

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

League of Women Voters of Minnesota
Education Fund, Vivian Latimer Tanniehill,

Plaintiffs,

v.

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

Defendant.

Civil Action No. 0:20-cv-01205-ECT-TNL

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Plaintiffs League of Women Voters of Minnesota Education Fund and Vivian Latimer Tanniehill respectfully move for a preliminary injunction directing Defendant Steve Simon, in his official capacity as Secretary of State of Minnesota, to: (1) refrain, for the duration of calendar year 2020, from enforcing any provision of law—including Minn. Stat. § 203B.07, Minn. Stat. § 204B.45, and their implementing regulations—insofar as such provisions would require voters casting absentee or mail ballots to obtain the signature, address, title, or notarial stamp of a witness; (2) instruct all local officials and ballot boards that, for all elections held during calendar year 2020, no absentee ballot or mail ballot may be rejected for failure to include the signature, address, title, or notarial stamp of a witness; (3) take steps sufficient to ensure that all official printed materials (including envelopes and instructions) provided to absentee and mail voters in connection with any election in calendar year 2020 do not explicitly or implicitly direct the voter to obtain the signature, address, title, or notarial stamp of a witness; and (4) undertake a public education campaign sufficient to inform the public that no witness is required for absentee

or mail voting in any election in calendar year 2020. A memorandum in support of this Motion will be filed concurrently herewith.

Date: May 29, 2020

Respectfully submitted,

/s/ Julia Dayton Klein

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**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

INTRODUCTION

The United States is living through the worst pandemic in over a century. Minnesota officials are rightly urging the public to avoid close contact between households to minimize the spread of Coronavirus Disease 2019 (COVID-19). Yet the state is asking its citizens to violate this social distancing practice to vote in upcoming elections. To cast a ballot, Minnesota voters must either go to the polls in person, or have their absentee ballot signed by a witness. For many members of Plaintiff League of Women Voters of Minnesota Education Fund, it is impossible to have an absentee ballot witnessed without risking exposure to COVID-19. The danger is especially grave for Minnesotans like Plaintiff Vivian Latimer Tanniehill, whose age and underlying health conditions make her particularly vulnerable to becoming severely ill or dying from the virus.

The fundamental right to vote cannot be conditioned on voters' willingness to risk contracting a disease that has killed more than 100,000 Americans over the past few months. The Court should therefore enter a preliminary injunction requiring Defendant to suspend

enforcement of the witness requirement for absentee voting for the duration of 2020 and inform the public of this suspension.

FACTUAL BACKGROUND

I. Absentee Voting in Minnesota

Minnesota permits any eligible voter to vote by absentee ballot. Minn. Stat. § 203B.02, subd. 1.¹ However, it is impossible for a voter to cast a valid absentee ballot without interacting in person with someone else.

When a voter properly requests to have an absentee ballot provided by mail, the local county auditor or municipal clerk sends the voter the ballot, together with a package of other materials, including multiple envelopes and directions for casting the ballot. *See* Minn. Stat. § 203B.07, subd. 1. One of the envelopes issued to each absentee voter is a signature envelope, on which a blank certificate is printed. To fill out the certificate, the voter must (1) provide her Minnesota driver's license number, state identification number, or the last four digits of her Social Security number, or indicate that she does not have any of these numbers; and (2) sign a sworn statement that the voter meets all legal requirements to cast this ballot. Minn. R. 8210.0600; Minn. R. 8210.0500; Minn. R. 8210.3000; *see also* Minn. Stat. § 203B.07, subd. 3.²

¹ Minnesota law also permits elections in certain towns, cities, and unorganized territories to be conducted entirely by mail, "with no polling place other than the office of the auditor or clerk or other locations designated by the auditor or clerk." Minn. Stat. § 204B.45; *see also* Minn. Stat. § 204B.46. The process for casting, verifying, and counting ballots in all-mail elections is generally the same as the process for absentee ballots under Minn. Stat. Chapter 203B. *See* Minn. Stat. § 204B.45, subd. 2 (providing that "the provisions of the Minnesota Election Law governing deposit and counting of ballots" generally apply in all-mail elections, and "[t]he mail and absentee ballots for a precinct must be counted together"). This Memorandum uses the term "absentee" to refer to all ballots transmitted by mail in Minnesota.

