change or place in doubt the results of the November 3 presidential election. Those very specific voters with a very specific claim don't assert a generalized grievance, and they include Voters. Thus, Voters have standing.

83. As established in the Facts discussion, existing and forthcoming evidence establish that in identified counties illegal voting has occurred in connection with the presidential-election results, which establishes that Voters' votes have been unconstitutionally diluted. So the presidential-election elections in those counties should be invalidated and not included in the certification of votes for selecting Presidential Electors.

84. The relevant standard for invalidating election results from a particular jurisdiction generally is that “the party contesting the election demonstrates an irregularity or illegality sufficient to change or place in doubt the result.” 26 Am. Jur. 2d Elections § 389 (quoting *Gore v. Harris*, 772 So.2d 1234 (Fla. 2000), *rev'd on other grounds*, *Bush v. Gore*, 531 U.S. 98 (2000)). “Ordinarily, an election may be contested only for matters that would impeach the fairness of the result.” *Id.* (citing *Duncan v. McMurray*, 249 S.W.2d 156 (Ky. 1952); *Appeal of Soucy*, 649 A.2d 60 (N.H. 1994); *Fielding v. South Carolina Election Com'n*, 408 S.E.2d 232 (S.C. 1991). “An election will not be invalidated unless the party contesting the election demonstrates an irregularity or illegality sufficient to change or place in doubt the result.” *Id.* (citing *Middleton v. Smith*, 539 S.E.2d 163 (Ga. 2000)).

85. In *Harris*, the Florida statute included as grounds for contesting an election “Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.” 772 So.2d at 1250 (citation and emphasis omitted). *Harris*

summarized the standard thus: “It is not enough to show a reasonable possibility that election results could have been altered by such irregularities, or inaccuracies, rather, a reasonable probability that the results of the election would have been changed must be shown.” *Id.* at 1255.

86. This generally recognized standard is reflected in this State’s laws. *See, e.g. Vorva v. Plymouth-Canton Cmty. Sch. Dist.*, 658–59, 584 N.W.2d 743, 746 (Mich. S. Ct. 1998) (“[i]t has been repeatedly held by [the Michigan Supreme Court] that irregularities in the conducting of an election will not invalidate the action taken unless it appears that the result was, or may have been affected thereby.” (quoting *Rosenbrock v. School Dist. No. 3, Fractional*, 74 N.W.2d 32 (Mich. S. Ct. 1955); *Attorney Gen. v. McQuade*, 53 N.W. 944, 945 (Mich. S. Ct. 1892) (“When the result, as shown by the returns, is false and fraudulent, and it is impossible to ascertain the actual vote from the other evidence in the case, the vote of such poll must be wholly rejected.”)).

87. Regarding evidence for invalidating election results in a jurisdiction, *Harris* established that the required showing could be made (inter alia) by “credible statistical evidence” establishing a changed election outcome “by a preponderance of a reasonable probability,” *id.*:

In this case, there is no credible statistical evidence, and no other competent substantial evidence to establish by a preponderance of a reasonable probability that the results of the statewide election in the State of Florida would be different from the result which has been certified by the State Elections Canvassing Commission.

88. In addition to *states* routinely providing for invalidating election results, including in the Presidential Electors context, the U.S. Supreme Court *itself* in *Bush*, 531 U.S. 98, required that partial recounts in some counties (that unconstitutionally employed different and unclear standards for determining voter intent) be excluded from the final count in the Florida 2000 presidential election because of the constitutional flaws identified, *id.* at 107-12.

89. The foregoing articulations of the standard for invalidating election results in a particular jurisdiction—including proof of reasonable probability by credible statistical evidence—should be applied here to determine whether the election results in certain counties should be excluded for purposes of certifying Presidential Electors. In some situations where election results are invalidated, a new election is ordered. *See, e.g., Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004). But with the Electoral College scheduled to be certified by December 8 and to meet and vote on December 14, 2020, there is insufficient time for a new election in the counties involved. Moreover, the Electoral College is unique and statutory provisions provide special procedures for moving the Electoral College vote along expeditiously since the presidency is at issue. So the proper remedy here is to exclude the results from jurisdictions meeting the standard for disqualifying elections from the final results that are certified and reported for Presidential Electors.

90. Because illegal votes dilute legal votes, the evidence establishes, and will establish, that the rights of Voters have been violated by vote-dilution disenfranchisement. Consequently, the presidential-election results from the counties identified should not be included in certified and reported totals for Presidential Electors from this state.

Prayer for Relief

91. Declare that the inclusion of illegal votes in identified counties violates Voters' right to vote under the First and Fourteenth Amendment by vote-dilution disenfranchisement.

92. Declare that the proper remedy for this constitutional violation as applied to presidential-election results is to exclude presidential-election results from those counties for the Presidential Elector certification under 3 U.S.C. § 6 for this state.

93. Under that remedy, declare that there is sufficient evidence that illegal votes were

counted in the identified county or counties to change or place in doubt the results of the November 3, 2020 presidential election results in contested counties, or in the state overall, so that the county's presidential-election results must be invalidated.

94. Enjoin Defendants from preparing and conducting the certification activities for Presidential Electors described in 3 U.S.C. § 6 (and applicable state law implementing the federal provision) without excluding the presidential-election results from the identified counties.

95. Award Voters their costs and attorneys fees under 42 U.S.C. § 1988 and any other applicable authority; and

96. Grant any and all other such relief as this Court deems just and equitable.

Date: November 11, 2020

Respectfully Submitted,

/s/ Maxwell Goss

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** Application for admission forthcoming*

Verified Complaint

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Verification

I, Lena Bally, declare as follows:

1. I am a resident of Michigan.
2. If called upon to testify, I would testify competently as to the matters set forth in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*.
3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Verified Complaint for Declaratory and Injunctive Relief* concerning me and my past and intended activities are true and correct to the best of my knowledge and understanding. 28 U.S.C. § 1746.

Executed on November 11, 2020.

A handwritten signature in blue ink that reads "Lena Bally". The signature is written in a cursive style and is positioned above a horizontal line.

Verification

I, Steven Butler, declare as follows:

1. I am a resident of Michigan.

2. If called upon to testify, I would testify competently as to the matters set forth in the foregoing *Verified Complaint for Declaratory and Injunctive Relief*.

3. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Verified Complaint for Declaratory and Injunctive Relief* concerning me and my past and intended activities are true and correct to the best of my knowledge and understanding. 28 U.S.C. § 1746.

Executed on November 10, 2020.

Steven Butler

In the United States District Court
For the Western District of Michigan
Southern Division

Lena Bally, et al.,

Plaintiffs,

Case No.: 1:20-cv-01088

v.

Gretchen Whitmer, in her official capacity
as Governor of Michigan, **et al.**

Defendants.

Brief in Support of Motion to Expedite

**EXPEDITED CONSIDERATION
REQUESTED**

Brief in Support of Motion to Expedite

Plaintiffs Lena Bally, Steven Butler, Gavriel Grossbard, and Carol Hatch (collectively “Voters”), pursuant to Federal Rule of Civil Procedure 57, move for this Court to Order an expedited schedule, expedited discovery, and an expedited hearing on the merits of the Verified Complaint (ECF No. 1).

Request for Prompt Scheduling Conference

Voters request a prompt scheduling conference to establish an expedited schedule for the resolution of this case.

Request for Expedited Schedule

Voters will be irreparably harmed unless this matter is expedited. In Voters’ Verified Complaint, Voters allege that their U.S. Constitutional right to vote has been infringed by vote dilution because of the number of illegal ballots that were cast and counted in the identified counties, which cast the result of the election for Presidential Electors in these counties, and overall in the state, in doubt and rendered it unascertainable. Voters have no remedy at law if the presidential-election results from the identified counties are included in the certified and reported

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totals for election of Presidential Electors from this state. With the Presidential Electors expected to be certified by December 8, 2020 and to meet and vote on December 14, 2020, there is insufficient time for a new election in the counties involved so the appropriate remedy is to disallow the election results in the identified counties. Moreover, the Electoral College is governed by unique Constitutional and statutory provisions providing special procedures for moving the Electoral College vote along expeditiously since the presidency is at issue. So this case must be resolved expeditiously.

Voters proposed the following expedited schedule:

- (1) All discovery requests and responses thereto, and all third party subpoenas and responses thereto shall be completed no later than November 18, 2020;
- (2) A trial brief shall be filed with the Court by all parties no later than one business day prior to the scheduled trial on the merits;
- (3) A trial on the merits shall be scheduled the week of November 23, 2020; and
- (4) This Court will rule promptly on the matter after the trial.

Request for Expedite Discovery

Voters also will be irreparably harmed if discovery is not expedited, and have shown good cause described herein and in their Verified Complaint for such request. Voters' discovery is needed to perform a complete data analysis fully demonstrating that sufficient illegal ballots were included in the election results in identified counties to change or place in doubt the November 3 presidential-election results. Discovery under the usual timetable will result in delay of Voters' ability to gather time-sensitive and currently not publically available data. Expedited discovery is thus necessary for the suit to proceed under the Voter's proposed schedule. For these

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reasons, Voters ask this Court to waive certain discovery rules in order to expedite discovery.

Specifically, Voters have presented evidence in their Verified Complaint (ECF No. 1) that sufficient illegal ballots were included in the election results in certain counties to alter or to place in doubt the November 3 presidential-election results. In addition to the evidence alleged in the Verified Complaint (ECF No. 1), Voters will provide additional evidence that sufficient illegal ballots were included in the results to change or place in doubt the November 3, 2020 presidential-election results. This evidence will be in the form of expert reports based on data analysis comparing state mail-in/absentee, provisional, limited ballot, and poll-book records for this election, which are currently not publicly available, with state voter-registration databases, United States Postal Service records, Social Security records, criminal justice records, driver records, and other governmental and commercial sources by using sophisticated and groundbreaking programs to determine the extent of illegal voters and illegal votes, including double votes, votes by ineligible voters, votes by phantom (fictitious) voters, felon votes (where illegal), non-citizen votes, illegal ballot harvesting, and pattern recognition to identify broader underlying subversion of the election results.

Voters have persons with such expertise and data-analysis software already in place who have begun preliminary analysis of available data to which final data, not currently publicly available such as the official poll list, will be added and reports generated. However, much of the information necessary for the expert report is not publicly available and is in the hands of Defendants or other government agencies. Expedited discovery is necessary to obtain this information. Voters intend to use expedited discovery to obtain the necessary information which is not publicly available for the expert reports.

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Accordingly, Voters request that this Court order expedition of all discovery according to the proposed schedule and waive certain discovery rules that would impede expedited discovery, as follows:

(1) Voters request that this Court waive the provisions of Federal Rule of Civil Procedure 26(a)(1) requiring initial disclosures and order that initial disclosures need not be made in order to expedite discovery;

(2) Voters further request that this Court waive the requirements of Federal Rule of Civil Procedure 26(f) that parties must confer before initiating discovery and order that Voters may begin discovery immediately pursuant to Federal Rule of Civil Procedure 26(d)(1); and

(3) Voters further request that this Court waive the requirements of Federal Rule of Civil Procedure 45(a)(4) of notice to all parties prior to serving third party subpoenas and permit third party subpoenas to be served immediately without prior notice.

Conclusion

For these reasons, Voters respectfully request that this Court order:

(1) All discovery requests and responses thereto, and all third party subpoenas and responses thereto, shall be expedited and completed no later than November 18, 2020;

(2) A trial brief shall be filed with the Court by all parties no later than one business day prior to the scheduled trial on the merits;

(3) A trial on the merits shall be scheduled the week of November 23, 2020,

(4) This Court will rule promptly on the matter after the trial, and

(5) With respect to discovery,

(a) The Court waives the provisions of Federal Rule of Civil Procedure 26(a)(1)

requiring initial disclosure and orders that initial disclosure need not be made in order to expedite discovery,

(b) The Court waives the requirements of Federal Rule of Civil Procedure 26(f) that parties must confer before initiating discovery and orders that Voters may begin discovery immediately pursuant to Federal Rule of Civil Procedure 26(d)(1), and

(c) The Court waives the requirements of Federal Rule of Civil Procedure 45(a)(4) of notice to all parties prior to serving third party subpoenas and permits third party subpoenas to be served immediately without prior notice.

Voters have attached a proposed order setting scheduling conference (attached as Ex. A) and a proposed order granting their motion to expedite (attached as Ex. B).

Date: November 12, 2020

Respectfully Submitted,

/s/ Maxwell Goss

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Certificate of Compliance

Pursuant to W.D. Mich. LCivR 7.3, I certify that the foregoing brief contains 1,119 words, as defined by LCivR 7.3(b)(I). WordPerfect 2020 was used to generate the word count.

/s/ Maxwell Goss
Maxwell Goss

Certificate of Service

I hereby certify that on November 12, 2020, I caused the foregoing *Brief in Support of Motion to Expedite* in the above-captioned matter to be filed with the United States District Court for the Western District of Michigan, Southern Division, via the Court's CM/ECF system. I also hereby certify that I caused the foregoing to be served via first class mail, and via email when known, upon:

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From: Riordan, Maureen ((b) (6))
Sent: Thur 10/1/2020 3:08:53 PM (UTC-04:00)
Subject: Updated Minnesota documents(with initial Plaintiff's Memo) attached
[CarsonetalMinnestoaMemorandumforPI.pdf](#)
[CarsonetalMemoinoppositionIntervenors.pdf](#)
[CarsonetalPlaintiff'sRelpyInSupport.pdf](#)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JAMES CARSON & ERIC LUCERO,
Plaintiffs,

v.

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

Defendant.

Case No. 0:20- cv-02030-NEB-TNL

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION

This case challenges a patently unlawful consent decree that the Minnesota Secretary of State entered with private litigants that bound the Secretary to violate Minnesota and federal law. Pursuant to its constitutionally delegated authority, the Minnesota Legislature established a bright-line deadline of 8:00 p.m. on November 3, 2020, for mail-in ballots to *arrive* at polling places. It chose November 3 because Congress set the Tuesday after the first Monday in November as a uniform Election Day — the day the voting process must be *consummated* — over 150 years ago. By law, ballots that fail to meet these deadlines are not to be counted. But the Secretary has unilaterally moved that deadline *eight days* with no colorable basis in legislative authority and in direct conflict with crystal-clear statutory mandates.

This is an *ultra vires* exercise of power that conflicts with the United States Constitution in two independent respects. First, Article II mandates that the rules governing presidential elections be set by Congress or the “Legislature” of each state, and the Secretary is neither. He therefore has no independent power to set any regulations governing presidential elections, let alone regulations that directly conflict with acts of

Congress and the State Legislature. Second, Congress established by statute November 3 as Election Day, and the Secretary has agreed to count ballots received and even potentially *mailed* after Election Day. By refusing to treat November 3 as the consummation of the voting—but merely its *beginning*—the Secretary has violated federal law, and his agreement must yield.

The Secretary’s decision to count unlawfully cast ballots promises to inflict severe vote dilution on Plaintiffs and all other Minnesota voters and to injure Plaintiffs directly, as Presidential Elector candidates. Worse, the choice to depart from the laws of the Minnesota Legislature threatens to cast the legitimacy of the entire statewide vote in doubt and creates a significant risk that Congress will not recognize the certified election results. These are irreparable harms, and the public interest plainly favors an injunction that would prevent them. The Court should act promptly to do just that.

Background

I. Congress and the Minnesota Legislature Exercise Their Constitutional Authority To Establish a Single Election Day, Which Is November 3 This Year

Article II of the Constitution establishes state and federal roles in enacting the laws governing presidential elections. Article II, § 1, cl. 2 identifies states’ role as: “appoint[ing] in such Manner as the *Legislature* thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.” U.S. Const. Art. II, § 1, cl. 2 (emphasis added). The term “Legislature” in this provision means what it says. The legislature of each state, not its executive actors or courts, has authority to define the “Manner” of choosing electors. *See, e.g., McPherson v. Blacker*, 146 U.S. 1, 25 (1892). In Minnesota, the “Legislature” within the meaning of Article II is the Minnesota Legislature.

The role of Congress is governed by Article II, § 1, cl. 4, which provides that “Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.” Congress has acted under this authority to set the time of choosing electors, and various statutes, taken together, “mandate[] holding all congressional and Presidential elections on a single November day.” *Fosterv. Love*, 522 U.S. 67, 67 (1997). This “immediate act of the people of America” protects the selection of the President from “cabal, intrigue, and corruption.” *The Federalist* No. 68 at 459 (Hamilton) (Cooke ed., 1961).

Both Congress and the Minnesota Legislature have exercised their respective authorities to regulate presidential elections.

A. Congress Exercised Its Power

Congress has exercised its authority by setting a single Election Day. Congress provided that “[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.” 3 U.S.C. § 1. This year, that date is Tuesday, November 3, 2020.

This statute necessarily forbids states from holding votes for the presidency after November 3. Another statute provides: “Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.” 3 U.S.C. § 2. This statute only applies if a state has held an election and failed “to make a choice on the day prescribed by law....” It

does not authorize states to allow voting in that election on days after the Tuesday after the first Monday in November.

Congress also set the time for electors appointed in each state to meet and vote: “The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.” 3 U.S.C. § 7. This year, that date is December 14, 2020. A state that fails to comply with these acts of Congress forfeits its votes in the Electoral College.

In addition, Congress provided a statutory safe harbor to allow states to provide a binding determination of its electors’ vote. 3 U.S.C. § 5. To qualify for the safe harbor, a state must have “provided, by laws enacted prior to the day fixed for the appointment of electors,” a means of determining “any controversy or contest concerning the appointment of” electors, and must have completed the process “at least six days before the time fixed for the meeting of the electors.” 3 U.S.C. § 5. This year, the safe-harbor deadline is December 8, 2020.

B. The Minnesota Legislature Exercised Its Power

The Minnesota Legislature has exercised its constitutional duty to establish rules governing the manner of presidential elections. Minnesota assigns all of its electors to the presidential candidate who receives the “highest number of votes” in the statewide vote. Minn. Stat. § 208.05. Minnesota statutes follow federal law and set the state general election as the first Tuesday after the first Monday of November. Minn. Stat. § 204D.03 Subd. 2. Voters may vote in person, *id.* § 204B.16, and if they do so, they must be in line at the polling place before 8:00 p.m. on voting day, when the polls close. *Id.* § 204C.05. In-person voting is not permitted after Election Day.