² By statute, the blank certificate is to be "printed on the back of the return envelope." Minn. Stat. § 203B.07, subd. 3. In practice, the envelope on which the certificate is printed is known as the signature envelope. *See* Minn. R. 8210.0600 (standard instructions to absentee voters).

The blank certificate also contains a section to be filled out by a third-party witness, who must be registered Minnesota voter, a notary, or an individual authorized to administer oaths. *See* Minn. Stat. § 203B.07, subd. 3; Minn. R. 8210.0600, subp. 1a; Minn. R. 8210.3000, subp. 4b. The witness must sign the certificate and write either her Minnesota street address or her title indicating that she is a notary or other official authorized to administer oaths. If the witness is a notary, she must also affix her notary stamp. *See* Minn. R. 8210.0600, subp. 1a; Minn. R. 8210.3000, subp. 4b.

By signing the certificate the witness certifies, at a minimum, that: (1) the voter showed the witness the blank ballot before voting; (2) the voter marked the ballot in private if physically able to do so, or else the ballot was “marked as directed by the voter” by someone else; (3) the voter enclosed and sealed the ballot in its dedicated envelope; and (4) the witness is a registered Minnesota voter, a notary, or a person authorized to administer oaths.³ Minn. Stat. § 203B.07, subd. 3; Minn. R. 8210.0600, subp. 1a; Minn. R. 8210.3000, subp. 4b.⁴ In order to complete these steps so the witness can truthfully make the required certifications, the voter and witness must be physically together for the voting process.

It is exceedingly rare for voters to attempt to cast fraudulent absentee ballots, both nationally and in Minnesota. In a comprehensive study covering all elections from 2000 to 2012,

³ The standard witness certification adopted by regulation states, “I am or have been registered to vote in Minnesota, or am a notary, or am authorized to give oaths.” Minn. R. 8210.0600; Minn. R. 8210.3000, subp. 4b. This language is ambiguous as to whether a *former* registered Minnesota voter qualifies as a witness. However, the statute establishing the witness requirement specifies that the witness, if not a notary or other person authorized to administer oaths, must be “a person who *is* registered to vote in Minnesota.” Minn. Stat. § 203B.07, subd. 3 (emphasis added).

⁴ Additionally, if the voter is not yet registered to vote and is submitting a voter registration application with an absentee ballot, the witness must certify that “the voter registered to vote by filling out and enclosing a voter registration application in this envelope” and that the voter provided appropriate proof of residence. Minn. R. 8210.0600, subp. 1a; *see also* Minn. Stat. § 203B.07, subd. 3.

journalists found 491 cases of alleged absentee ballot fraud nationally, and just *one* in Minnesota. Ex. 1 (Election Fraud Database). This represents a miniscule fraction of absentee voting. In the November 2012 election alone, over 21.8 *million* Americans, including 255,141 Minnesotans, voted by domestic absentee ballot. Ex. 2 (Election Assistance Commission 2012 Voting Survey) at 9.

Setting aside the witness requirement, Minnesota law provides numerous safeguards against any potential fraud in absentee voting. To begin with, Minnesota provides steep criminal sanctions for absentee voting fraud. It is a felony for any individual to “make or sign any false certificate” required by Minn. Stat. Chapter 203B, the statutory chapter on absentee voting; “make any false or untrue statement in any application for absentee ballots;” “apply for absentee ballots more than once in any election with the intent to cast an illegal ballot;” “exhibit a ballot marked by that individual to any other individual;” violate Chapter 203B “for the purpose of casting an illegal vote in any precinct or for the purpose of aiding another to cast an illegal vote;” “use information from absentee ballot materials or records for purposes unrelated to elections, political activities, or law enforcement;” “provide assistance to an absentee voter” except as specifically authorized by law; “solicit the vote of an absentee voter while in the immediate presence of the voter during the time the individual knows the absentee voter is voting;” or “alter an absentee ballot application after it has been signed by the voter, except by an election official for administrative purposes.” Minn. Stat. § 203B.03. Similarly, any person who votes in Minnesota despite knowing that she is ineligible to vote is guilty of a felony. Minn. Stat. § 201.014. A felony in Minnesota is punishable by imprisonment for up to five years, a fine of up to \$10,000, or both. Minn. Stat. § 609.03.

Minnesota also protects against counting fraudulent absentee votes by subjecting all absentee ballots to a verification process to determine whether the ballot is accepted or rejected. Local ballot boards composed of trained officials are responsible for making this determination. Minn. Stat. § 203B.121; Minn. Stat. § 204B.45, subd. 2. Each absentee ballot must be examined by at least two ballot board members who, subject to limited exceptions, must belong to different major political parties. Minn. Stat. § 203B.121, subd. 2; Minn. Stat. § 204B.45, subd. 2; Minn. R. 8210.2450, subp. 1. Before an absentee ballot is accepted for counting, the majority of the ballot board members examining the ballot must determine that the ballot satisfies *six* independent criteria, five of which have nothing to do with the witness statement. Minn. Stat. § 203B.121, subd. 2.

- *First*, “[t]he voter’s name and address on the absentee ballot application must match the voter’s name and address on the signature envelope.” Minn. R. 8210.2450, subp. 2; *see also* Minn. Stat. § 203B.121, subd. 2(b)(1).
- *Second*, the ballot board members must determine that “the voter signed the certification on the envelope.” Minn. Stat. § 203B.121, subd. 2(b)(2). “A ballot must be rejected . . . on the basis of the signature if the name signed is clearly a different name than the name of the voter as printed on the signature envelope.” Minn. R. 8210.2450, subp. 2.
- *Third*, the ballot board members must check whether “the voter’s Minnesota driver’s license, state identification number, or the last four digits of the voter’s Social Security number are the same as a number on the voter’s absentee ballot application or voter record.” If so, the ballot may move on to the next verification step; if not, the ballot board members “must compare the signature provided by the applicant to determine whether

the ballots were returned by the same person to whom they were transmitted.” Minn. Stat. § 203B.121, subd. 2(b)(3); *see also* Minn. R. 8210.2450, subp. 3.

- *Fourth*, the ballot board members must verify that “the voter is registered and eligible to vote in the precinct or has included a properly completed voter registration application in the return envelope.” Minn. Stat. § 203B.121, subd. 2(b)(4); *see also* Minn. R. 8210.2450, subp. 4.
- *Fifth*, the ballot board members must check that “the certificate has been completed as prescribed in the directions for casting an absentee ballot.” Minn. Stat. § 203B.121, subd. 2(b)(5). This is the only one of the six verification steps that depends on the presence of a witness signature. The witness requirement is deemed satisfied if the witness has signed the required statement and done any one of the following: provided a Minnesota address, provided a title indicating that the witness is eligible to administer oaths, or affixed a notarial stamp. Minn. R. 8210.2450, subp. 5. The ballot board does not check whether the witness’s name or address matches an existing voter registration record for purposes of determining whether the ballot in question should be accepted or rejected. *See id.*
- *Sixth*, it must be confirmed that “the voter has not already voted at that election, either in person or, if it is after the close of business on the seventh day before the election, by absentee ballot.” Minn. Stat. § 203B.121, subd. 2(b)(6); *see also* Minn. R. 8210.2450, subp. 6.

If the majority of ballot board members examining a ballot determine that it fails to satisfy *any* of these six criteria, the ballot is rejected. Minn. Stat. § 203B.121, subd. 2(c)(1).

II. The COVID-19 Pandemic Necessitates Consistent Social Distancing and Will Increase Demand for Absentee Voting

The United States—and much of the rest of the world—“is in the midst of an unprecedented health crisis occasioned by the worldwide COVID-19 pandemic.” *In re Rutledge*, 956 F.3d 1018 (8th Cir. 2020). SARS-CoV-2 is a new virus that causes COVID-19. Ex. 3 (Decl. of Dr. Arthur Reingold), at ¶ 7. As of May 28, 2020, there have been 1,678,843 confirmed cases of COVID-19 and 99,031 deaths attributed to COVID-19 in the United States, according to the Centers for Disease Control and Prevention (“CDC”). Ex. 4 (CDC National COVID-19 Case Data). Minnesota has had 22,947 confirmed cases and 967 deaths. Ex. 5 (Minnesota COVID-19 Dashboard). These figures almost certainly understate the real numbers of COVID-19 cases and deaths, given limitations in testing. *See* Ex. 3 (Reingold Decl.) at ¶ 13.