Minnesota law also authorizes in-person absentee voting “during the 46 days before the election,” *id.* § 203B.081, and absentee voting by mail, *id.* §§ 203B.04, 203B.08. No different from voters who elect to vote in person, those who elect to vote by mail must vote on or before Election Day, not after Election Day. The law requires any ballot received on Election Day “either (1) after 3:00 p.m., if delivered in person; or (2) after 8:00 p.m., if delivered by mail or package delivery service, [to] be marked as received late by the county auditor or municipal clerk” and requires that any such late ballot “must not be delivered to the ballot board.” *Id.* § 203B.08 subd. 3, *see also* §§ 204B.45–46. Ballots that are not delivered to the ballot board are not counted. In this way, the law enacted by the Minnesota Legislature does not permit the counting of votes contained in absentee ballots received after the 8:00 p.m. deadline.

Minnesota law provides that the Secretary is the State’s chief elections administrator and administers Minnesota’s election laws.¹ Reinforcing the Election Day receipt deadline, the Secretary has promulgated rules establishing election procedures consistent with Minnesota and federal statutes. These regulations direct municipal clerks to “communicate with the United States postal service facility serving the municipality with regard to the handling of absentee ballot return envelopes” and to “take all reasonable steps to ensure that all return envelopes received by the post office before 4 p.m. on election day are delivered before the closing of the polls to the ballot board.” Minn. R. 8210.2500. The regulations are clear: ballots “received after election day shall be marked as received late...and must not be delivered to the ballot board.” *Id.*

¹ Among other duties, he “adopt[s] 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.

Additionally, any absentee ballot return envelopes “delivered in person by an absent voter or an agent must be received by the county auditor or municipal clerk by 3:00 p.m. on election day,” *id.* at 8210.2200. These regulations demonstrate that the Secretary understands Minnesota statutes to establish a non-negotiable deadline of receipt of ballots by 8:00 p.m. on Election Day.

II. The Secretary Agrees With Private Litigants To Change the Election Day

In May 2020, a group of registered Minnesota voters and the Minnesota Alliance for Retired Americans Educational Fund (“the State Plaintiffs”) filed a complaint against the Secretary in Minnesota state court, challenging *inter alia* the Election Day receipt requirements applicable to mail-in absentee votes.² Foix Decl. Ex. A.

Rather than contest the complaint and defend the Legislature’s enactments, the Secretary struck a deal with the State Plaintiffs to give them what they were seeking. Their consent decree provides that, “[f]or the November General Election [Secretary Simon] shall not enforce the Election Day Receipt Deadline for mail-in ballots, as set out in Minn. Stat. §§203B.08 subd. 3, 204B.45, and 204B.46 and Minn. R. 8210.2220 subp. 1, and 8210.3000, that ballots shall be received by 8:00 p.m. on Election Day...” Foix Decl. Ex. B.³ The Secretary agreed to “issue guidance instructing all relevant local election officials to count all mail-in ballots in the November General Election that are otherwise validly cast and postmarked on or before Election Day but received by 8 p.m. within 5 business days of Election Day (i.e., seven calendar days, or one week.” *Id.* at VI.D. Additionally, the agreement provides that, when “a ballot does not bear a postmark date, the election official reviewing the ballot should presume that it

² The Secretary is the State’s chief elections administrator and administers Minnesota’s election laws.

³ The Consent Decree was affirmed by the Court’s August 3, 2020 order. Foix Decl. Ex. C.

was mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day.” *Id.* By entering into agreement, the Secretary has chosen to abandon the enforcement of statutes enacted by the Minnesota Legislature.

III. The Secretary’s Agreement Threatens the Integrity of Minnesota’s Presidential Election and the Disenfranchisement of the Entire State’s Electorate and Imposes Irreparable Harm on Plaintiffs

Plaintiff James Carson is a registered Minnesota voter and a nominee of the Republican Party to participate in the Electoral College as a presidential elector. Declaration ¶¶1, 9; *see also* Minn. Stat. § 208.03. Plaintiff Eric Lucero is a registered Minnesota voter, serves in the Minnesota House of Representatives as the representative of District 30B and has also been certified as a nominee of the Republican Party to participate in the Electoral College as a presidential election. Declaration ¶¶, 10.

The Secretary’s agreement to alter acts of the Minnesota Legislature and Congress work a direct and substantial harm on various interests of both Plaintiffs. First, the Secretary’s agreement will necessarily result in the counting of many ballots—perhaps hundreds of thousands—that by law may not be counted in the presidential election. The result of this change in law is dilute the value of Plaintiffs’ votes and permit the counting of ballots for Plaintiffs’ opponents for the elector offices they seek. Carson Declaration ¶¶ 7, 10-15, Lucero Declaration ¶¶7, 10-11, 13.

Second, the Secretary’s agreement to violate federal and state law creates substantial uncertainty where those laws create clarity. Statutory law, which is superior to the Secretary’s executive authority, establishes a deadline, but Plaintiffs are unable to discern whether that law governs or the Secretary’s alterations govern. This uncertainty frustrates Plaintiffs’ ability to determine whether to vote in person (and thereby

risk exposure to the Coronavirus) or cast absentee ballots (and thereby risk that their votes will not be counted) and how to advise those who intend to vote for them.

Third, the Secretary's agreement to violate federal and state law threatens to disenfranchise all Minnesota voters. A procedure for resolving election contests (which the vote-counting process qualifies as) will not satisfy Congress's safe harbor of 3 U.S.C. § 5 unless it is resolved "by laws enacted prior to the day fixed for the appointment of electors." The consent decree is not an enacted law but an executive policy in flat contradiction to State law. Adherence to this policy over and against Minnesota's "enacted" laws creates a clear and present danger that Minnesota's election results will not be accepted under the safe harbor law and therefore will not be accepted by the United States Congress in determining the winner of the presidential election. As the Secretary intends to conduct the election, Congress will have no obligation to respect the popular vote of Minnesota's electorate. This threatens Plaintiffs' opportunity to cast meaningful votes and to take office as Electors and participate in the Electoral College.

Fourth, the Secretary's selection deadlines risk placing the resolution of the contest past dates Congress has set for both the safe harbor and the actual vote of the Electoral College. Under those deadlines, it will remain unknown who wins the state's vote for at least eight days after Election Day, and any contest about the ultimate result is unlikely to reach a conclusion before the safe-harbor deadline or even before the vote of the Electoral College. There is a substantial risk that Plaintiffs' votes will be completely meaningless, if either Minnesota loses its representation in the Electoral College or its asserted results do not qualify for the safe harbor. This is yet another way in

which the Secretary's actions threaten Plaintiffs' right to cast meaningful votes and opportunity to participate in the Electoral College.

Legal Standard

"When deciding whether to grant a preliminary injunction, district courts must consider whether (1) the plaintiffs are "likely to succeed on the merits," (2) they are "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tip[ped] in [their] favor," and (4) "an injunction [is] in the public interest." See *Jones v. Jegley*, 947 F.3d 1100, 1104–05 (8th Cir. 2020) (quoting *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008)).

Argument

I. Plaintiffs Are Likely To Succeed on the Merits of Their Claim that the Consent Decree Violates Federal Law and the Constitution

The Secretary's agreement to violate state and federal law by counting ballots received and even mailed after Election Day is plainly unlawful and is virtually certain to be held as such after final judgment. First, the Secretary lacks the constitutional authority to depart from the laws established by Congress and the Minnesota Legislature and to set a completely new set of time-and-manner election regulations that flatly *contradict* those laws. Second, the Secretary's choice to count ballots cast after election day plainly contradicts federal law and is preempted. Each of these violations of the Constitution is itself a sufficient basis for an injunction and establishes that the first element is met.

A. The Secretary's Agreement Is *Ultra Vires* in Violation of Article II of the Constitution

The Secretary's agreement violates Article II of the Constitution by arrogating to himself, an executive actor, the authority to regulate presidential elections, which Article II vests solely with legislative actors: Congress and the "Legislature" of each

state. The Secretary has no authority to set time or manner regulations governing presidential elections by overriding the law enacted by the Minnesota Legislature and yet has purported to do so by an agreement with private parties. That is unconstitutional.

The Article II delegation of authority over presidential elections confers on Congress and state legislatures a share of *federal constitutional* lawmaking authority. As the Supreme Court unanimously held in *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000), “in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.” *Id.* at 473–74. This provision “convey[s] the broadest power of determination” and “leaves it to the legislature *exclusively* to define the method” of appointment of electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (emphasis added). Indeed, because “[t]his power is conferred upon the legislatures of the States by the Constitution of the United States,” it “cannot be taken from them or modified” even by “their State constitutions.” *Id.* at 35; *see also Bush v. Gore*, 531 U.S. 98, 112–13 (2000) (Rehnquist, J., concurring).

It necessarily follows that only the Minnesota Legislature, not the Secretary, may establish regulations governing the upcoming presidential election. The word “legislature” was “not one ‘of uncertain meaning when incorporated into the Constitution.’” *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). The term “legislature” necessarily differentiates between that body and the “State” of which it is only a subpart. By empowering one body of the state to

prescribe election rules, the Constitution impliedly denies it to other state bodies and officials, including the Secretary.

Further, the Article II delegation of authority is the states' sole basis for regulating presidential elections. This power is neither inherent nor persevered under the Tenth Amendment. *Cook v. Gralike*, 531 U.S. 510, 522 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). Because there is no basis for Minnesota to regulate elections to the presidency outside of the delegation of Article II, any regulation not promulgated by the Minnesota Legislature is beyond the very authority of Minnesota, as a sovereign, to regulate in this arena.

There is then no authority for the Secretary to establish *any* rules governing the time of presidential elections, let alone rules that *directly contradict* statutes enacted by "the Legislature" of Minnesota. U.S. Const. Art. II, § 1, cl. 1. Neither the Minnesota Legislature nor Congress passed laws providing that voters may vote up to *eight days* after Election Day, and the bright line deadline of 8:00 p.m. on that date for ballots to *arrive* reflects a clear and unmistakable legislative *rejection* of the Secretary's position. The Secretary has agreed to a panoply of new election rules with no basis whatsoever in the Constitution or Minnesota statutory law, and the agreement unlawfully promulgates rules in direct contravention of Minnesota statutory law. In short, the Constitution delegates no authority to the Secretary, and the Secretary's act violates the law established by the body that ~~does~~ received delegated authority.

Article II affords this violation of *Minnesota* law a *federal* constitutional significance. It is Article II itself that delegates the power to regulate elections, so "the text of the election law itself...takes on independent significance." *Bush*, 531 U.S. at 112-13 (Rehnquist, J., concurring). "A significant departure from the legislative scheme for

appointing Presidential electors presents a federal constitutional question.” *Id.* 113. The question whether rules promulgated by the Secretary constitute as manner restrictions “direct[ed]” by the Minnesota “Legislature,” U.S. Const. Art. II, § 1, cl. 2, is a federal constitutional question for this Court to resolve. And the plain answer is no.

B. The Secretary’s Agreement Contravenes Acts of Congress

The Secretary’s agreement violates federal law yet again insofar as it directly conflicts with Acts of Congress setting the Election Day. The new deadlines and ballot-counting procedures the Secretary has set would therefore be unlawful even if the Minnesota Legislature had adopted them.

Courts have uniformly interpreted Article II to confer on Congress a unique authority over presidential elections, which supersedes state authority in the event of a conflict. *See Oregon v. Mitchell*, 400 U.S. 112, 124, (1970) (“It is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections and to set the qualifications for voters for electors for those offices.”); *cf. Anderson v. Celebrezze* 460 U.S. 780, 784–85 (1983). Here, Congress has acted definitively by statute to establish the Tuesday after the first Monday in November as the *sole* day for choosing electors for the presidency. 3 U.S.C. § 1. This choice of the Tuesday after the first Monday in November goes back at least to January 1845, which Congress passed the “Presidential Election Day Act.” 28 Cong. Ch. 1, 5 Stat. 721.

As *Foster v. Love*, 522 U.S. 67 (1997) recognized, this provision and others “mandate[] holding all elections for Congress and the presidency on a single day throughout the Union.” *Id.* at 69–70. *Foster* rejected a state’s efforts to conduct an election on a day other than election day as preempted by act of Congress. *Id.* at 74. Indeed, a single Election Day was what the framers of the Constitution envisioned. Alexander Hamilton opined that “uniformity in the time of elections...may be found by experience to

be of great importance to the public welfare,” The Federalist No. 61 at 413 (Hamilton) (Cooke ed. 1961) and that “the immediate act of the people of America” in selecting electors would frustrate “cabal, intrigue, and corruption.” The Federalist No. 68 at 459 (Hamilton) (Cooke ed., 1961). Indeed, during the reconstruction era, “Congress expressly considered [and rejected] an amendment to continue to allow states in which by law polls are held open more than one day to continue the practice.” *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1173 (9th Cir. 2001) (internal quotation marks omitted). Congress rejected this proposal for a simple and plain reason: “It gives some states undue advantage. It gives some parties undue advantage.” Cong. Globe, 42d Cong., 2d Sess. 141 (1871)⁴

For these reasons, the case law is unanimous that Election Day must be the “consummation” of the process of voting. *Voting Integrity Project*, 259 F.3d at 1175 (applying *Foster*, 522 U.S. at 67). There is “no dispute that the combined actions must occur, that voting must end, on federal election day.” *Lamone v. Capozzi*, 912 A.2d 674, 692 (Md. 2006). Any “regime of combined action meant to make a final selection on any day other than federal election day” violates federal law. *Millsaps v. Thompson*, 259 F.3d 535, 547 (6th Cir. 2001). Of unique relevance on this point is *Maddox v. Bd. of State Canvassers*, 149 P.2d 112 (Mont. 1944), which rejected a Montana statute, enacted during World War II, that authorized overseas ballots that arrived in December to be counted in the presidential election. *Id.* at 114. Notwithstanding the legislature’s good intentions to assist absent servicemembers in voting, the court found the act unconstitutional, holding that “the legislature may not constitutionally extend beyond

⁴ For all of these reasons, the notion the Election Day is unconstitutional is patently incorrect.

‘the Tuesday next after the first Monday in November’ the time when the presidential electors shall be appointed or elected by the ballots of the voters’*Id.* at 114.

This case is no different. The Secretary’s new state-law regime treats Election Day as the beginning, not the consummation, of voting. Under the Secretary’s agreement, votes will be counted if they arrive up to eight days after Election Day. And, so long as they do not bear a postmark, they will be counted even if they are *mailed after Election Day*. This means that voters who decide to vote on November 4, or even later, may still vote in Minnesota, and the Secretary has required that these votes be counted. That contravenes the law of Congress and is preempted.

II. Plaintiffs —and the Entire State of Minnesota —Will Suffer Irreparable Harm in the Absence of an Injunction

The Secretary’s agreement to violate state and federal law will inflict irreparable harm on Plaintiffs, unless this Court intervenes. The Secretary’s newfangled policy of counting invalid votes is certain to dilute the value of Plaintiffs’ votes. The “principal issue[]” here is “whether the votes that have been ordered to be counted are, under a reasonable interpretation of [Minnesota] law, legally cast votes,” and the “counting of votes that are of questionable legality...threaten[s] irreparable harm.” *Bush v. Gore*, 531 U.S. 1046, 1047 (2000) (Scalia, J., concurring in order issuing stay pending appeal).

By increasing the pool of counted votes to include those illegally cast after Election Day, the Secretary will dilute the votes of all voters who dutifully comply with Minnesota statutory law and submit their ballots by Election Day. This is a paradigmatic irreparable harm supporting provisional injunctive relief. *Montano v. Suffolk Cty. Legislature* 268 F. Supp. 2d 243, 260 (E.D.N.Y. 2003) (“An abridgement or dilution of the right to vote constitutes irreparable harm.”); *Patino v. City of Pasadena* 229 F. Supp. 3d 582, 590 (S.D. Tex. 2017) (“The irreparable harm to the plaintiffs’

fundamental right to vote weighs heavily against a stay.”); *Day v. Robinwood W. Cmty. Improvement Dist.*, 2009 WL 1161655, at *3 (E.D. Mo. Apr. 29, 2009) (“These Plaintiffs are threatened with an irreparable harm because, absent a preliminary injunction, their votes will be diluted in the upcoming June 9, 2009 election.”); *Democrat Nat’l Comm. v. Republican Nat’l Comm.*, 2016 WL 6584915, at *17 (D.N.J. Nov. 5, 2016) (collecting cases).

And the Secretary’s agreement imposes special injury on Plaintiffs, who are not only voters, but also candidates for office. Because “the rights of voters and the rights of candidates do not lend themselves to neat separation,” *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (quotation marks omitted), “laws that affect candidates always have at least some theoretical, correlative effect on voters” and vice versa. *Bullock v. Carter*, 405 U.S. 134, 143 (1972); cf. *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973) (permitting “both candidates and voters” to challenge an election law “because of its impact on voting rights,” and because a “candidate for public office...is so closely related to and dependent upon those who wish to vote for him and his litigation will so vitally affect their rights....”). The Secretary’s agreement to violate state and federal law will dilute all validly cast votes, including all votes validly cast for Plaintiffs as electors. That irreparable injury runs directly to Plaintiffs in their capacity as candidates to represent Minnesota as electors.

In addition, the legal infirmity of the Secretary’s agreement and concomitant set of policies has created a significant uncertainty about the rules governing the November election and whether *any* Minnesota citizens will have their votes counted. A procedure for resolving election contests (which the vote-counting process qualifies as) will not satisfy Congress’s safe harbor of 3 U.S.C. § 5 unless it is resolved “by laws enacted

prior to the day fixed for the appointment of electors.” See *Bush v. Gore*, 531 U.S. 98, 111 (2000). The consent decree is not an enacted law but an executive policy in flat contradiction to enacted law. As a result, the implementation of these policies over and against Minnesota’s “enacted” laws creates a clear and present danger that Minnesota’s election results will not be accepted under the safe harbor law and therefore will not be accepted by the United States Congress in determining the winner of the presidential election. As the Secretary intends to conduct the election, Congress will have no obligation to respect the popular vote of Minnesota’s electorate, and Minnesota’s popular vote may prove completely worthless.

If it is irreparable harm to dilute even one vote (it is), it is clearly irreparable harm to deny any value to any vote cast by anyone in the entire state of Minnesota. That harm would yet again directly impact Plaintiffs in their capacities as candidates to represent Minnesota as electors. The Secretary’s unlawful policy will confer on Congress the unfettered right to reject the results of the statewide vote and thereby deny Plaintiffs the opportunity to serve as electors and participate in the Electoral College.

A further harm results from the Secretary’s election deadlines risk placing the resolution of the contest past dates Congress has set for both the safe harbor and the actual vote of the Electoral College. It will remain unknown who wins the state’s vote for at least eight days after Election Day, and any contest about the ultimate result is unlikely to reach a conclusion before the safe-harbor deadline or even before the vote of the Electoral College. There is a substantial risk that Plaintiffs’ votes will be completely meaningless, if either Minnesota loses its representation in the Electoral College or its asserted results do not qualify for the safe harbor.

III. The Balance of Equities and the Public Interest Favor an Injunction

There is no contest on the other equitable factors. “[I]t is always in the public interest to protect constitutional rights” and “[t]he balance of equities generally favors...constitutionally-protected freedom[s].” *Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019) (cleaned up). *Cf. Willson v. City of Bel-Nor, Mo.*, 924 F.3d 995, 999 (8th Cir. 2019).

The balance of equities is one-sided. On the one hand, the Secretary’s policy is sure to inflict substantial vote dilution of millions of Minnesota voters (including Plaintiffs) and places the entire statewide vote at risk. That is an injury of the highest and most severe constitutional magnitude, for reasons stated above.

On the other hand, the Secretary has no interest at all in setting rules that the Constitution does not allow him to set. And the Secretary’s interest in settling a meritless lawsuit—contending nonsensically that Election Day is unconstitutional—carries zero weight. *Cf. Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (holding that a state has “no...interest in avoiding meritless lawsuits”). Further, even if the Secretary is (somehow) vindicated by the final resolution of this case, the harm of an erroneous ruling at this stage would be non-existent: the Secretary would simply be compelled to conduct this election the way every Minnesota Secretary of State has conducted elections for generations. An order compelling the Secretary to do what Minnesota law tells the Secretary to do does not inflict any meaningful injury on the Secretary *in his official capacity* (i.e., as an officer of the state charged with carrying out the law enacted by the Legislature)—and certainly not one sufficiently severe as to outweigh the voting rights of every last Minnesota citizen. And the State’s interest is for the valid laws enacted by its Legislature to be enforced. *See, e.g., Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1144 (8th Cir. 2005) (recognizing a “State’s interest in enforcing its laws”).

The public interest emphatically supports a preliminary injunction. Again, “it is always in the public interest to protect constitutional rights,” *Phelps Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008),⁵ and the right to vote of each Minnesota citizen hangs in the balance and is directly threatened by the Secretary’s unlawful agreement. The policies Congress implemented in setting an Election Day well over 100 years ago, and the policies of the Minnesota Legislature in honor that date with a clear received-by deadline, vindicate the public’s interest in the integrity of presidential elections and in a clear set of rules—that have proven fair over generations of practice—for voters to follow in casting their votes. Indeed, the Secretary’s unlawful agreement is of momentous concern to the entire State and the country, “by casting a cloud upon...the legitimacy of the election.” *Bush*, 531 U.S. at 1047 (Scalia, J., concurring in order granting a stay pending appeal). No Minnesota citizen benefits from that cloud, and every Minnesota voter would benefit from an injunction.

CONCLUSION

The Court should grant the motion and enjoin the Secretary’s unlawful agreement to count ballots received after 8:00 p.m. on Election Day.

⁵ Overruled on other grounds by *Phelps Roper v. City of Manchester Mo.*, 697 F.3d 678 (8th Cir. 2012).

Date: September 24, 2020

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L.R. 7.1(f) CERTIFICATE OF COMPLIANCE

I, Danyll W. Foix, hereby certify that the forgoing Memorandum of Points and Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction complies with Local Rule 7.1(f).

I further certify that, in preparation of the above document, I obtained the word count from Microsoft Word and the above document contains 5,284 words.

Date: September 24, 2020

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JAMES CARSON & ERIC LUCERO,

Plaintiffs,

v.

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

Defendant,

and

ROBERT LAROSE, TERESA MAPLES,
MARY SANSOM, GARY SEVERSON, &
MINNESOTA ALLIANCE FOR
RETIRED AMERICANS EDUCATIONAL
FUND,

Intervenor-Defendants.

Civil Action No. 0:20-cv-02030
(NEB/TNL)

**INTERVENOR-DEFENDANTS'
MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR A PRELIMINARY
INJUNCTION**

“There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted.” *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

Recognizing this constitutional imperative, and seeking to ensure that all eligible Minnesotans have safe and meaningful opportunities to cast ballots during an unprecedented public health crisis, Intervenor-Defendants Robert LaRose, Teresa Maples, Mary Sansom, Gary Severson, and Minnesota Alliance for Retired Americans (the “Alliance,” and collectively, “Intervenors”) filed suit in Minnesota state court, challenging two provisions of the State’s election laws that impose particular hardships on voters relying on mail ballots. Defendant Steve Simon, the Minnesota Secretary of State (the “Secretary”), entered a consent decree with Intervenor (the “Consent Decree”), agreeing to forgo enforcement of the challenged laws during the November 2020 general election (the “November Election”). Following extensive briefing, a hearing, and a determination that Intervenor were likely to succeed on the merits of their constitutional challenges to Minnesota’s election laws, Ramsey County District Court Judge Sara Grewing issued an order entering the Consent Decree on August 3, 2020.

That should have been the end of this story. Instead, nearly *two months* after Judge Grewing entered the Consent Decree, Plaintiffs James Carson and Eric Lucero challenge the reasonable and constitutionally required resolution of the state court litigation. Relying on misreadings of the law and rank speculation, they seek to upend the plans already in place to ensure that every vote is counted in November and, in so doing, threaten to disenfranchise countless vulnerable Minnesotans.

Plaintiffs' lawsuit—a collateral attack on a state court judgment and the resulting consent decree—raises basic questions of propriety; as the U.S. Supreme Court recently noted, a party “lack[s] a cognizable interest in the State’s ability to ‘enforce its duly enacted’ laws” where “state election officials support [a] challenged decree, and no state official has expressed opposition.” *Republican Nat’l Comm. v. Common Cause R.I.*, No. 20A28, 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020) (quoting *Abbott v. Perez*, 138 S.Ct. 2305, 2324 n.17 (2018)). But even if Plaintiffs’ suit were not fundamentally inappropriate, they have failed to meet the high burden required for the extraordinary remedy of preliminary injunctive relief.

Plaintiffs cannot succeed on the merits of their claims, which are not only wrong as a matter of law, but also precluded by several jurisdictional and procedural bars. And the purportedly irreparable injuries they claim will be suffered absent an injunction are ultimately fictions, supported by nothing more than supposition and conjecture. By striking contrast, their requested relief *will* result in widescale

disruption ahead of the November Election, and *will* cause voters to suffer disenfranchisement.

“[A]n injunction is an equitable remedy,” and, as such, must be deployed to achieve equitable ends. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982). Plaintiffs should not be permitted to launch a procedurally, legally, and factually improper attack on the Consent Decree—one that risks confusion and disenfranchisement for Minnesota voters—when they have fallen far short of the considerable showing required for the extraordinary relief they seek. For these reasons and those that follow, Intervenors respectfully request that Plaintiffs’ motion be denied.

BACKGROUND

I. The State Court Action

Each year, Minnesota disenfranchises thousands of voters whose completed mail ballots are postmarked on or before Election Day but arrive after 8 p.m. (the “Election Day Receipt Deadline”). See Minn. Stat. §§ 203B.08 subd. 3, 204B.45, 204B.46; Minn. R. 8210.2220 subp. 1; Minn. R. 8210.3000. Recognizing that the ongoing coronavirus pandemic would increase Minnesotans’ reliance on absentee voting during both the August primary election (the “August Primary”) and the November Election, Intervenors filed suit against the Secretary in state court on May 13, 2020. See Declaration of Danyll W. Foix (“Foix Decl.”), ECF No. 14, Ex. A.

Intervenors include the Alliance, a nonprofit that seeks to ensure social and economic justice and full civil rights for its more than 84,000 members; individual voters who are at an increased risk of severe illness or death if exposed to COVID-19; and voters whose ballots have been—or are likely to be—rejected as a result of the Election Day Receipt Deadline. *See id.*, Ex. A ¶¶ 9–14. Their complaint sought to enjoin both the Election Day Receipt Deadline and the witness-signature requirement for mail ballots. *See id.*, Ex. A ¶¶ 98–142.

On June 16, Intervenors and the Secretary entered a consent decree in which the Secretary agreed not to enforce these provisions during the August Primary. Two days later, the Republican Party of Minnesota, Republican National Committee, and National Republican Congressional Committee (the “State Court Intervenors”) filed a notice of intervention. On July 2, Intervenors filed a motion for temporary injunction, demonstrating that the Election Day Receipt Deadline violates both the fundamental right to vote and the due process clauses of the U.S. and Minnesota Constitutions. *See Ex. 1 at 21–28; see also Ex. 14.*¹ On July 17, the State Court Intervenors filed an opposition to Intervenors’ motion for temporary injunction, arguing that Intervenors failed to establish the unconstitutionality of the challenged laws. *See generally Ex. 11.*

¹ Exhibit cites refer to the exhibits attached to the Declaration of Abha Khanna, filed concurrently with this brief.

That same day, Intervenors and the Secretary filed the Consent Decree, in which the Secretary agreed not to enforce either of the challenged provisions during the November Election. *See* Foix Decl., Ex. B (“Consent Decree”). The State Court Intervenors filed various objections to the Consent Decree—claiming, among other things, that “the Secretary propose[s] to overrule Minnesota’s election laws . . . duly enacted by the people of Minnesota through the Legislature,” that the Consent Decree permits the “count[ing of] votes that are ***invalid under Minnesota state law***,” and that “the Secretary ha[s] no authority to order invalid votes to be counted.” Ex. 12 at 2. On July 31, the state court held a hearing on all pending motions and objections, and on August 3, Judge Grewing issued an order entering the Consent Decree (the “State Court Order”). *See* Foix Decl., Ex. C (“State Court Order”).

The court first considered which legal standard should be applied to a review of the Consent Decree. *See* State Court Order at 17. While Intervenors advocated a basic fairness inquiry, the State Court Intervenors argued “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.” *Id.* (citing *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975)). Under the latter standard, Judge Grewing explained, “[c]ourts 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.” *Id.* (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)). “Because the Court would reach the same result under the federal standards,” it ultimately “analyze[d] the proposed entry of the consent decree under both Minnesota and federal law.” *Id.* at 18.

The state court’s analysis under Minnesota law was straightforward. “It is undisputed,” the court explained,

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. [Intervenors and the Secretary] 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.

Id. The court also observed that “[t]he Consent Decree [] affords [the Secretary] sufficient time to provide instruction and certainty to voters and local election officials before absentee voting begins on September 18.” *Id.*

In applying the more probing federal standard, the state court concluded that Intervenors were likely to succeed on the merits of their constitutional challenges to the Election Day Receipt Deadline. After observing that courts have recently approved similar agreements extending the receipt deadline for mail ballots and determining that “safety concerns for the ballot box are not so speculative as to render the Secretary’s decision to resolve the Plaintiff’s complaints unreasonable,” the state court concluded that Intervenors

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.

Id. at 21–23, 25.² Upon further concluding that “waiver of the . . . 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,” the state court entered the Consent Decree. *Id.*

The State Court Intervenors appealed. On August 18, the parties signed a stipulation to dismiss the appeal (the “Stipulation”), with the State Court Intervenors “waiv[ing] the right to challenge in any other judicial forum the [State Court Order] and the [Consent Decree].” Ex. 15 at 2. The Minnesota Supreme Court dismissed the appeal pursuant to the Stipulation. *See* Ex. 16 at 2.

II. The Consent Decree

Under the Consent Decree, the Secretary agreed to “issue guidance instructing all relevant local election officials to count all mail-in ballots in the November General Election that are otherwise validly cast and postmarked on or

² There appears to be a typographical error in the State Court Order. Given that the underlying action *challenged* the Election Day Receipt Deadline—and that the court agreed with Intervenors’ factual and legal conclusions—the order is more reasonably read as concluding that “a ballot placed with the United States Postal Service quite possibly might not be delivered until *after* Election Day.”

before Election Day but received by 8 p.m. within 5 business days of Election Day.” Consent Decree at 10. He further agreed to “issue instructions to include with all absentee and designated mail ballots” to inform voters that mail ballots “postmarked on or before Election Day and received by 8 p.m. within 5 business days of Election Day . . . will be counted.” *Id.* at 11. “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 after Election Day.” *Id.* at 10. As defined in the Consent Decree, “postmark [] refer[s] to any type of imprint applied by the United States Postal Service to indicate the location and date the Postal Service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks.” *Id.*

On August 28, the Secretary issued the prescribed guidance to local election officials and provided them with materials that could be distributed to educate voters about the new deadline. *See* Ex. 21. The Secretary also updated his website to directly inform voters about the change, *see, e.g.*, Ex. 22, and numerous news outlets made similar announcements. *See, e.g.*, Exs. 23–24. Likewise, groups dedicated to voter education and engagement, including the Alliance, began informing voters of the deadline in reliance on the Consent Decree. *See* Ex. 17 ¶¶ 9–11; Ex. 18 ¶¶ 6–8. Local election officials began printing absentee ballots—including instructions about the postmark deadline—after certification of candidate names on August 28.

See Minn. R. 8210.0500; Ex. 25. Officials began sending these ballots to voters on September 18. See Minn. Stat. § 204B.35. As of that date, over 1 million voters had requested absentee ballots, a number that the Secretary described as “off the charts.” Ex. 26 at 1.

III. Plaintiffs’ Suit

Nearly two months after the Consent Decree was entered, on September 22, 2020, Plaintiffs filed their complaint, alleging that the Consent Decree violates the U.S. Constitution and federal law. See Complaint (“Compl.”), ECF No. 1. Count I claims that the Consent Decree is an impermissible exercise of the Secretary’s authority and thus violates Article II of the U.S. Constitution. See *id.* ¶¶ 75–83. Count II alleges that the Consent Decree “permits Minnesota voters to vote for president *after* Election Day,” in violation of federal statutes setting the dates of elections. *Id.* ¶¶ 84–90. Plaintiffs subsequently moved for a preliminary injunction, asking this Court to “enjoin the Secretary’s unlawful agreement to count ballots received after 8:00 p.m. on Election Day.” See Memorandum in Support of Plaintiffs’ Motion for a Preliminary Injunction (“Mot.”), ECF No. 13, at 18.

The Court granted Intervenors’ unopposed motion to intervene as defendants on September 28, 2020. See ECF No. 33.

STANDARD OF LAW

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); accord *Brand Advantage Grp., Inc. v. Henshaw*, Civil No. 20-225 (JRT/HB), 2020 WL 1891772, at *7 (D. Minn. Apr. 16, 2020) (“Because ‘a preliminary injunction is an extraordinary and drastic remedy, one [] should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” (alteration in original) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997))).

“A plaintiff seeking a preliminary injunction must establish’ four factors showing such relief is warranted”:

- (1) “he is likely to succeed on the merits”;
- (2) “he is likely to suffer irreparable harm in the absence of preliminary relief”;
- (3) “the balance of equities tips in his favor”;
- and (4) “an injunction is in the public interest.”

MPAY Inc. v. Erie Custom Comput. Applications, Inc., 970 F.3d 1010, 1015 (8th Cir. 2020) (quoting *Wise v. Dep’t of Transp.*, 943 F.3d 1161, 1165 (8th Cir. 2019)). “[T]he ‘party seeking injunctive relief bears the burden of proving’ that the relevant factors ‘weigh in its favor.’” *Id.* (quoting *Mgmt. Registry, Inc. v. A.W. Cos.*, 920 F.3d 1181, 1183 (8th Cir. 2019)). A party seeking a preliminary injunction must have Article III standing, see *Rodgers v. Bryant*, 942 F.3d 451, 454-55 (8th Cir. 2019), and the action must be justiciable. See *First Lutheran Church v. City of St. Paul*, 326 F.Supp.3d 745, 757 (D. Minn. 2018).

ARGUMENT

I. Plaintiffs cannot succeed on the merits.

Plaintiffs' suit is an improper collateral attack on a state court judgment, one premised on the fundamentally illogical premise that Plaintiffs and other Minnesota voters are injured by a law that *makes it easier for their ballots to be counted*. Given these basic facts, it is unsurprising that Plaintiffs cannot succeed on the merits.

A. Plaintiffs' suit is an improper collateral attack.

The Consent Decree represents an agreement between Intervenors and the Secretary, and the State Court Order entering it is entitled to full faith and credit. *See* art. IV, § 1; 28 U.S.C. § 1738 (“[J]udicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States.”). Similarly, the Stipulation agreed to by the parties and relied upon by the Minnesota Supreme Court—in which the State Court Intervenors agreed to “waive the right to challenge in any other judicial forum” both the State Court Order and the Consent Decree, Ex. 15 at 2—remains in effect. Both agreements bind Plaintiffs, and both preclude this suit.

Under governing Minnesota law, absent fraud, a valid judgment entered by agreement or consent has the same preclusive effect “as if it had been rendered after contest and full hearing and is binding and conclusive upon the parties *and those in privity with them*.” *Hentschel v. Smith*, 153 N.W.2d 199, 203 (Minn. 1967) (emphasis

added) (quoting *Pangalos v. Halpern*, 76 N.W.2d 702, 706 (Minn. 1956)). Both individually and combined, the Consent Decree and the Stipulation constitute a complete and permanent resolution of the state court dispute for the November Election: the Consent Decree agreed that the November Election would operate under an alternative receipt deadline, and the Stipulation precluded further challenge to the Consent Decree in *any* forum. These agreements, entered into absent fraud and effectuated by both Judge Grewing and the Minnesota Supreme Court, therefore bind Plaintiffs and prohibit this action *if* Plaintiffs are in privity with any of the parties to the state court action.

They are. “In determining privity, the Minnesota Supreme Court has directed that ‘privity must be determined by the facts of each case.’” *Benson v. Hackbarth*, 481 N.W.2d 375, 377 (Minn. Ct. App. 1992) (quoting *Johnson v. Hunter*, 447 N.W.2d 871, 874 (1989)); *see also Reil v. Benjamin*, 584 N.W.2d 442, 445 (Minn. Ct. App. 1998) (“Privity does not follow one specific definition, but rather expresses the idea that a judgment should also determine the interests of certain non-parties closely connected with the litigation.”). Here, the facts indicate Plaintiffs are in privity with both the Secretary and the State Court Intervenors.