Some individuals infected with SARS-CoV-2 experience no symptoms or only mild symptoms. *Id.* ¶¶ 7, 12. Others, however, experience respiratory failure or other life-threatening complications from COVID-19. *Id.* ¶¶ 7, 8. Hospitals treating COVID-19 patients, including all sites of the Minnesota-based Mayo Clinic, are prohibiting or severely restricting visitors to avoid spreading the virus. Ex. 6 (Statement of the Mayo Clinic). Unable to receive visitors, many hospital patients dying of COVID-19 are dying alone. *See* Ex. 7 (New England Journal of Medicine Report).

Anyone could potentially become severely ill or die from COVID-19. However, certain populations are at a heightened risk of severe illness or death from COVID-19—specifically, patients over age 65, people with immunologic conditions, and people with certain other health conditions, including some heart conditions, asthma, COPD, diabetes, obesity, and chronic kidney disease. Ex. 3 (Reingold Decl.) at ¶ 8.

SARS-CoV-2 spreads easily from person to person through respiratory droplets. *Id.* ¶ 9. The virus also may also be capable of aerosolization, meaning it may linger in the air and infect people who enter the airspace. *Id.* Additionally, the virus can spread through contact with contaminated surfaces. *Id.* SARS-CoV-2 is so contagious that each infected individual is estimated to infect two to eight others. *Id.* Infected individuals who are not symptomatic can nevertheless spread the virus *Id.* ¶ 12.

There is currently no vaccine for COVID-19, and it is unlikely that a vaccine approved by the Food and Drug Administration will be available for at least the next twelve months. *Id.* ¶ 14. Before the U.S. population can develop “herd immunity” that protects against widespread transmission of COVID-19, approximately 80 to 95 percent of the population must become immune to the virus. *Id.* ¶ 15. For this to happen, either a vaccine must become widely available, or the majority of U.S. residents must be infected with the virus and develop antibodies to it. *Id.* ¶¶ 15-16. All told, it is likely that there will be resurgences of COVID-19 transmissions across the U.S. throughout 2020 and into 2021, even accounting for behavioral interventions and government-imposed restrictions designed to control the spread of the virus. *Id.* ¶ 16. Resurgences in the fall and winter of 2020 are especially likely, given that SARS-CoV-2 may spread most easily in colder weather (although this is not yet confirmed). *Id.* ¶ 18.

Nevertheless, behavior is an important factor influencing the course of the pandemic. The only known ways to reduce the spread of COVID-19 are frequent handwashing, disinfecting surfaces, social isolation, and social distancing (i.e., maintaining at least six feet of separation between individuals). *Id.* ¶ 11. The CDC currently advises that “[l]imiting face-to-face contact with others is the best way to reduce the spread of” COVID-19. Ex. 8 (CDC Social Distancing Recommendations). Early evidence shows that social distancing slows transmission of the virus,

and jurisdictions that imposed stay-at-home orders early are succeeding in reducing transmission. Ex. 3 (Reingold Decl.) ¶ 13.

Recognizing the importance of social distancing, Minnesota Governor Tim Walz issued an Executive Order directing all Minnesota residents to stay home through May 17, except when engaging in certain exempt activities. Ex. 9 (Minn. Emergency Exec. Order 20-48). In a subsequent Executive Order currently in effect, Governor Walz renewed many restrictions while relaxing others. The current Executive Order prohibits gatherings of more than ten people, requires public accommodations including restaurants and bars to stay closed, requires workers to work from home if possible, mandates social distancing protocols in workplaces that open, and states that “[a]ll persons currently living within the State of Minnesota who are at risk of severe illness from COVID-19 . . . are strongly urged to stay at home or in their place of residence.” Ex. 10 (Minn. Emergency Exec. Order 20-56).

Emerging evidence shows that elections with a large amount of in-person voting are dangerous during the pandemic. In Wisconsin, the presidential primary drew nearly 400,000 in-person voters on April 7, 2020. Ex. 11 (Wisconsin Elections Commission Report). As of May 16, at least 71 people had tested positive for COVID-19 after voting in person or serving as poll workers in the Wisconsin primary. Ex. 12 (Madison Article). In Milwaukee County alone, at least 52 individuals who participated in the election as in-person voters or poll workers had tested positive for COVID-19 by May 4, including 26 who did not begin experiencing symptoms until April 9 or later. Ex. 13 (Milwaukee County COVID-19 Election Report). An analysis by university economists has preliminarily found that, controlling for other potentially relevant factors, Wisconsin counties with more in-person voters per voting location had higher rates of positive COVID-19 tests, while counties with more absentee voting had lower positive COVID-

19 test rates—patterns that emerged in the weeks following the primary. Ex. 14 (National Bureau of Economic Research Paper on Wisconsin Primary); *see also* Ex. 3 (Reingold Decl.) ¶ 19.