As to the former, “when a state government litigates a matter of public concern, that state’s citizens will be deemed to be in privity with the government for preclusion purposes.” *Mo’s Express, LLC v. Sopkin*, 441 F.3d 1229, 1235 (10th Cir.

2006) (quoting *Lance v. Davidson*, 379 F. Supp. 2d 1117, 1125 (D. Colo. 2005)); accord *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979) (“[T]hese individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and ‘they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment.’” (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340–41 (1958))). There is no reasonable dispute that the Secretary, in litigating the state court action and entering the Consent Decree, represented all Minnesotans—including Plaintiffs. See Compl. ¶¶ 7–8 (describing Plaintiffs as Minnesota residents and “registered Minnesota voter[s]”).

Plaintiffs are also in privity with the State Court Intervenors. The State Court Intervenors intervened “[o]n behalf of their supported candidates[and] voters,” citing their interest in “helping Republican candidates and voters” by “support[ing] Republican candidates for office” and “educat[ing], mobiliz[ing], assist[ing], and turn[ing] out voters,” as well as their interests in “defending the[] commonsense and constitutional state laws” that Intervenors challenged and “ensuring that Minnesota runs free and fair elections.” Ex 13 at 1, 5, 8, 12. As Republican voters and candidates, see Compl. ¶¶ 7–8, 67–69, 72–73; Mot. at 7–9, 14–16, Plaintiffs are not only aligned with the State Court Intervenors—they are expressly represented by them. Accordingly, although Plaintiffs are “not parties to” the state court action, they are

nonetheless “connected with it in their interests . . . as if they were parties” because their “interests are represented” by the State Court Intervenors. *Rucker v. Schmidt*, 768 N.W.2d 408, 413 (Minn. Ct. App. 2009) (quoting *Margo-Kraft Distribs., Inc. v. Minneapolis Gas Co.*, 200 N.W.2d 45, 47-48 (Minn. 1972)). To put it differently, Plaintiffs—who are members *and seek to be electors* of the very political party that intervened in the state court action—“are so connected with the” state court litigation that both the Consent Decree *and* the Stipulation “should determine their interests as well as those of the actual parties.” *Balasuriya v. Bemel*, 617 N.W.2d 596, 600 (Minn. Ct. App. 2000). Therefore, Plaintiffs are bound by the Stipulation, and cannot challenge either the State Court Order or the Consent Decree in any forum—including this one.

These doctrines ultimately express in legalese what is plainly obvious from the facts of this case. The Secretary entered the Consent Decree to expand the franchise for all Minnesotans, Plaintiffs included. The State Court Intervenors—with whom Plaintiffs as Republican electors have an indisputable connection—signed the Stipulation and agreed to forgo *precisely* this sort of collateral attack. The purpose of both agreements was to promote stability and the franchise in the November Election and its leadup. It would therefore be inequitable and unjust—and unlawful—for Plaintiffs to circumvent the Stipulation and launch this meritless attack on the Consent Decree.

B. This Court should abstain under *Pennzoil*.

Plaintiffs' claims are further precluded under *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). There, the losing party in a state court proceeding filed suit in federal court, "alleg[ing] that the Texas proceedings violated rights secured to [it] by the Constitution and various federal statutes." *Id.* at 6. The U.S. Supreme Court, noting "the importance to the States of enforcing the orders and judgments of their courts," concluded it must abstain:

[T]his case involve[s] challenges to the processes by which the State compels compliance with the judgments of its courts. Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand.

Id. at 13–14 (footnote omitted); accord *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73–73 (2013) (under *Pennzoil*, federal courts must abstain where "state civil proceedings . . . implicate a State's interest in enforcing the orders and judgments of its courts"); *Schall v. Joyce*, 885 F.2d 101, 110 (3d Cir. 1989) ("[A]pplication of *Pennzoil* leads to the conclusion that it would be inappropriate for the federal court to proceed on an injunctive claim to render the state judgment nugatory."). The *Pennzoil* Court further noted that abstention was appropriate because the constitutional claims could have been raised in state court. *See* 481 U.S. at 14–16; *see also Aaron v. Target Corp.*, 357 F.3d 768, 774 (8th Cir. 2004) ("Permitting issues

before a state court to be litigated in a federal forum instead could be ‘quite costly’ to the comity and federalism interests which [the abstention doctrine] seeks to protect.” (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 (1975)).

Such is the case here. Plaintiffs ultimately seek to render the state court’s adjudication nugatory—to enjoin enforcement of the Consent Decree that the state court entered. But that underlying state court action is ongoing, and *that* forum, not this one, is the proper venue for Plaintiffs’ challenge to the Consent Decree. Plaintiffs identify no reason why they cannot argue their constitutional claims in state court. This Court should therefore “defer[] on principles of comity to the pending state proceedings.” *Pennzoil*, 481 U.S. at 17.

Notably, *Pennzoil* applies even though Plaintiffs are not formally parties in the state court action. Under the abstention doctrine from which *Pennzoil* is derived, *see generally Younger v. Harris*, 401 U.S. 37 (1971), “[i]t is not a prerequisite . . . that the federal plaintiffs also be defendants in the action pending in state court” where, as here, “the interests of the parties seeking relief in federal court are closely related to those of parties in pending state proceedings and where the federal action seeks to interfere with pending state proceedings.” *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 881–82 (8th Cir. 2002) (quoting *Womens Servs., P.C. v. Douglas*, 653 F.2d 355, 358 (8th Cir. 1981)). Here, Plaintiffs’ action certainly seeks to interfere with the pending state court action, since Plaintiffs move to invalidate the

Consent Decree that was properly entered by the state court. Moreover, Plaintiffs' interests are closely related to the State Court Intervenors'—indeed, as discussed in Part I.A *supra*, they are in privity with them.

C. Plaintiffs lack standing.

“The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves ‘both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.’” *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

“The ‘irreducible constitutional minimum of standing’ is that a plaintiff show (1) an ‘injury-in-fact’ that (2) is ‘fairly . . . trace[able] to the challenged action of the defendant’ and (3) is ‘likely . . . [to] be redressed by a favorable decision’ in court.” *ABF Freight Sys., Inc. v. Int’l Brotherhood of Teamsters*, 645 F.3d 954, 958 (8th Cir. 2011) (alterations in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). “To establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *First Lutheran Church*, 326 F.Supp.3d at 758 (quoting *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1548 (2016)).

Moreover, prudential considerations require “that a party ‘generally must assert his own legal rights and interests, and cannot rest his claim to relief on the

legal rights or interests of third parties.” *Kowalski*, 543 U.S. at 129 (quoting *Warth*, 422 U.S. at 499).

1. Article III Standing

Plaintiffs lack Article III standing to bring their claims. They identify four purported injuries that they will suffer as a result of the Consent Decree: (1) it “will necessarily result in the counting of many ballots—perhaps hundreds of thousands—that by law may not be counted in the presidential election,” which will “dilute the value of Plaintiffs’ votes and permit the counting of ballots for Plaintiffs’ opponents for the elector offices they seek”; (2) it “violate[s] federal and state law [and] creates substantial uncertainty,” which “frustrates Plaintiffs’ ability to determine whether to vote in person (and thereby risk exposure to the Coronavirus) or cast absentee ballots (and thereby risk that their votes will not be counted) and how to advise those who intend to vote for them”; (3) it “creates a clear and present danger that Minnesota’s election results will not be accepted under the safe harbor law and therefore will not be accepted by the United States Congress in determining the winner of the presidential election” because it “is not an enacted law but an executive policy in flat contradiction to State law”; and (4) its “election deadlines risk placing the resolution of the contest past dates Congress has set for both the safe harbor and the actual vote of the Electoral College,” leading to “a substantial risk that Plaintiffs’ votes will be completely meaningless, if either Minnesota loses

its representation in the Electoral College or its asserted results do not qualify for the safe harbor.” Mot. at 7–9; *see also id.* at 14–16; Compl. ¶¶ 66–74. Ultimately, none of these alleged harms withstands even the slightest scrutiny, and certainly none satisfies Article III.

a. Vote Dilution

Plaintiffs point to the alleged “[c]ounting [of] votes invalidly cast,” which will “substantially increase[] the pool of total votes cast and dilute[] the weight of Plaintiffs’ votes.” Compl. ¶ 68; *see also* Mot. at 14–15. But courts have repeatedly held that the purported injury of vote dilution as a result of unlawful voting does not confer standing, as it is both unduly speculative and impermissibly generalized. *See, e.g., Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) (“Plaintiffs never describe how their member voters will be harmed by vote dilution where other voters will not. As with other ‘[g]enerally available grievance[s] about the government,’ plaintiffs seek relief on behalf of their member voters that ‘no more directly and tangibly benefits [them] than it does the public at large.’” (alterations in original) (quoting *Lujan*, 504 U.S. at 573–74)); *Martel v. Condos*, No. 5:20-cv-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) (“If every voter suffers the same incremental dilution of the franchise caused by some third-party’s fraudulent vote, then these voters have experienced a generalized injury.”); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F.Supp.3d 779,

789 (W.D. Tex. 2015) (“[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.”).

As another court recently explained when confronted with a similar claim,

Plaintiffs’ purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter. Such claimed injury therefore does not satisfy the requirement that Plaintiffs must state a concrete and particularized injury. This is not a pioneering finding. Other courts have similarly found the absence of an injury-in-fact based on claimed vote dilution.

Paher v. Cegavske (“*Paher I*”), No. 3:20-cv-00243-MMD-WGC, 2020 WL 2089813, at *5 (D. Nev. Apr. 30, 2020) (citations omitted); *accord Paher v. Cegavske* (“*Paher II*”), No. 3:20-cv-00243-MMD-WGC, 2020 WL 2748301, at *4 (D. Nev. May 27, 2020) (no standing where Plaintiffs “fail to more than speculatively connect the specific conduct they challenge . . . and the claimed injury [of] vote dilution”).

Such is the case here. Any purported dilution somehow caused by the Consent Decree and postmark presumption would affect *all* Minnesota voters, not merely Plaintiffs. *Cf. Citizens for Fair Representation v. Padilla*, 815 F.App’x 120, 123 (9th Cir. 2020) (no standing where “the growing size of California’s electoral districts values—or in Plaintiffs’ view, devalues—every vote equally”). Accordingly, Plaintiffs’ purported vote-dilution injury is an impermissibly generalized grievance and cannot support standing. *See Lujan*, 504 U.S. at 573–74 (holding that plaintiff “claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws . . . does not state an Article III case or controversy”).

Moreover, any vote-dilution injury Plaintiffs claim on the basis that they “are not only voters, but also candidates for office,” Mot. at 15, cannot establish standing. As an initial matter, it is wholly speculative. Plaintiffs cannot and do not offer any logical theory as to why unlawful voting would exclusively benefit their opponents and only cause harm to them. Indeed, it is just as likely under Plaintiffs’ scant reasoning that their electoral positions would be *improved*, not undermined, by illegal voting. *See Trump for President*, 2020 WL 5626974, at *7 (finding that “alleged harm is too speculative” where plaintiffs failed to show that enjoining challenged law would “improve the odds for plaintiffs’ candidates”). The injury also relies on the actions of independent third parties—either fraudsters who knowingly cast ballots after November 3 or lawful citizens who accidentally cast late ballots—the existence of whom is never explained by Plaintiffs. These tardy votes would then need to pass through the postal system *without* receiving a postmark or some other indicia of when they were mailed—a wholly unlikely scenario, as discussed in Part II *infra*. This daisy-chain of hypothetical occurrences, unsupported by even a shred of persuasive explanation, is simply too speculative to constitute a concrete injury-in-fact. *See id.* at *5 (concluding that “injuries are too speculative to establish standing” where plaintiffs “offer a patchwork theory of harm that does not rely on” challenged law but instead on entities “out of defendant’s control”).

There is also an “unbridgeable gap in the causal chain” between the claimed injury of vote dilution and the alleged constitutional violations. *Corman v. Torres*, 287 F.Supp.3d 558, 571 (M.D. Pa. 2018) (per curiam). To satisfy Article III, “there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’” *Lujan*, 504 U.S. at 560 (alterations in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). Plaintiffs’ vote-dilution injury is traceable to non-party actors who might, for various reasons, cast ballots after Election Day. It is *not* traceable to the Secretary or the Consent Decree. *See Lujan*, 504 U.S. at 562 (where “the existence of one or more of the essential elements of standing ‘depends on the unfettered choices made by independent actors not before the courts’ . . . it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury” (citations omitted) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989))).

b. Uncertainty

Plaintiffs’ claims of widespread uncertainty fare no better. The only basis they identify for this uncertainty is the alleged unlawfulness of the Consent Decree. *See* Mot. at 7 (“Statutory law, which is superior to the Secretary’s executive authority,

establishes a deadline, but Plaintiffs are unable to discern whether that law governs or the Secretary's alterations govern."). Any purported confusion is a generalized grievance, akin to claims that the alleged constitutional violation itself creates a viable injury. The U.S. Supreme Court has repeatedly described such harms as "precisely the kind of undifferentiated, generalized grievance about the conduct of government that" is insufficient for standing. *Lance v. Coffman*, 549 U.S. 437, 442 (2007); *see also Lujan*, 504 U.S. at 573-74.

Moreover, Plaintiffs do not identify any actual basis for this purported confusion. *See Trump for President*, 2020 WL 5626974, at *5 ("Outside of stating 'confus[ion]' and 'discourage[ment]' in a conclusory manner, plaintiffs make no indication of how [challenged law] will discourage their member voters from voting." (first and second alterations in original)). The Secretary's conduct is wholly consistent with Minnesota law, *see infra* Part I.D, and under the terms of the Consent Decree, both the Secretary and local officials have informed the public that a postmark deadline will be in place for the November Election—just as it was for the August Primary. The *only* source muddying these untroubled waters and introducing confusion and uncertainty *is this litigation itself*, and courts have routinely held that such self-inflicted wounds are insufficient for standing. *See, e.g., Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013) (concluding that "self-inflicted injuries [] not fairly traceable to the Government's purported activities . . .

do[] not give rise to standing”). Plaintiffs cannot cast doubt on the propriety of the Secretary’s lawful actions and then claim that the resulting confusion causes them injury. In fact, the relief Plaintiffs seek would *create*, not *redress*, any uncertainty, since Minnesota voters have been informed of the postmark presumption and are expecting an election consistent with the August Primary. *See infra* Parts II–III; *see also Common Cause R.I.*, 2020 WL 4680151, at *1 (“The status quo is one in which the challenged requirement has not been in effect, given the rules used in Rhode Island’s last election, and many Rhode Island voters may well hold that belief.”); *Townley v. Miller*, 722 F.3d 1128, 1133–35 (9th Cir. 2013) (no standing where relief plaintiffs sought would increase rather than decrease their asserted harm).

c. Safe Harbor and Congressional Deadlines

The third and fourth harms identified by Plaintiffs boil down to the same grievance: the Consent Decree runs afoul of Congress’s mechanisms for determining the winners of presidential contests, both because it is inherently unlawful and because it will not comply with necessary deadlines. But both harms are ultimately “conjectural” and “hypothetical,” and neither “actual” nor “imminent” as required by Article III. *First Lutheran Church*, 326 F.Supp.3d at 758 (quoting *Spokeo*, 136 S.Ct. at 1548).

First, the Consent Decree and the Secretary’s actions pursuant to it are wholly consistent with Minnesota law. *See infra* Part I.D. There is thus no doubt that the

State's vote-counting process for the November Election will be conducted pursuant to "laws enacted prior to the day fixed for the appointment of electors," 3 U.S.C. § 5, and no imminent or likely risk that Congress will reject Minnesota's returns under the safe-harbor provision. Any injury based on this impossible scenario is therefore completely hypothetical and patently insufficient for purposes of standing.

Second, there is simply no logical basis for Plaintiffs' assertion that "the Secretary's election deadlines risk placing the resolution of the contest past dates Congress has set for both the safe harbor and the actual vote of the Electoral College." Mot. at 8. Their only basis for this alleged harm is that "it will remain unknown who wins the state's vote for at least eight days after Election Day, and any contest about the ultimate result is unlikely to reach a conclusion before the safe-harbor deadline or even before the vote of the Electoral College." *Id.* But even a cursory review of the relevant chronology demonstrates just how farfetched Plaintiffs' claims are. County canvassing boards have until 10 days after an election to publicly canvass votes, Minn. Stat. § 204C.33 subd. 1—*after* the receipt deadline applied by the Consent Decree. The state canvassing board then meets the third Tuesday after election day (this year, November 24) to canvass the county canvassing boards' reports, declaring the results three days later: November 27. *Id.* § 204C.33 subd. 3. There is thus no plausible reason why the Consent Decree will result in uncertainty past December 14. Accordingly, any alleged risk stemming from

the applicable deadlines is wholly conjectural and neither traceable to the Consent Decree nor likely to be redressed by its invalidation, since the Secretary's actions consistent with the agreement will ensure that all necessary deadlines are met.³

The reasoning underlying Plaintiffs' purported harms ranges from the nonsensical to the merely unpersuasive. In any event, Plaintiffs have not identified *any* concrete injuries, traceable to the Secretary and redressable by this Court, that they will suffer absent injunctive relief. This is, ultimately, a case where the formalistic Article III requirement perfectly illustrates the practical underpinning of the standing doctrine: Plaintiffs will suffer no actual harm as a result of the Consent Decree, which will *expand* voting opportunities for Minnesotans. Accordingly, they lack Article III standing.

2. Prudential Standing

Plaintiffs further lack prudential standing to bring Count I. "Even if an injury in fact is demonstrated, the usual rule is that a party may assert only a violation of its own rights." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988). Plaintiffs'

³ Other states' ballot receipt deadlines match or even *exceed* the provisions of the Consent Decree. *See, e.g.*, 10 Ill. Comp. Stat. 5/19-8, 5/18A-15 (ballot must be received within 14 days of election); Alaska Stat. § 15.20.081 (ballot must be received within 10 days of election); Ohio Rev. Code § 3509.05 (same). There is no indication that these states have difficulty, regularly or even occasionally, meeting applicable deadlines.

claims, by contrast, “rest . . . on the legal rights or interests of third parties.” *Kowalski*, 543 U.S. at 129 (quoting *Warth*, 422 U.S. at 499).

Count I is predicated solely on *the Minnesota Legislature’s* purported rights under the Electors Clause—and nothing more. Plaintiffs allege that the Consent Decree “is contrary to Minnesota State Law setting the receipt deadline as 8:00 p.m. on November 3, 2020,” and therefore violates Article II, “which vests authority *solely in the state legislature* to modify the manner and time of elections.” Compl. ¶¶ 78–79 (emphasis added). Their motion is replete with references to the Minnesota Legislature and the alleged usurpation of its authority. *See, e.g.*, Mot. at 2 (“The legislature of each state, not its executive actors or courts, has authority to define the ‘Manner’ of choosing electors.” (citation omitted) (quoting U.S. Const. art. II, § 1, cl. 2)); *id.* at 10 (“[O]nly the Minnesota Legislature, not the Secretary, may establish regulations governing the upcoming presidential election.”). Plaintiffs, however, have no authority or standing to assert the rights of the Minnesota Legislature. *Cf. Corman*, 287 F.Supp.3d at 573 (“[T]he Elections Clause claims asserted in the verified complaint belong, if they belong to anyone, only to the Pennsylvania General Assembly.”).⁴

⁴ Although *Corman* specifically concerned the Elections Clause, the Elections and Electors Clauses play functionally identical roles, with the former setting the terms for congressional elections and the latter implicating presidential elections. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting) (noting that Electors Clause is “a constitutional provision

Plaintiffs are not the Minnesota Legislature,⁵ and they have identified no “‘hindrance’ to the [Legislature’s] ability to protect [its] own interests.” *Kowalski*, 543 U.S. at 130 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)); see also *Hughes v. City of Cedar Rapids*, 840 F.3d 987, 992 (8th Cir. 2016) (third-party standing requires “a close relationship with the person who possesses the right’ and ‘a hindrance to the possessor’s ability to protect [her] own interests” (alteration in original) (emphasis added) (quoting *Kowalski*, 543 U.S. at 130)). “Absent a ‘hindrance’ to the third-party’s ability to defend its own rights, this prudential limitation on standing cannot be excused.” *Corman*, 287 F.Supp.3d at 572 (quoting *Kowalski*, 543 U.S. at 130).⁶ Accordingly, applying the “usual rule” of prudential standing, *Am. Booksellers*, 484 U.S. at 392, Plaintiffs “do[] not have third-party

with considerable similarity to the Elections Clause”). Accordingly, cases interpreting “the Legislature” in the context of the Elections Clause inform application of the Electors Clause. See, e.g., *Castañon v. United States*, 444 F.Supp.3d 118, 140–41 (D.D.C. 2020); *De La Fuente v. Simon*, 940 N.W.2d 477, 493 n.15 (Minn. 2020).

⁵ Plaintiff Lucero serves as a member of the Minnesota House of Representatives, Mot. at 7, but does not purport to represent the Minnesota Legislature. Nor could he; in his individual capacity, he cannot assert that body’s institutional injuries, see, e.g., *Raines v. Byrd*, 521 U.S. 811, 829 (1997); *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214–15 (10th Cir. 2016), and the Secretary’s “alleged usurpation of the [Minnesota Legislature’s] power did not deprive [him] of any rights vested personally in” him by the Electors Clause. *Corman*, 287 F.Supp.3d at 569.

⁶ The opinion of the three-judge panel in *Corman* is highly instructive. There, as here, third parties brought in federal court a collateral attack on a state court judgment. See 287 F.Supp.3d at 561. The panel ultimately concluded that these third parties lacked both Article III and prudential standing. See *id.* at 573–74.

standing” to assert claims on the Legislature’s behalf, which is fully capable of representing its own interests. *Hughes*, 840 F.3d at 992; *see also Corman*, 287 F.Supp.3d at 571–73.⁷

D. Count I fails as a matter of law.

Even if this Court could adjudicate Count I, it fails as a matter of law, and therefore cannot serve as the basis for injunctive relief.

The Electors Clause vests authority in “the Legislature” of each state to regulate presidential elections. U.S. Const. art. II, § 1, cl. 2. The U.S. Supreme Court has held, however, that state legislatures can delegate this authority—including to state officials like the Secretary. *See, e.g., Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 807 (2015) (noting that Elections Clause does not preclude “the State’s choice to include” state officials in lawmaking functions so long as such involvement is “in accordance with the method which the State has prescribed for legislative enactments” (quoting *Smiley v. Holm*, 285 U.S. 355, 367 (1932))); *Corman*, 287 F.Supp.3d at 573 (“The Supreme Court interprets the words ‘the Legislature thereof,’ as used in that clause, to mean the lawmaking processes of

⁷ Indeed, the Minnesota Legislature has seen fit to defend its interests in prior judicial proceedings. *See, e.g., Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 612 (Minn. 2017) (adjudicating Legislature’s challenge to governor’s line-item veto power).

a state.” (quoting *Ariz. State Legislature*, 576 U.S. at 816).⁸ Indeed, such delegation *must* be permitted; if Plaintiffs were correct that “any regulation not promulgated by the Minnesota Legislature is beyond the very authority of Minnesota, as a sovereign, to regulate in this arena,” Mot. at 11, then *any* discretion exercised by *any* non-legislative entity in *any* state—from a county clerk’s decision on polling-place locations to a secretary of state’s guidance on how to word ballot instructions—would be unconstitutional.⁹

Accordingly, the Consent Decree and the Secretary’s actions under it could only constitute plausible violations of the Electors Clause if he exceeded the authority granted to him by the Minnesota Legislature. He did not. Minnesota Statutes section 204B.47, titled “Alternative election procedures; duties of secretary of state,” provides as follows:

When a provision of the Minnesota Election Law cannot be implemented as a result of an order of a state or federal court, the secretary of state shall adopt alternative election procedures to permit the administration of any election affected by the order. The procedures may include the voting and handling of ballots cast after 8:00 p.m. as a result of a state or federal court order or any other order extending the time established by law for closing the polls. The alternative election procedures remain in effect until the first day of July following the next succeeding final adjournment of the legislature, unless otherwise provided by law or by court order.

⁸ As discussed in note 4 *supra*, the Electors and Elections Clauses are textually and legally analogous.

⁹ Plaintiffs themselves highlight some of the discretionary responsibilities lawfully conveyed by the Minnesota Legislature to the Secretary and local officials. *See* Mot. at 5–6 & n.1.

See also Clark v. Pawlenty, 755 N.W.2d 293, 299 (Minn. 2008). In other words, if a court determines that an election law cannot be implemented, then the Minnesota Legislature does not merely *permit* the Secretary to adopt alternative procedures, it *requires* him to do so. Such remedial action explicitly includes extending the Election Day Receipt Deadline.

This is *precisely* what happened here. Intervenors sued the Secretary in state court, challenging, among other things, the Election Day Receipt Deadline. The parties drafted the Consent Decree, which was submitted to Judge Grewing. At the insistence of the State Court Intervenors, the court undertook a rigorous analysis and addressed Intervenors' likelihood of success on the merits. *See State Court Order at 17-25*. Judge Grewing determined that Intervenors were likely to succeed on the merits of their constitutional challenges to the Election Day Receipt Deadline, and having concluded that "this waiver of the . . . 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," entered the Consent Decree. *Id.* at 25.

In the parlance of section 204B.47, following the State Court Order, the Election Day Receipt Deadline *could not be implemented*. The Secretary therefore *had* to "adopt alternative election procedures to permit the administration" of the November Election. He did so, issuing guidance and instructions consistent with

the Consent Decree. *See* Exs. 21–22 These actions were both contemplated and required by a statute enacted by the Minnesota Legislature.

Accordingly, the Secretary has not “chosen to abandon the enforcement of statutes enacted by the Minnesota Legislature.” Mot. at 7. Quite the contrary, he has exercised the authority expressly granted to him by that body—a result required by the state court’s finding regarding the unconstitutionality of the Election Day Receipt Deadline during the November Election.¹⁰

¹⁰ *American Broadcasting Cos. v. Ritchie*, Civil No. 08-5285 (MJD/AJB), 2011 WL 665858 (D. Minn. Feb. 14, 2011), is instructive. There, “[t]he Court held that ‘Plaintiffs are likely to succeed on the merits of their claim that, as applied to Plaintiffs’ exit polling activities, [a Minnesota election statute] violates the First Amendment.’” *Id.* at *2 (quoting *Am. Broad. Cos. v. Ritchie*, Civil No. 08-5285 (MJD/AJB), 2008 WL 4635377, at *7 (D. Minn. Oct. 15, 2008)). Subsequently, the court explained that

[u]nder Minnesota law, if a provision of state election law cannot be implemented as a result of a court order, the Secretary of State has the duty to “adopt alternative election procedures to permit the administration of any election affected by the order.” This is exactly what the Secretary of State did after this Court issued the Preliminary Injunction in this case.

Id. at *4 (citation omitted) (quoting Minn. Stat. § 204B.47). Here, similarly, Judge Grewing concluded that Intervenors were likely to succeed on the merits of their challenge to the Election Day Receipt Deadline and entered the Consent Decree, thus requiring the Secretary to take remedial actions and implement alternative procedures.

E. Count II fails as a matter of law.

Count II—which alleges that the Consent Decree “violates federal law yet again insofar as it directly conflicts with Acts of Congress setting the Election Day,” Mot. at 12–14—also fails as a matter of law.

“[A] state’s discretion and flexibility in establishing the time, place and manner of” federal elections—presidential elections included—has one, and *only* one, “limitation: the state system cannot directly conflict with federal election laws on the subject.” *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000). But while “Congress has the authority to compel states to hold [federal] elections on the dates it specifies,” *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1170 (9th Cir. 2001)—specifically, “the Tuesday next after the first Monday in November,” 3 U.S.C. § 1—nothing in the Consent Decree alters the timing of Minnesota’s election to a date other than that prescribed by Congress. Contrary to Plaintiffs’ assertions, the Consent Decree does not “treat November 3 as . . . merely [the] *beginning*” of Election Day or permit “holding votes for the presidency *after* November 3.” Mot. at 2–3. Instead, the Consent Decree requires that, to be counted, mail ballots must be “postmarked *on or before Election Day*.” Consent Decree at 10 (emphasis added).

This critical fact notwithstanding, Count II focuses on a complementary provision of the Consent Decree, which reads, “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 after.” *Id.* But this provision simply provides a presumption for election officials to use to determine whether a mail ballot was “postmarked on or before Election Day,” *id.*—the date mandated by Congress.

The Elections Clause—and, by extension, the Electors Clause, *see supra* note 4—“is a default provision; it invests the States with responsibility for the mechanics of [federal] elections, *but only so far as Congress declines to preempt state legislative choices.*” *Foster v. Love*, 522 U.S. 67, 69 (1997) (emphasis added) (citation omitted). Intervenor’s are not aware of, and Plaintiffs have not pointed to, any law by Congress dictating to states how to determine the postmark date of mail ballots. Because Congress has *not* codified a postmark presumption that competes with the Secretary’s, “compliance with both [the postmark presumption] and the federal election day statutes does not present ‘a physical impossibility,’” and so no preemption has occurred. *Millsaps v. Thompson*, 259 F.3d 535, 549 (6th Cir. 2001) (citation omitted) (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

This case is therefore readily distinguishable from *Foster*, the leading case on which Plaintiffs rely. There, the U.S. Supreme Court considered “Louisiana’s ‘open primary’ statute,” which “provide[d] an opportunity to fill the offices of United

States Senator and Representative during the previous month” before the date mandated by Congress, “without any action to be taken on federal election day.” *Foster*, 522 U.S. at 68–69. The Court concluded that this system “runs afoul of the federal statute” because it permitted federal elections to be entirely consummated before the statutorily mandated Election Day. *Id.* at 69, 72. Here, by contrast, the Consent Decree does *not* set a competing date on which “a contested selection of candidates for a [federal] office [] is concluded as a matter of law.” *Id.* at 72. Quite the contrary, it mandates that ballots be postmarked by Election Day, and its postmark presumption effectuates this requirement. Courts have consistently held that the procedures and standards established by states to facilitate the federal election date do not alter the date prescribed by Congress. *See, e.g., Millsaps*, 259 F.3d at 549 (“[T]here is no reason to think that simply because Congress established a federal election day it displaced all State regulation of the times for holding federal elections.”); *Keisling*, 259 F.3d at 1175 (emphasizing that *Foster* did not “present the question whether a State must always employ the conventional mechanics of an election” (quoting *Foster*, 522 U.S. at 72 n.4)).

As one post-*Foster* appellate court decision concluded, “we cannot conceive that Congress intended the federal election day statutes to have the effect of impeding citizens in exercising their right to vote.” *Bomer*, 199 F.3d at 777; *accord Millsaps*, 259 F.3d at 545 (“[A]ll courts that have considered the issue have viewed

statutes that facilitate the exercise of the fundamental right of voting as compatible with the federal statutes.”). The Consent Decree facilitates Minnesotans’ ability to have their votes counted by creating a presumption that certain ballots were cast on the Election Day prescribed by Congress. It thus “further[s] the important federal objective of reducing the burden on citizens to exercise their right to vote . . . without thwarting other federal concerns,” *Bomer*, 199 F.3d at 777, by ensuring that voters who cast ballots on or before Election Day are not arbitrarily disenfranchised simply because the postal system, through no fault of the voter, fails to affix a legible postmark.

Conspicuously, Plaintiffs cite no cases where postmark presumptions or similar regulations were found to conflict with federal law.¹¹ This is not surprising; the Consent Decree’s postmark presumption, like other similar presumptions applied nationwide,¹² is wholly consistent with federal law because it merely sets a

¹¹ Notably, in *Gallagher v. New York State Board of Elections*, a federal court embraced a presumption “that absentee ballots received [within days of primary election] were [] timely cast despite the absence of a postmark.” No. 20 Civ. 5504 (AT), 2020 WL 4496849, at *22 & n.5 (S.D.N.Y. Aug. 3, 2020). And the Pennsylvania Supreme Court recently adopted a postmark presumption with similar language to the Consent Decree. *See Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *31 (Pa. Sept. 17, 2020) (“[B]allots . . . that lack a postmark or other proof of mailing, or for which the postmark or other proof of mailing is illegible, will be presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day.”).

¹² *See, e.g.*, Cal. Elec. Code § 4103(b)(2); 10 Ill. Comp. Stat. 5/19-8(c); Md. Code Regs. 33.11.03.08(B)(3)(b)(ii); Wash. Rev. Code § 29A.40.110(4).

standard for election officials to determine whether ballots were cast on Election Day. Therefore, the Consent Decree is not preempted, and Plaintiffs cannot prevail on the merits of Count II.

II. Plaintiffs will suffer no injury absent an injunction.

Even if Plaintiffs could succeed on the merits of their claims, the equities strongly militate against injunctive relief.

To satisfy *Winter*'s irreparable-harm requirement, "[t]he harm must be 'likely in the absence of an injunction,' 'great[,] and of such imminence that there is a clear and present need for equitable relief.'" *Minn. RFL Republican Farmer Lab. Caucus v. Freeman*, No. 19-cv-1949 (ECT/DTS), 2020 WL 5512509, at *5 (D. Minn. Sept. 14, 2020) (second alteration in original) (citation omitted) (first quoting *Winter*, 555 U.S. at 22; and then quoting *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996)). Plaintiffs have fallen far short of this burden; they have failed to demonstrate *any* imminent or even plausible injury, let alone one that is likely.

As discussed at length in Part I.C.1 *supra*, Plaintiffs identify four bases for irreparable harm in their motion: vote dilution, widespread uncertainty, rejection of Minnesota's presidential votes under Congress's safe-harbor provision, and the risk that the State will be unable to meet federal election deadlines. *See Mot.* at 14–16. These harms are not only hopelessly speculative and even illogical, but are also unsupported by any compelling evidence.

First, Plaintiffs have provided no sound reasoning—let alone persuasive evidence—as to how their votes will be diluted due to a sudden influx of late ballots, or why any appreciable number of mail ballots would lack postmarks, bar codes, tracking marks, or any other indicia indicating the dates the U.S. Postal Service (“USPS”) took custody of the ballots. Indeed, the likelihood of such an occurrence is infinitesimal. As explained by Richard Haefner, the President of the Minnesota Postal Workers’ Union and a USPS employee in Minnesota for nearly three decades, “almost all absentee ballots that are mailed in Minnesota receive a postmark or some other indicia indicating the date that they were sent, and it is highly unlikely that any substantial quantity (and certainly not thousands) of ballots are delivered to election offices without postmarks.” Ex. 19 ¶¶ 2, 6; *see also id.* ¶¶ 3–5 (explaining how mail ballots are processed). He further notes that “ballots dropped off after election day . . . would have gone through [these same] cancellation procedures . . . and would have been clearly dated as mail sent after Election Day.” *Id.* ¶ 7. Mr. Haefner is not alone in this assessment. Former Deputy Postmaster General Ronald Stroman confirms that “it is the USPS’s standard practice to affix postmarks to *all* single-piece First Class Mail, including all completed absentee ballots mailed by voters,” and “[c]onsistent with this requirement, almost all completed ballots mailed by voters that the USPS handles have postmarks affixed to them.” Ex. 20 ¶¶ 2, 7. Moreover, “[o]n rare occasions” where, “through inadvertent oversight, a piece of

mail [is not] postmarked . . . there are readily available means for determining when the USPS received” it, as “USPS sprays barcodes on all pieces of mail that it receives” and “takes a scanned, date-stamped image of every piece of mail that it processes.” *Id.* ¶ 9.