To avoid COVID-19 transmission at polling places, the CDC currently recommends that election officials “[e]ncourage mail-in methods of voting” during the pandemic. Ex. 15 (CDC Recommendations for Election Polling Locations). Defendant himself has recognized the importance of shifting toward absentee voting during the pandemic, saying in a recent statement: “To slow the spread of COVID-19 we need to reduce large gatherings, including at polling places. I’m challenging all eligible Minnesota voters to cast their vote from the safety of their home.” Ex. 16 (Statement of Def. Simon re: Absentee Ballots).

Minnesota will hold two statewide election days in the remaining part of 2020. Primary elections for offices including U.S. Senate, U.S. House of Representatives, Minnesota Senate, and Minnesota House of Representatives, among others, will be held on August 11, with early voting from June 26 to August 10. The general Presidential election will be held on November 3, with early voting from September 18 to November 2. Ex. 17 (Minn. SOS Elections Calendar). Given the apparent danger of voting in person, demand for absentee voting in these elections will likely rise to unprecedented levels.

III. Applying the Witness Requirement During the Pandemic Burdens Plaintiffs

Although absentee voting offers Minnesotans a safer alternative to in-person voting during the COVID-19 pandemic, it is not entirely safe. For Minnesota voters who do not live with a person qualified to witness absentee ballots—i.e., a registered Minnesota voter, a notary, or another person authorized to give oaths—complying with the witness requirement for absentee voting necessarily means meeting in person with an individual outside their household.

This increases the voter's risk of being exposed to COVID-19 or transmitting the virus. Ex. 3 (Reingold Decl.) ¶ 19.

For Plaintiff Vivian Latimer Tanniehill, the witness requirement may be an insurmountable obstacle to voting during the COVID-19 pandemic. Ms. Latimer Tanniehill is sixty-seven years old and lives alone. Ex. 18 (Decl. of Vivian Latimer Tanniehill) at ¶ 2. She has previously had open heart surgery, takes a blood-thinning medication daily for her cardiac health, and has asthma. *Id.* ¶ 17. The combination of her age and underlying health conditions places her at high risk of developing severe or life-threatening symptoms if she contracts COVID-19. *Id.* ¶¶ 16-18; *see also* Ex. 3 (Reingold Decl.) ¶ 8. Although she has always voted in person in the past, she believes that voting in person would be too risky during the pandemic. Ex. 18 (Latimer Tanniehill Decl.) at ¶ 21. She therefore hopes to vote absentee in the August and November 2020 elections, and possibly subsequent elections. *Id.* ¶ 14. However, in order to vote absentee under current Minnesota law, Ms. Latimer Tanniehill would need to invite another person into her home or travel to meet with another person, violating the social distancing protocol she has been assiduously following. *Id.* ¶¶ 19, 23. She is anxiously monitoring public health conditions to assess the health risk that would come with having her absentee ballot witnessed, so that she can decide whether the risk is too high to tolerate. *Id.* ¶ 25.

Ms. Latimer Tanniehill serves as Advocacy Chair of the Board of Directors of the League of Women Voters of Minnesota Education Fund (LWVMN), and has a passion for democratic participation stemming from her childhood. Latimer Tanniehill Decl. ¶¶ 7-11. As a Black woman originally from Birmingham, Alabama, she experienced segregation and state-sanctioned racism as a day-to-day reality. *Id.* ¶¶ 6-7. After moving to Minnesota at age seven, she saw her mother vote in the 1960 election—the first election in which she had ever been able to vote. *Id.* ¶ 8.

These early experiences impressed on Ms. Latimer Tanniehill the paramount importance of voting. *Id.* Giving up her vote to protect her health would be a painful choice for Ms. Latimer Tanniehill. *Id.* ¶ 25.