Even setting aside Intervenors’ evidence regarding standard USPS practice, it is simply not plausible, let alone likely, that such widespread post-Election Day voting would occur. The *only* way Plaintiffs could suffer vote dilution would be if, even before a mail ballot proceeded through the postal system, someone—either a nefarious fraudster or merely a hapless innocent—cast it *after* Election Day. But the existence of such late voters is neither likely nor even plausible. For the hypothetical innocent voter, it beggars belief that someone politically engaged enough to cast a ballot would somehow do so *after* Election Day. And as for the specter of voter fraud, Plaintiffs have not produced a shred of compelling evidence suggesting a likelihood of fraud in Minnesota or anywhere else. Quite the contrary, the literature on voter fraud in the United States has a clear and consistent finding: this form of fraud is rare. *See, e.g.*, Ex. 27 (surveying universal vote-by-mail states and concluding that there is no “evidence that there is widespread fraud in the use of mail-in ballots”); Ex. 28 (“[I]t is [] more likely for an American to be struck by lightning than to commit mail voting fraud.”). Even though the August Primary utilized a similar postmark deadline, Plaintiffs do not—and cannot—provide any evidence of fraud

associated with mail balloting during that election. See Ex. 19 ¶¶ 7–8 (“I do not remember seeing any absentee ballots dropped off after election day. . . . It is also not the case that absentee ballots or any other type of mail is likely to be given a backdated postmark.”). Repeating the fiction of widespread voter fraud, even in a court of law, does not make it true—as evidenced by the repeated rejection of attempts to limit voting opportunities based on similarly speculative and unsubstantiated allegations.¹³

¹³ See, e.g., *People First of Ala. v. Sec’y of State*, 815 F.App’x 505, 513 (11th Cir. 2020) (concluding that state’s “interest for maintaining the photo ID and witness requirements do not outweigh” burdens on voters where evidence “suggests that Alabama has not found itself in recent years to have a significant absentee-ballot fraud problem”); *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1036 (9th Cir. 2020) (en banc) (rejecting fraud-based justification for ballot collection ban where “[t]here has never been a case of voter fraud associated with ballot collection charged in Arizona” (quoting *Democratic Nat’l Comm. v. Reagan*, 329 F.Supp.3d 824, 852 (D. Ariz. 2018))); *Middleton v. Andino*, No. 3:20-cv-01730-JMC, 2020 WL 5591590, at *32 (D.S.C. Sept. 18, 2020) (“[T]he fact the Witness Requirement may provide a lead to investigate absentee fraud is undercut by an utter dearth of absentee fraud. Indeed, the recent June 2020 Primaries occurred without the Witness Requirement and resulted in little to ‘no evidence of fraud . . . much less material evidence of the type of fraud that could be prevented by the [Witness Requirement] in the first place.” (quoting *Common Cause R.I. v. Gorbea*, 970 F.3d 11, 15 (1st Cir. 2020) (per curiam))); *Cook Cnty. Republican Party v. Pritzker*, No. 20-cv-4676, 2020 WL 5573059, at *3 (N.D. Ill. Sept. 17, 2020) (denying preliminary injunction upon finding “[t]he isolated incidents cited lend support to the proposition that over time voter fraud rates have ‘remained infinitesimally small’”); *Paher II*, 2020 WL 2748301, at *7 (denying preliminary injunction where “Plaintiffs’ claims of voter disenfranchisement are speculative at best”); *Paher I*, 2020 WL 2089813, at *6 & n.10 (finding that plaintiffs’ “claim of voter fraud is without any factual basis”).

Next, Plaintiffs have not explained how the Consent Decree could result in widespread confusion regarding “the rules governing the November election.” Mot. at 15. Guidance and information issued by the Secretary, local election officials, and voter education organizations have been consistent throughout this election season, indicating that the Election Day Receipt Deadline will not be in effect, and that ballots must be postmarked on or before Election Day. *See, e.g.*, Exs. 21–22; Ex. 17 ¶¶ 9–10; Ex. 18 ¶¶ 6–7. Moreover, the Consent Decree replicates the system used during the August Primary—an election that saw record turnout. *See* Ex. 29 (“Six out of every 10 Minnesotans who voted in the August primary election cast their ballot absentee or by mail—a surge that helped voter turnout to triple over the last presidential election year in 2016.”); *see also Trump for President*, 2020 WL 5626974, at *5 (finding “no showing of [] voters’ confusion” where “voters exercised their ability to vote by mail in Nevada’s 2020 primary election”). Nor have Plaintiffs demonstrated why any uncertainty would exist due to the alleged risk of disenfranchisement stemming from Congress’s safe-harbor statute. Both the Consent Decree and the Secretary’s actions applying it are consistent with enactments of the Minnesota Legislature, and thus do not run afoul of the safe-harbor provision.

Finally, Plaintiffs’ concerns about the applicable deadlines are nothing but bunkum. There is simply no indication that the postmark deadline and

accompanying presumption—which *conform* to applicable deadlines, not conflict with them—will result in harm to Plaintiffs or any other voters. *See supra* Part I.C.1.c.

Plaintiffs’ delay in filing suit further militates against a finding of irreparable harm. The state court entered the Consent Decree on August 3. Despite the allegedly grievous injuries that Plaintiffs will suffer as a result, they waited *nearly two months* before filing their complaint and seeking injunctive relief, during which time the Secretary and other election officials implemented plans and issued guidance consistent with the Consent Decree. As courts have explained,

[a] preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff’s rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action and cannot complain of the delay involved pending any final relief to which it may be entitled after a trial of all the issues.

GTE Corp. v. Williams, 731 F.2d 676, 679 (10th Cir. 1984) (quoting *Gillette Co. v. Ed Pinaud, Inc.*, 178 F.Supp. 618, 622 (S.D.N.Y. 1959)); *see also Travel Tags, Inc. v. UV Color, Inc.*, 690 F.Supp.2d 785, 801 (D. Minn. 2010) (“The Court may consider unexplained delays when assessing irreparable harm.”). Plaintiffs’ inexplicable delay would not only result in harm to the Secretary and public if injunctive relief were granted, *see infra* Part III, but also illustrates a fundamental reality—despite their vociferous claims to the contrary, Plaintiffs are not actually at *any risk* of irreparable injury stemming from the Consent Decree.

III. The balance of harms weighs strongly against injunctive relief.

While Plaintiffs have not demonstrated *any* likely injury, enjoining the Consent Decree at this late stage would have a devastating impact on the course of the November Election in Minnesota. Plaintiffs suggest that “the harm of an erroneous ruling at this stage would be non-existent: the Secretary would simply be compelled to conduct this election the way every Minnesota Secretary of State has conducted elections for generations.” Mot. at 17. This blasé assertion does not reflect the hardships that would be imposed on both election officials and voters—including Intervenors—if the Consent Decree were enjoined.

Restoring the Election Day Receipt Deadline for the November Election would result in disenfranchisement for Minnesota voters. This Court need not take Intervenors’ word for it—this is the conclusion reached by the state court when it entered the Consent Decree. Judge Grewing explained that “[b]ased 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,” State Court Order at 5—a prediction later underscored by the record turnout in the August Primary. Judge Grewing further noted the “stretched [] capacity of the U.S. Postal Service” and the negative experiences of mail voters in Ohio and Wisconsin. State Court Order at 6–7. Ultimately, the state court concluded that “waiver of the . . . 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.” *Id.* at 25. This conclusion was supported by Intervenors’ evidence and declarations, which established the difficulties they and other voters would experience under the Election Day Receipt Deadline. *See* Exs. 2–9; Ex. 10 ¶¶ 3, 46, 52–55, 64–66 (noting that 3,517 late ballots were rejected in 2018 and predicting that 16,800 ballots could be rejected in November Election due to Election Day Receipt Deadline); *see also* Ex. 17 ¶¶ 4, 7, 10–11 (describing hardships if Election Day Receipt Deadline were reinstated); Ex. 18 ¶¶ 3, 8–11 (same).

This disenfranchisement would come to pass if the Consent Decree were enjoined. Depriving a voter of the opportunity to cast a ballot is not only a significant harm—“[t]o disenfranchise a single voter is a matter for grave concern,” *Serv. Emps. Int’l Union, Local 1 v. Husted*, 906 F.Supp.2d 745, 750 (S.D. Ohio 2012)—but an irreparable harm as well. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“[O]nce the election occurs, there can be no do-over and no redress.”); *Fla. Democratic Party v. Scott*, 215 F.Supp.3d 1250, 1258 (N.D. Fla. 2016) (“This isn’t golf: there are no mulligans.”).

These disenfranchising effects would only be exacerbated if election officials were required to reverse course at this late date. Both officials *and* the voters they serve have already planned for an election similar to the August Primary, which featured a postmark deadline *and* boasted record turnout. *See supra* Part II; *see also*

Paher I, 2020 WL 2089813, at *12 (“[E]ven accepting Plaintiffs’ purported harm to them of being disenfranchised due to vote dilution, such disenfranchisement could be, even more concretely, claimed in the absence of the Plan (and additionally by confusion that may result by the Court enjoining the Plan . . .).”). Local election officials are proceeding with implementation of the Consent Decree, and requiring corrective efforts at this point—such as changing guidance on websites, updating absentee ballot return envelope instructions, and distributing new guidance and instructions directly to voters—would be administratively infeasible. *See Cook Cnty. Republican Party*, 2020 WL 5573059, at *10 (denying preliminary injunction where plaintiff delayed in bringing suit and concluding that “enjoining the [challenged election law] approximately six weeks before the election would introduce even greater challenges into what already is an exceedingly difficult election to administer”).

Plaintiffs had every reason to know that absentee voting in Minnesota began on September 18, several days before they even filed their suit—this date was emphasized in both the State Court Order, *see* State Court Order at 18, and the Consent Decree itself, *see* Consent Decree at 3, 6. And yet they allowed this and other critical dates to pass, thus adding considerably to the administrative burdens that must be shouldered in order to undo the Consent Decree and heightening the consequent risk of disenfranchisement. Plaintiffs, in turn, have not demonstrated

any likely injury to themselves that would occur absent an injunction. Accordingly, while enjoining the Consent Decree’s postmark deadline would not prevent any harms to Plaintiffs—their supposed harms are ultimately imaginary—it would indisputably disenfranchise Minnesota voters whose ballots, *through no fault of their own*, are not delivered by Election Day.

IV. The public interest would not be served by an injunction.

An injunction restoring the Election Day Receipt Deadline—resulting in likely disenfranchisement of eligible voters—would not serve the public interest. “By definition, [t]he public interest . . . favors permitting as many qualified voters to vote as possible.” *League of Women Voters*, 769 F.3d at 247 (alterations in original) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012)). This includes not only Intervenors and the Alliance’s members, but *all* eligible Minnesotans who would risk disenfranchisement if Plaintiffs receive their requested injunctive relief. *See, e.g.*, Ex. 18 ¶¶ 3, 8–11. By contrast, the public interest would most assuredly be *ill-served* if voters’ constitutional rights were violated to safeguard against nonexistent risks of voter fraud and missed deadlines. *See, e.g., Common Cause R.I. v. Gorbea*, 970 F.3d 11, 15 (1st Cir. 2020) (per curiam) (concluding that risk of “fraudulent ballots is dubious as a matter of fact and reality” where state law provides protections against fraud); *Paher I*, 2020 WL 2089813, at *7 (“Plaintiffs’ overarching theory that having widespread mail-in votes makes the Nevada election

more susceptible to voter fraud seems unlikely where the Plan essentially maintains the material safeguards to preserve election integrity.”).¹⁴

CONCLUSION

Plaintiffs seek the extraordinary remedy of a preliminary injunction to dismantle the Consent Decree and, as a result, inject confusion and disenfranchisement into the November Election. But the Court cannot grant the relief they seek consistent with basic principles of preclusion, abstention, and standing. Plaintiffs ultimately fail to demonstrate a likelihood of success on the merits or any actual injury that they would suffer as a result of the Consent Decree. Because they have not, “by a clear showing, carry[ed] the burden of persuasion,” *Brand Advantage Grp.*, 2020 WL 1891772, at *7 (quoting *Mazurek*, 520 U.S. at 972), Intervenor respectfully request that this Court deny Plaintiffs’ motion for a preliminary injunction.

¹⁴ For example, under Minnesota law, it is a felony to vote more than once in the same election, Minn. Stat. § 204C.14; to “[p]ut a ballot in a ballot box for any illegal purpose,” *id.*; to apply for an absentee ballot with the intent to cast it illegally, *id.* § 203B.03; or to bribe or otherwise induce a voter to refrain from voting or vote in a particular way, *id.* § 211B.13.

DATED this 29th day of September, 2020

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JAMES CARSON & ERIC LUCERO,

Plaintiffs,

v.

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

Defendant,

and

ROBERT LAROSE, TERESA MAPLES,
MARY SANSOM, GARY SEVERSON, &
MINNESOTA ALLIANCE FOR
RETIRED AMERICANS EDUCATIONAL
FUND,

Proposed Intervenor-Defendants.

Civil Action No. 0:20-cv-02030
(NEB/TNL)

LOCAL RULE 7.1
CERTIFICATE OF COMPLIANCE

Pursuant to LR 7.1(f)(2), the undersigned hereby certifies that Intervenor-Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction was prepared in Microsoft Word 2010 using 13-point font and complies with the other limits of LR 7.1(h).

The undersigned further certifies that the above referenced Memorandum contains 11,939 words according to Microsoft Word 2010's word count, including headings, footnotes, and quotations, but excluding the caption, signature-block

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**REPLY IN SUPPORT OF PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION**

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INTRODUCTION

This case presents vital questions of federal law that will have to be answered either now or after Election Day. Both the Secretary and Intervenors say their aim is to avoid disenfranchisement of Minnesota voters, but disenfranchisement is precisely what the policies they defend will do. When voters rely on those policies to cast ballots that arrive after Election Day, those ballots will be subject to challenge by candidates. And, because the Secretary’s decision to permit the counting of such ballots blatantly violates the prescriptions of the United States Constitution, those ballots will be disqualified and those voters completely disenfranchised. The lawfulness of the Secretary’s policies must be resolved now to prevent that result by making clear what deadline applies for votes to be lawfully counted, to avoid the chaos that will inevitably result when large numbers of untimely ballots are challenged in the short period between Election Day and the federal law “safe harbor” for appointing electors, and to avoid the irreparable harm that Plaintiffs face as candidates and voters.

I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

A. Plaintiffs Are Likely To Prevail On Count I

For all their arguments, the Secretary and Intervenors cannot get past the fact that neither the Secretary nor a Minnesota court is “the Legislature” of Minnesota. Because Article II “leaves it to the legislature exclusively to define the method” of appointing electors, *McPherson v. Blacker*, 146 U.S. 1, 27 (1892), the Secretary may not alter bright-line statutory deadlines.

As an initial matter, the Secretary is incorrect (at 25-26) that the Supreme Court concluded otherwise in *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (2020) (per curiam). The decision made clear that the lower court’s extension of the ballot-receipt deadline—the election-law alteration the Secretary cites

as relevant here—“is not challenged in this Court.” *Id.* at 1206. Further, no Article II argument was presented to the Supreme Court as to *any* election-law alteration,¹ and such an argument would have had questionable merit, since the presidential preference primary at issue does not appear to have involved the “appoint[ment]” of “Electors” to the Electoral College. Const. Art. II, § 1, cl. 2. “[C]ases cannot be read as foreclosing an argument that they never dealt with.” *Waters v. Churchill*, 511 U.S. 661, 678 (1994).²

1. Article II Prohibits the Secretary from Rewriting State Law on the Manner of Appointing Electors

a. The Secretary is mistaken to claim (at 27-31) the right to abandon statutes he believes “would violate Minnesota’s Constitution,” and a state court’s blessing cannot cure his lack of authority. The Electors Clause authorizes *neither* an executive actor nor a state court applying state constitutional law to abandon the “Manner...the Legislature” has “direct[ed]” for appointing electors. “This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified *by their state constitutions.*” *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (quotation marks omitted) (emphasis added).

The Electors Clause therefore establishes “a limitation upon the State in respect of any attempt to circumscribe the legislative power.” *Id.* at 25; *see also Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (same). This limitation operates on the Secretary and forecloses his argument (at 29) that “state constitutional officers and judges” may, constituent with Article II, rewrite the law. *See Bush v. Gore*, 531 U.S. 98, 111-12 (2000) (Rehnquist, J., concurring)).

¹ *See* Emergency Application for Stay, available at <https://bit.ly/2ScI9Zm>.

² Similarly, no Article II issues were raised in *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11 (1st Cir. 2020).

b. State constitutions do not supersede Article II of the *federal* Constitution. Following *McPherson*, state courts have repeatedly held that state constitutional provisions “may not operate to ‘circumscribe legislative power’ granted by the Constitution of the United States” and that it is therefore “unnecessary...to consider whether or not there is a conflict between the method of appointment of presidential electors directed by the Legislature and the state constitutional provision.” *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 286-87 (Neb. 1948); *see also Commonwealth ex rel. Dummit v. O’Connell*, 181 S.W.2d 691, 694 (Ky. 1944); *Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *In re Opinions of Justices*, 45 N.H. 595, 601-07 (1864); *Chase v. Miller*, 41 Pa. 403, 409 (1862); *PG Pub. Co. v. Aichele*, 902 F. Supp. 2d 724, 748 (W.D. Pa. 2012).

The Secretary has no authority for his contrary view. The two decisions he cites (at 29-30), *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 576 U.S. 787 (2015), and *Smiley v. Holm*, 285 U.S. 355 (1932), both undermine his position. Their holding that the Elections Clause of Article I does not permit a state legislature to “prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State’s constitution,” *Arizona*, 576 U.S. at 817-18, refers to the “lawmaking *process*” established by a state constitution. *Id.* at 804 (emphasis added); *see also id.* at 808-13. *Smiley* held that a congressional redistricting plan was not valid under the Elections Clause where the state’s governor vetoed the law, consistent with the “*manner...*in which the Constitution of the state has provided that laws shall be enacted.” 285 U.S. at 368 (emphasis added). Likewise, *Arizona* held that a redistricting commission, and the ballot initiative that created it, belonged to “the State’s prescriptions for lawmaking,” 576 U.S. at 808, and therefore fit within the term

“Legislature” of the Elections Clause, “which encompasses all legislative authority conferred by the State Constitution, including initiatives adopted by the people themselves.” *Id.* at 793.

Here, the ballot-receipt deadline obviously was enacted through Minnesota’s lawmaking process: the Minnesota Legislature passed the law, and the Governor signed it. And the Secretary’s abandonment of the law obviously does *not* conform to Minnesota’s lawmaking prescriptions: the Secretary simply “present[ed] a judge with a consent decree implementing such relief” as he deemed appropriate and obtained an order approving it. Secretary Br. 27. Laws are enacted in Minnesota when the Legislature presents a bill to the Governor and the Governor signs it, not when the Secretary presents a proposed order to a judge and the judge approves it.

c. Even if *Smiley* and *Arizona* somehow prescribed a limited role for “the Legislature” in setting the “Times, Places, and Manner” of congressional elections under the Elections Clause of Article I, § 4, that could be circumscribed by executive officials and courts, that would not reach the Electors Clause. *Arizona* distinguished various functions the Constitution assigns state legislatures, holding that, when the Constitution assigns the legislature an “electoral” function rather than a “lawmaking” function, the legislature must “perform that function to the exclusion of other participants.” 576 U.S. at 2667-68.

The Electors Clause function of state legislatures concerns the power to “appoint.” See *McPherson*, 146 U.S. at 28 (observing that “[t]he appointment of delegates was, in fact, made by the legislatures directly” in many states for generations after the founding). It is more akin to the “‘ratifying’ function for ‘proposed amendments to the

Constitution under Article V,” *Arizona*, 576 U.S. at 806-07 (citations omitted), than to the lawmaking function assigned by the Elections Clause of Article I.

d. Even if the Minnesota Constitution could “circumscrib[e] the legislature’s authority under Art. II, § 1, cl. 2,” *Palm Beach*, 531 U.S. at 475, the Secretary’s position still fails because he lacks the authority to declare Minnesota law unconstitutional. It is the Minnesota judiciary’s duty, not the Secretary’s, to determine “whether the Legislature has violated its constitutional duty,” *Cruz-Guzman v. State*, 916 N.W.2d 1, 9 (Minn. 2018), and that never happened here. The Minnesota judiciary *has not determined that the ballot-receipt deadline violates the State Constitution*. The court order approving the Secretary’s agreement states: “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.” State Court Order 17 (quotation marks omitted). There is no lawful determination that the State Constitution supersedes the “Manner” adopted by the “Legislature.”

2. The Secretary Lacks the Authority Under Minnesota Law To Alter State Law Establishing the Manner of Appointing Electors

Intervenors (unlike the Secretary) do not dispute that the Secretary violates the Electors Clause when he “exceed[s] the authority granted to him by the Minnesota Legislature,” Int’s Br. 30, but they claim (along with the Secretary (at 31)) that this delegation was afforded through Minnesota Statutes § 204B.47. Not so.

a. Because the Minnesota Legislature was “not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution,” *Palm Beach*, 531 U.S. at 76, this Court “necessarily must examine the law of the State” for itself. *Bush*, 531

U.S. at 114 (Rehnquist, J., concurring). Viewed under that standard, Section 204B.47 does not “delegate [legislative] authority” to the Secretary, Int’s Br. 29, but authorizes the Secretary to comply with lawful court orders issued on the merits in arms-length litigation. The statute does not engraft the Secretary into Minnesota’s “lawmaking functions” in “accordance with the method with the State has prescribed for legislative enactments.” *Id.* at (29) (quoting *Arizona*, 576 U.S. at 807).

Section 204B.47 cannot carry the weight Intervenors would give it. It authorizes the Secretary “adopt alternative election procedures” only “[w]hen a provision of the Minnesota Election Law cannot be implemented as a result of an order of a state or federal court....” Here, it is not the case that the receipt deadline “cannot be implemented as a *result*” of a state-court order. Instead, the *Secretary* decided that the deadline should not be implemented and asked a state court to rubberstamp that determination. Had the Secretary not requested this, there would be no impediment to implementing the Election Day deadline—and, importantly, the Secretary and Intervenors do not ask this Court to hold otherwise.

Plaintiffs insist that the state court “undertook a rigorous analysis” in approving the Secretary’s request, but that is incorrect. “A consent judgment is based wholly on the consent of the parties,” *Hentschel v. Smith*, 153 N.W.2d 199, 206 (Minn. 1967); *City of Barnum v. Sabri*, 657 N.W.2d 201, 205 (Minn. Ct. App. 2003), so the Secretary’s *consent* is the cause in fact from which the supposed inability to enforce the ballot-receipt deadline “result[ed].” Moreover, “there is no judicial inquiry into the facts or the law applicable to the controversy” before a Minnesota court approves a consent decree, and “the court’s authority is limited by the consent or stipulation,” *Hentschel*, 153 N.W.2d at 206 (quotation marks omitted), a point the state court acknowledged,

Foix Decl. Ex. C (State Court Order) 17. Although the court purported to discuss the likelihood of success under an alternative “federal” standard, *id.* at 19, it did not analyze the ballot-receipt deadline: on this topic, it simply determined that “the Secretary’s decision to enter the consent decree [is] reasonable,” *id.* at 21.

No Minnesota court has determined that the ballot-receipt deadline violates, or even likely violates, the Minnesota Constitution. It is not true that the deadline “cannot be enforced,” and any such inability is not the “result” of a court’s determination, but the Secretary’s.

b. The position of the Secretary and Intervenors undoes the statutory scheme. It fares no better than the position rejected in *Bush* under a Florida statute broadly authorizing state courts to “provide any relief appropriate under the circumstances” during an election recount. 531 U.S. at 102 (quoting Fla. Stat. § 102.168(8)). The Supreme Court determined that the Florida Supreme Court’s order requiring “a recount to proceed” was not authorized under this provision because that course of action would conflict with the reticulated structure of the election code, which was designed to ensure that a winner be named by the federal safe-harbor deadline. *Id.* at 110-11. The Supreme Court held that Florida Supreme Court’s order “contemplates action in violation of the Florida Election Code, and hence could not be part of an ‘appropriate’ order authorized by” Florida statute. *Id.* at 111.

So too here: Minnesota law contemplates that the Secretary will serve an executive function in enforcing the law, not a legislative function in rewriting it. To read Section 204B.47 as empowering the Secretary to rewrite state election law through an agreement, approved unless there is “fraud, mistake, or absence of real consent,” *Hentschel*, 153 N.W.2d at 206, would distort the statutory scheme beyond recognition.

B. Plaintiffs Are Likely To Prevail On Count II

Intervenors and the Secretary concede that “the state system cannot directly conflict with federal election laws” governing presidential elections. Int’s Br. 33 (quotation marks omitted). But they inexplicably contend that their agreement to count votes received *seven days* after November 3 “does not change the date of the election.” Secretary Br. 32. They cannot square that circle.

1. There is no “presumption against preemption” in cases under the Electors Clause or its cousin the Elections Clause. *See Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 13 (2013). When Congress exercises this authority “it necessarily displaces some element of a pre-existing legal regime erected by the States,” *id.* at 14, not to mention non-pre-existing regimes contrived by state executive officials. “[T]here is no compelling reason not to read Elections Clause [or Electors Clause] legislation simply to mean what it says.” *Id.* at 15.

The statute at issue here says that electors “shall be appointed...on the Tuesday next after the first Monday in November.” 3. U.S.C. § 1. Election Day is November 3. “When the federal statutes speak of ‘the election’..., they plainly refer to the combined actions of voters and officials meant to make a final selection of an officeholder.” *Foster v. Love*, 522 U.S. 67, 71 (1997). Thus, “voting must end[] on federal election day.” *Lamone v. Capozzi*, 912 A.2d 674, 692 (Md. 2006).

The Secretary tries (at 32) to square his policy with this clear statutory text by contending that under his policy “a ballot must be mailed by election day” to be counted. *See also* Int’s Br. 33. But even if that were true (it is not), it is the arrival of the ballot, not its mailing, that marks the “‘consummation’ of the process of selecting an official.” *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001). Voters do not “appoint[]” electors by handing paper to a postal worker, but by casting

a ballot at a polling place. 3 U.S.C. § 1; *Foster*, 522 U.S. at 71 (holding that “Election Day” requires the combination of actions by voters *and election officials*). The Minnesota Legislature and the Secretary understand this: the State’s law and regulations are unequivocal that it is the arrival that counts, not the mailing. Minn. Stat. § 204D.03 Subd. 2; Minn. R. 8210.2500, 8210.2200.

2. Even if the congressional deadline was to mail a ballot by November 3, the Secretary has agreed to count ballots mailed after that date. It is not true that, as the Secretary insists, “a ballot must be mailed by election day” under his policy. Secretary Br. 32. Instead, the Secretary has agreed to count ballots “if they are received within seven days and there is no evidence...showing they were mailed after election day.” *Id.* at 32-33. Ballots mailed after November 3 will be counted under this policy. This “fundamentally alters the nature of the election.” *Republican Nat’l Comm.*, 140 S. Ct. at 1207.

It does not help the Secretary or Intervenors to call this policy a “presumption.” Secretary Br. 32; Int’s Br. 33-34. They identify no circumstance under which any poll worker could ever have a basis to suspect that a ballot received on (say) November 8 was mailed after Election Day. That being so, the policy treats late-mailed ballots as mailed on November 3 by operation of law, so long as they are received by 8:00 p.m. on the 10th. Importantly, the U.S. Postal Service’s policy is that it does not postmark mail bearing prepaid postage,³ which includes all Minnesota absentee ballots, and so most or all ballots will bear no postmark and no evidence one way or the other of the true mailing date.

³ United States Postal Service, Handbook PO-408 - Area Mail Processing Guidelines, 1-1.3 “Postmarks,” available at https://about.usps.com/handbooks/po408/ch1_003.htm (Last accessed Oct. 1, 2020).

Intervenors therefore miss the mark (at 34) in claiming no conflict because “Congress has *not* codified a postmark presumption.” Congress *has* codified an Election Day, and altering Election Day under the label “presumption” is no less a conflict than doing so by any other label. By Intervenors’ logic, the Secretary could keep ballot drop boxes open a week (or a month) after Election Day and “presume” that every ballot envelope deposited that week (or month) was actually cast (e.g., filled out and sealed) November 3. For the same reason, it is entirely illogical for Intervenors to claim (at 35) that the “postmark presumption effectuates [a] requirement” that “ballots be postmarked on Election Day.” It is the opposite: to presume that a ballot bearing *no postmark* is in fact “postmarked on Election Day” is to suspend reality. This is not a “standard for election officials to determination whether ballots were cast on Election Day,” Int’s Br. 37, but the abdication of any enforceable standard. The way to “effectuate” a postmarked-by-Election-Day requirement is to require a postmark showing that the ballot was cast on or before Election Day.

Equally unpersuasive is the Secretary’s contention (at 33) that the “presumption is based on the Postal Service’s own guidance” that it may take “one week” for ballots to be delivered. That is not a basis to *presume* that a ballot received by November 10 was cast on or before November 3. The Postal Service guidance tells voters when to cast a ballot to avoid a risk that it may arrive after a certain date, but does not reveal when a given ballot was mailed. Simply because *some* ballots may take a week to arrive does not mean one can presume that a ballot arriving at a polling place must have been sent at least seven days earlier. Indeed, Minnesota court rules presume that postal mail is generally received in three days, not a week. Minn. R. Civ. P. 6.01(e).

4. It is indeed “not surprising” that “Plaintiffs cite no cases where postmark presumptions...were found to conflict with federal law.” Int’s Br. 36. Until the year 2020, no one seems to have thought of this workaround of Election Day. “[T]he law responds to proper evidence and valid inferences in ever-changing circumstances, as it learns more about ways in which its commands are circumvented.” *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). Similarly, until 2020, no one seems to have thought that Election Day “ha[s] the effect of impeding citizens in exercising their right to vote.” Int’s Br. 35 (quotation marks omitted). The law of the Minnesota Legislature and Congress is the same law that has governed presidential elections for generations, through all sorts of calamities and difficulties.

The franchise is easier than ever to exercise. Mail-in voting itself is relatively new, and Intervenors and the Secretary have no response to the Montana Supreme Court’s determination in 1944 that Congress intended servicemembers risking their lives in World War II to have their ballots in by Election Day to be counted. *Maddox v. Bd. of State Canvassers*, 116 Mont. 217, 149 P.2d 112, 113 (1944). There is no reason to believe that Congress intended a different result here.

C. The *Purcell* Principle Is Inapplicable Here

The Secretary’s reliance (at 32-34) on *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), (which Intervenors do not join) is misplaced. *Purcell* requires a federal court to entertain “considerations specific to election cases and its own institutional procedures” before issuing an injunction impacting election procedures. *Id.* at 4-5. “[I]t is important to remember that the Supreme Court in *Purcell* did not set forth a per se prohibition against enjoining voting laws on the eve of an election.” *Feldman v. Arizona*

Sec'y of State's Office, 843 F.3d 366, 368 (9th Cir. 2016). In this case, those considerations favor an injunction.

First, the question here, relating to which ballots are validly cast, can be, and often is, litigated *after* the election. That type of issue was litigated in 2000 until December 12, a full five weeks after Election Day. *See Bush v. Gore*, 531 U.S. at 106-11. In fact, a case related to *Bush v. Gore* concerning the timeliness of absentee ballots and rules governing postmarking was decided on December 8. *See Bush v. Hillsborough Cty. Canvassing Bd.*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000). It cannot be too *late* to raise these issues, when they will otherwise be raised weeks from now.

Nor does the Secretary explain why it is better to obtain federal-court resolution of these issues later rather than sooner. The Secretary admits (at 32) that “post-election litigation about the validity of ballots cast for particular candidates” is a potential outcome but fails to appreciate that denying relief under *Purcell* (or any other doctrine) will not prevent that. It would be far better for voters to know *now* what the rules are then find out after they voted when their ballots may be disqualified. This is a case where concerns related to “voter confusion,” *Purcell*, 549 U.S. at 4-5, weigh in favor of an injunction rather than against it.

Second, this is not a case involving something like a redistricting plan, a voter-identification law, or the names printed on the face of a ballot. Challenges to those features of an election concern what happens *before* the election, but this challenge concerns what happens *after* it—i.e., which ballots will be deemed late or early. Other than announce that Minnesota law means what it *already says*, the Secretary will not need to change any element of the election process.

Third, the *Purcell* principle limits courts' discretion "to grant an injunction to alter a State's *established* election procedures," *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (emphasis added), but there is nothing established about the Secretary's policy of counting ballots received and even mailed after Election Day. *Feldman*, 843 F.3d at 368 ("[T]he concern in *Purcell* and *Southwest Voter* was that a federal court injunction would disrupt long standing state procedures."). Minnesota statutory law has never followed that policy, and the established policy is the one Plaintiffs ask to be applied. *Compare id.* at 369 ("Here, the injunction preserves the status quo" as "[e]very other election cycle in Arizona has permitted the collection of legitimate ballots by third parties to election officials.").

Fourth, the Secretary favored a last-minute alteration to election procedure by entering into an agreement with private parties. Having done so, the Secretary cannot credibly contend that review of that alteration is too disruptive. Further, the alteration the Secretary favored was not merely the suspension of a state-law requirement, as in *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 13 (1st Cir. 2020) (suspension of required witness signatures for absentee ballots), but a *newly invented* regime, complete with a new "Election Day."

Fifth, "[a] state official unhappy with the lawful decisions of the state legislature should not be able to round up an agreeable plaintiff who then uses collusive litigation to 'force' the state to do what the official wants." *Common Cause Rhode Island*, 970 F.3d at 17. Here, the Secretary disagrees with the Minnesota Legislature's judgment, and he leveraged a state-court suit to manufacture a workaround. Unfortunately, the First Circuit's warning that its *Common Cause Rhode Island* decision should not be "relied upon to open any floodgates," *id.*, is being relied upon to open floodgates.

Sixth, Plaintiffs did not delay in bringing this action, which was filed less than a month after they were certified as elector candidates. *Feldman*, 843 F.3d at 369 (finding no delay where plaintiffs filed the action “less than six weeks” after their claims became ripe). Further, Plaintiffs “have pursued expedited consideration of their claims at every stage of the litigation,” *id.*, and will continue to do so. The Secretary’s refrain that the suit was filed “four days after voting began,” *see, e.g.*, Secretary Br. 22, identifies no prejudice: voters who send their ballots in *now* are complying with Minnesota law as written and will benefit from an injunction, rather than suffer harm.

As in *Common Cause Rhode Island*, “[b]ecause of the unusual—indeed in several instances unique—characteristics of this case, the *Purcell* concerns that would normally support a stay are largely inapplicable, and arguably militate against it.” 970 F.3d at 17. The doctrine does not bar an injunction.

II. Plaintiffs Have Standing Because the Secretary’s Actions Threaten Their Concrete Interests as Candidates and Voters

A. Article III Standing

Plaintiffs’ standing, as both candidates for office and voters, to challenge the validity of the Secretary’s actions under federal law is unimpeachable.

1. Plaintiffs have standing as candidates for the office of Presidential elector. *See* Minn. Stat. § 208.03 (providing for the election of “Presidential electors”). As candidates, Plaintiffs have a direct and personal stake in the conduct of their election consistent with governing federal law and, in particular, Article II’s Presidential Electors Clause. Recognizing as much, practically every major case enforcing the Electors Clause has been brought by candidates. That includes *McPherson v. Blacker*, 146 U.S. 1 (1892), a pre-election suit by elector candidates challenging a state’s manner of appointing electors as inconsistent with the Electors Clause. More recently, the Supreme

Court adjudicated similar claims by candidates in *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 76, and then *Bush v. Gore*, 531 U.S. at 103.⁴ As in those latter cases, Plaintiffs will be injured by the tallying of votes for their opponents in violation of federal law.

Additional injuries to Plaintiffs of an election conducted other than in the “manner” authorized by federal law are obvious and acute. The most daunting is the prospect that the Secretary’s policies will be held to violate the “safe harbor” provision of 3 U.S.C. § 5—because they were not validly “enacted prior to the day fixed for the appointment of the electors”—thereby jeopardizing Minnesota’s participation in the Electoral College, as well as Plaintiffs’ ability to serve effectively as electors. *See generally Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 77-78. This injury arises directly by operation of law: if the Secretary’s actions are invalid, then Minnesota will be ineligible for the safe harbor. It was to avoid *that precise result* that the Supreme Court terminated Florida’s 2000 recount, and Plaintiffs’ interest here as candidates is identical. *Bush v. Gore*, 531 U.S. at 110.

Another injury is the inevitable last-minute litigation over ballot eligibility, and chaos, that will inevitably occur in the absence of a clear determination as to what rules govern under federal law in advance of Election Day. *See, e.g., Bush v. Gore, supra.* Not only will that force Plaintiffs to incur significant expense, but it will also risk extended litigation that may push resolution of the contest past the safe harbor deadline—after all, if ballots are still coming in (under the Secretary’s policies) on November 10, there is every likelihood that controversies and contests over those votes will

⁴ In each case, Bush, as the party “seeking to invoke [the Supreme] Court’s jurisdiction,” was required to have standing. *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Electors’ standing is no less than that of the nominees they support. *See Storer v. Brown*, 415 U.S. 724, 738 n.9 (1974).

continue straight through the December 8 deadline and perhaps even through the Electoral College’s vote on December 14. 3 U.S.C. § 7. These injuries are more than sufficient to support standing, and they counsel resolution of this dispute now, rather than after Election Day when the likelihood of serious, irreparable injury is even greater. *See* Secretary Br. 32 (acknowledging “problem” of “post-election litigation over whether to count the ballot”).

The Secretary’s only response to all this is the claim (at 19) that Plaintiffs as electors are somehow acting in the capacity of “representatives of the Republican Party of Minnesota.” But Minnesota law regards Plaintiffs as candidates for elected office, Minn. Stat. § 208.03, not organizational representatives of a political party.

Intervenors, in turn, primarily argue (at 23-24) that Minnesota’s safe-harbor compliance is not at risk because (in their view) the Secretary’s actions comport were validly “enacted” and therefore satisfy the safe harbor—essentially the merits presented in this litigation. Crucially, Intervenors do not dispute that, if the Secretary’s actions were not validly “enacted” because they violate Article II, serious cognizable injury will follow. Nor does the Secretary dispute as much. And while Intervenors contend that extending the ballot deadline will not itself threaten safe-harbor compliance, their argument (at 25) consists entirely of a recitation of statutory deadlines, unmoored from the well-known realities of drawn-out post-election litigation. *See, e.g., Bush v. Gore, supra*. This is not uncharted territory for Minnesota: driven largely by disputes over absentee ballots, the 2008 senatorial election recount was only certified on January 5—62 days after the election—and the contest litigation took another six months.⁵ Given the far larger numbers of absentee ballots expected this year, the

⁵ *See generally* 2008 United States Senate election in Minnesota, Wikipedia, <https://bit.ly/3cS55pi>.

Secretary's actions will only exacerbate the already serious problem of timely certification of the vote. That is especially so given the lack of any dispute by the Secretary or Intervenors that the issues presented in this case will have to be decided for this election; if not now, it will be after Election Day through numerous challenges to particular late-received ballots, increasing the chaos and likelihood of disaster.

2. Plaintiffs have standing as voters threatened with the dilution of their votes by ballots cast and counted in violation of federal law. "The right to vote is individual and personal in nature, and voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916, 1920 (2018) (internal quotation marks and citations omitted). Here, the Secretaries' actions authorize counting ballots that federal law holds to be ineligible, and that will necessarily have the effect of diluting Plaintiffs' lawfully cast votes.

The Secretary does not dispute that vote dilution is a cognizable injury in fact or that it can be remedied by injunction. Instead, he contends (at 19) that this injury amounts to a "generalized grievance," citing *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2748301 (D. Nev. May 27, 2020). But the claimed injury in *Pahler* was dilution through the casting of additional fraudulent ballots that the plaintiffs believed would be facilitated by the policies they challenged. *Id.* at *2. That, the court concluded, amounted to a generalized grievance that the state should be enforcing its policies to deter fraudulent voting. *Id.* at *4. Here, by contrast, the entire point of the Secretary's actions is to count votes that, as a matter of federal law, are ineligible. Unlike in *Pahler*, there is nothing "speculative," *id.*, about the link between Plaintiffs' dilution injury and the specific actions they challenge: the more ineligible votes that

are counted, the less weight Plaintiffs' votes will receive. Intervenor's cited authorities (at 19-20) are identically inapposite, all addressing speculative claims of dilution-through-fraudulent-voting as opposed to, as here, the certainty that ballots will be counted in violation of federal law, which is precisely what the Secretary has agreed to do.⁶ While both the Secretaries and Intervenor's cite *Lance v. Coffman*, 549 U.S. 437 (2007) in their "generalized grievance" argument, neither notes that it specifically juxtaposed the injury it rejected against vote dilution, which it recognized to be a firm basis for standing, *id.* at 1198 (citing *Baker v. Carr*, 369 U.S. 186 (1962)). In that way, *Lance* supports standing here.

As voters, Plaintiffs also face the prospect of complete disenfranchisement through the State's failure to comply with the safe harbor, as discussed above. While the Secretary and Intervenor's dispute the premise, they do not deny that this would be a cognizable injury sufficient to support standing.

3. Finally, the Secretary's reliance on *Republican National Committee v. Common Cause of Rhode Island*, Sup. Ct. No. 20A28 (Aug. 13, 2020 order), is misplaced. The case involved a challenge by political parties as intervenors to a federal consent decree relaxing a state's witness or notary requirement for mailed ballots in light of the COVID-19 pandemic. *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 13-14 (1st Cir. 2020). Similar to the other cases cited by the Secretary and Intervenor's, the intervenors' sole claimed injury was that "their candidates may be the victims of fraudulent ballots." *Id.* at 15. Thus, it was little surprise that the Supreme Court found the intervenors to "lack a cognizable interest in the State's ability to enforce its duly enacted laws," given that their complaint was that the state should be doing more to deter

⁶ Intervenor's assertion (at 22) that there is no causal link between Plaintiffs' dilution injury and the Secretary's challenged actions is wrong for the same reason.

fraud, *see* 970 F.3d at 15-16. As explained above, that is completely different from Plaintiffs' objection to the Secretary's commitment to count votes that federal law holds to be ineligible, a policy that injures Plaintiffs directly as both candidates and voters.

B. Prudential Standing

The Secretary's prudential standing argument comes *at least* a decade too late. Contrary to the Secretary's claim (at 13-14), Plaintiffs seek to vindicate their own rights, not any third party's like the Minnesota Legislature or Congress. The Electors Clause and Election Day Clause of Article II are among the Constitution's federalism provisions that serve to "protect[] the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond v. United States*, 564 U.S. 211, 222 (2011). On that basis, *Bond* held that individuals "can assert injury from governmental action taken in excess of the authority that federalism defines." *Id.* at 220. An individual's "rights in that regard do not belong to a State," *id.*, a point that carries the day equally under Article III and "prudential standing rules," *id.* at 225. That is so in this context: the aberrant prudential standing limitations invoked by the Secretary would have barred adjudication in each of the Electors Clause cases discussed above, including *McPherson v. Blacker* and *Bush v. Palm Beach County Canvassing Bd.* *See also Foster*, 522 U.S. at 67 (voter challenge under Elections Clause).⁷

⁷ Obsolete decisions like *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty*, 115 F.3d 1372, (8th Cir. 1997), which the Secretary cites (at 14), were overruled by *Bond*, as the Eighth Circuit has recognized, *see United States v. Smith*, 655 F.3d 839, 848 (8th Cir.2011), *vacated on other grounds*, 566 U.S. 1032 (2012).

The line on standing to enforce the Elections Clause that Intervenors quote (at 27) from *Corman v. Torres*, 287 F. Supp. 3d 558 (M.D. Pa. 2018), does not mean what

III. *Younger* Abstention Does Not Apply

The Court should not, and may not, abstain. “Abstention from the exercise of federal jurisdiction is the exception, not the rule,” *Col. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 813 (1976), and “[c]ases involving questions of civil rights are the least likely candidates for abstention,” *Assoc. for Retarded Citizens of North Dakota v. Olson*, 713 F.3d 1384, 1391 (8th Cir. 1983). The Secretary and Intervenors rely on a doctrine they call “*Pennzoil* abstention,” see *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), but *Pennzoil* applied *Younger* abstention, *id.* at 17; see also Federal Practice & Procedure § 4254.

In *Sprint Communications v. Jacobs*, 571 U.S. 69 (2013), the Court “restate[d] [its] *Younger* jurisprudence,” holding that *Younger* does not apply outside “three ‘exceptional’ categories”: (1) “ongoing state criminal prosecutions,” (2) “certain civil enforcement proceedings,” and (3) “pending civil proceedings involving certain orders uniquely in furtherance of the state courts’ ability to perform their judicial functions.” *Id.* at 591, 594. The Court cited *Pennzoil* for that third category. *Id.* at 591. It is inapplicable here for multiple reasons.

First, this abstention doctrine is triggered only in cases between the “same parties and ‘substantially identical’ claims, raising ‘nearly identical allegations and issues.’” *Yang v. Tsui*, 416 F.3d 199, 204 n. 5 (3rd Cir. 2005); *Friends of Lake View Sch. Dist. Incop. No. 25 v. Beebe*, 578 F.3d 753, 757 (8th Cir. 2009) (applying *Younger* when identical parties raised “the same issues as the state-court proceedings”); *Bates v. Van Buren Tp.*, 122 Fed. Appx. 803, 805 (6th Cir. 2004) (*Younger* requires “a parallel case between the same parties”). Plaintiffs were not parties to the state proceeding, and their

Intervenors suggest; in context, the court’s point was that *individual state legislators* in their official capacity as such, as opposed to the legislature as a whole, lacked standing.

affiliation with the Republican Party does not make them parties. A person's mere affiliation with a political party, as a voter, party member, or candidate for office, does not render that person bound to the judgments that bind the party. *See Womens Services, P.C. v. Douglas*, 654 F.2d 355 (9th Cir. 1981); *see infra* § IV. Nor are the issues the same: neither merits argument here was raised in state court.

Second, there is *no* “pending case in a state court—or even a pending administrative proceeding or any type of proceeding,” so “abstention would be inappropriate.” *Fantasysrus 2, L.L.C. v. City of East Grand Forks, Minn.*, 881 F.Supp.2d 1024, 1029 (D. Minn. 2012) (distinguishing *Cedar Rapids Cellular*). The state proceeding here has concluded.

Third, the concluded state-court proceeding did not “involve[] certain orders uniquely in furtherance of the state courts’ ability to perform their judicial functions.” *Sprint*, 572 U.S. at 591. The Minnesota court only acted because the Secretary asked it to do so, and there is no circumstance like in *Pennzoil* where the federal plaintiff was seeking to enjoin a state court from enforcing its judgment. *See Pennzoil*, 481 U.S. at 13-14. This case is not the “extraordinary” exception to the Court’s duty to exercise its jurisdiction.

IV. Plaintiffs Are Not Bound by the Consent Decree

Intervenors’ reliance (at 11-14) on the Full Faith and Credit Clause is erroneous for similar reasons. The Clause requires federal courts to apply “the preclusion rules of the state from which the judgment originated.” *Lommen v. City of E. Grand Forks*, 97 F.3d 272, 274 (8th Cir. 1996). Minnesota preclusion doctrine does not reach Plaintiffs because they were not parties to the state-court litigation, nor in privity with any parties.

“Privity expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties.” *Rucker v. Schmidt*, 794 N.W.2d 114, 118 (Minn. 2011) (quotation marks omitted). “[C]ourts will find privity to exist for those who control an action although not parties to it, those whose interests are represented by a party to the action, and successors in interest to those having derivative claims.” *Id.* (quotation marks omitted). Outside of those narrow circumstances, privity will only be attributed to a party “so identified in interest with another that he represents the same legal right.” *Id.* The Secretary advances two privity arguments, and both fail.

1. The Intervenors first advances the baffling argument (at 12-13) that Plaintiffs were in privity *with the Secretary* in the state-court action. But Plaintiffs are *suing* the Secretary to assert an alleged dilution of their votes; the Secretary does not get to halt the lawsuit by claiming to have Plaintiffs’ best interests at heart.

The right to vote is personal to Plaintiffs; it does not exist at the grace of the Secretary. Even for purposes of *intervention*, courts have repeatedly recognized that voter interests are not represented by state officials. As the D.C. Circuit explained in *Cleveland Cty. Ass’n for Gov’t by People v. Cleveland Cty. Bd. of Comm’rs*, voters’ and representatives’ interests in vote-dilution litigation do not align with the government’s interest because “intervenors [seek] to advance their own interests in achieving the greatest possible participation in the political process,” whereas the government, “on the other hand, was required to balance a range of interests likely to diverge from those of the intervenors.” 142 F.3d 468, 474 (D.C. Cir. 1998 (quoting *MEEK v. Metro. Dade Cty., Fla.*, 985 F.2d 1471, 1478 (11th Cir. 1993)); *see also King v. Illinois State Bd. of Elections*,

410 F.3d 404, 409 (7th Cir. 2005) (awarding attorneys' fees to intervenors in vote-dilution case). The Eleventh Circuit went further in *Clark v. Putnam Cty.*, 168 F.3d 458 (11th Cir. 1999), concluding that the interests of the government are directly "adverse" to proposed defendant intervenors in vote-dilution litigation because, "after all, both the plaintiffs and the proposed defendant-intervenors are Putnam County citizens." *Id.* at 461. "The commissioners cannot adequately represent the proposed defendants while simultaneously representing the plaintiffs' interests." *Id.* Accordingly, "it is normal practice in reapportionment controversies to allow intervention of voters...supporting a position that could theoretically be adequately represented by public officials." *Id.* at 462 n.3 (quotation marks omitted).

The Secretary's cited authorities have nothing to do with the right to vote—or this case. See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661-662, 692 n.32 (dispute over fishing rights "under a series of treaties with Indian tribes"); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 329 (1958) (dispute over the validity of "a large issue of revenue bonds").

2. Plaintiffs are also not in privity with the political party organizations that intervened in the state-court litigation. The mere affiliation with a political party as voters or candidates does not render an individual "so identified in interest with another that he represents the same legal right." *Rucker*, 794 N.W.2d at 118. Those parties did not represent Plaintiffs' interests or even raise the same *arguments* Plaintiffs raise here. "[T]he application of collateral estoppel is...inequitable," to put it mildly. *Reil v. Benjamin*, 584 N.W.2d 442, 445 (Minn. Ct. App. 1998). The Minnesota Supreme Court has long stated that consent decrees "constitute[] only the agreement of the parties," *Hentschel v. Smith*, 153 N.W.2d at 208 (citations omitted), and cannot expand to

include the rights of those not party to the agreement. Minnesota law bars courts from finding privity when one of the parties is a “stranger” to a contractual agreement, *Gen. Elec. Co. v. Jordan*, 162 N.W. 1061, 1062 (1917), as the Plaintiffs are here. They had no involvement with the Secretary’s agreement, and were only certified as elector candidates after the intervenors consented to dismiss the case.

Further, those intervenors were “not legally responsible for” nor “in any way accountable to” Mr. Carson or Mr. Lucero. *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 762 (1st Cir. 1994) (finding no privity in such a situation). And the Secretary’s Agreement did not “conclusively determine” whether Plaintiffs have viable claims under federal law. *See Bunge v. Yager*, 52 N.W.2d 446, 450 (Minn. 1952) (finding no privity when party’s claims had not been adjudicated). Minnesota courts have only found privity where there is far greater control over the litigation, *see, e.g., Balasuriya v. Bemel*, 617 N.W.2d 596, 600 (Minn. Ct. App. 2000) (president of a corporation was in privity with corporation because he controlled the prior litigation). Without being “so connected” to the proceedings, *id.*, the Plaintiffs cannot be in privity with the State Intervenors.

V. The Equities Weigh Heavily in Favor of Enforcing the Enactments of Congress and the Minnesota Legislature Over the Secretary’s Conflicting Policies

The balance of equities favors an injunction. The Secretary’s actions threaten post-election chaos over issues that can and should be put to rest now. Neither response brief addresses the injury Plaintiffs bear as candidates for office when invalid votes for their opponents are counted. As discussed above, that injury will have to be redressed either now or in the future, and every equity favors doing so now, so as to avoid myriad acute harms to Plaintiffs as well as voters who can avoid having their

late-cast ballots challenged and rejected only by a decision in advance of the election. In addition, the Secretary's policies will increase the voting pool by counting invalid votes, resulting in vote dilution, a severe, irreparable harm.⁸ *See Bush v. Gore*, 531 U.S. at 1047 (Scalia, J., concurring in order issuing stay pending appeal) (the "counting of votes that are of questionable legality...threaten[s] irreparable harm").

Contrary to Intervenor's contention (at 39), "the existence of such late voters is" both "likely" and "plausible." Under the Secretary's policy, voters have no incentive to mail their ballots early, drop them off, or vote in person, meaning that many ballots will arrive after Election Day. Worse, persons watching the elongated ballot-counting unfolding under this new "Election Week" will face strong incentives to cast a ballot, and those who already cast their ballot will find new incentive to vote again. This is not a "specter;" it's called "human nature." Nor is the August primary a helpful benchmark for analyzing this dynamic: there was no meaningful presidential contest at issue then.

By contrast, the Secretary has *no* interest in a new statutory scheme not enacted by the Minnesota Legislature. Hence, an injunction would be all benefit and no harm. The Secretary's concern that he would need to re-instruct voters on the deadline is resolved quite simply: an injunction would require a simple communication to Minnesota poll-workers and voters that the long-standing deadline for absentee ballots applies. And that would benefit voters and the public interest by avoiding likely disenfranchisement through post-election challenges.

⁸ Neither response brief addressed the additional injury Plaintiffs bear as candidates for office when valid votes are diluted with unlawful ones. *Cf. Mancuso v. Taft*, 467 F.2d 187, 190 (1st Cir. 1973). The point stands un rebutted.

Meanwhile, the Secretary’s “worst case scenario”—“that scores of ballots are not counted,” Secretary Br. 35,—is more likely to occur without an injunction than with one. Nothing prevents a candidate from challenging late-received ballots. Without an injunction, an untold number of Minnesota voters will cast their ballots in reliance on the Secretary’s unconstitutional and unlawful guidance and risk seeing their votes rejected after a post-election legal challenge. The result: complete disenfranchisement. By contrast, an injunction now makes clear to voters, at a time when they can do something about it, that ballots must be received by Election Day to be counted.

Thus, the public interest therefore plainly favors an injunction. Intervenors are correct that (at 44), “once the election occurs, there can be no do-over and no redress.” (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)). And neither the Secretary nor Intervenors has any meaningful response to Plaintiffs’ contention that the safe harbor cannot be satisfied through this unlawful scheme, except to restate their incorrect view of the merits that the Secretary’s novel legal regime is “consistent with enactments of the Minnesota Legislature” and federal law. Int’s Br. 41.

And, as discussed above, there is grave doubt the State will be able to count the ballots and appoint electors in the tight timeline prescribed by federal law, given the Secretary’s (at 34) and Intervenors’ acknowledgements (at 43–44) that more mail-in ballots than ever before will be cast. Adding further pressure, the Secretary’s actions leave canvassing boards seven fewer days to complete their results. The die is cast for disaster.

CONCLUSION

The Court should enter the requested injunction.

Date: October 1, 2020

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L.R. 7.1(f) CERTIFICATE OF COMPLIANCE

I, Danyll W. Foix, hereby certify that the forgoing Memorandum of Points and Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction complies with Local Rule 7.1(f), pursuant to Plaintiffs' Rule 7.1(f)(1)(D) Request for leave to Exceed the Word Limit.

I further certify that, in preparation of the above document, I obtained the word count from Microsoft Word and the above document contains 7,982 words.

Date: October 1, 2020

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