Other members of LWVMN are similarly at risk of having to forego voting during the pandemic to avoid the health hazards of having their ballots witnessed. LWVMN is a nonprofit organization with about 2,200 members throughout Minnesota. Ex. 19 (Decl. of Michelle Witte) at ¶ 9. Many of LWVMN's members are over age 65, and some have additional health conditions that make them especially vulnerable to becoming severely ill or dying if they contract COVID-19. *Id.* ¶ 11. While some LWVMN members live with a registered Minnesota voter or other qualified witness, many others (like Ms. Latimer Tanniehill) live alone or live only with people who cannot witness absentee ballots, such as minor children or non-U.S. citizens. *Id.* ¶ 12. LWVMN members who cannot have their ballots witnessed at home—especially those at high risk of severe symptoms or death from COVID-19—will face a choice between endangering their health and giving up their vote during the pandemic.

For LWVMN itself, the continued enforcement of the witness requirement during the pandemic has become a drain on its time, energy, and money. LWVMN has scarce resources, with just three full-time employees serving about 2,200 members and 35 local chapters throughout Minnesota. Ex. 19 (Witte Decl.) at ¶¶ 6, 9, 13. Ordinarily, LWVMN's core activities include conducting voter registration drives and hosting forum events to help voters learn about candidates and policy issues. *Id.* ¶¶ 15, 29. These services to the electorate are most in demand in presidential election years, and 2020 is no exception. *Id.* ¶¶ 15, 18. LWVMN is trying to ramp up these activities and adapt them to the current public health situation, which requires a formidable investment of resources. *Id.* ¶¶ 20, 21. On top of this challenge, LWVMN now must

set aside resources to help Minnesota absentee voters—a much larger group than ever before—understand the witness requirement and comply with it as safely as possible. *Id.* ¶¶ 26-27. LWVMN is now developing a communications campaign educating voters about the need for an absentee ballot witness and the qualifications for serving as a witness. LWVMN is also developing plans to help voters have their absentee ballots witnessed during the pandemic—potentially by implementing a program in which LWVMN would directly connect voters with volunteers who are willing and able to serve as witnesses (although these volunteers will likely be scarce during the pandemic). *Id.* ¶¶ 29-30. These projects focused on the witness requirement take time, energy, and money—resources that LWVMN would otherwise devote toward updating and executing its core activities such as voter registration and educational forum events. *Id.* ¶ 29.

LEGAL STANDARD

“Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.” *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). The Court must apply this test in a “flexible” manner appropriate to “the particular circumstances of each case.” *Id.* “[W]here the balance of other factors tips decidedly toward plaintiff a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation,” even if the district court does not conclude that the movant is more than fifty percent likely to succeed on the merits. *Id.*

ARGUMENT

I. Plaintiffs are likely to succeed on the merits of their claim for a temporary suspension of Minnesota’s witness requirement for absentee voting during the COVID-19 pandemic.

By applying its witness requirement for absentee ballots during the COVID-19 pandemic, Minnesota puts voters in danger for no good reason. Plaintiffs are therefore likely to succeed in showing that the witness requirement is unconstitutional as applied in this unique situation.

The constitutional right to vote “is of the most fundamental significance under our constitutional structure.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *see also Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.”). When analyzing the constitutionality of a restriction on voting, the Court “must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). A severe restriction on voting rights “must be narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 428 (citation omitted). Even if the challenged restriction falls short of being “severe,” courts do not revert to rational basis review but employ a “sliding scale,” subjecting each voting restriction to a level of scrutiny calibrated to the burden it imposes. *Fish v. Schwab*, 957 F.3d 1105, 1124, 1124 n.4 (10th Cir. 2020); *id.* at 1128 (applying “heightened scrutiny” to a “significant” burden on voting rights).

Minnesota's enforcement of its witness requirement for absentee voting during the COVID-19 pandemic cannot survive review under this framework. Requiring voters to have their absentee ballots witnessed and signed during the COVID-19 pandemic, at substantial risk to their health, places a severe burden on the right to vote for Ms. Latimer Tanniehill and many other members of LWVMN. The state derives no significant benefit from keeping the witness requirement in place during the pandemic—and certainly no benefit important enough to justify burdening voters to this degree.

A. The witness requirement severely burdens voting rights as applied to voters during the COVID-19 pandemic.

Minnesota's witness requirement for absentee voting puts Ms. Latimer Tanniehill and many other voters to an impossible choice: exercise their right to vote during the COVID-19 pandemic, or protect their health and the health of others by following social distancing best practices. The state thus imposes a severe burden on voting rights.

In Minnesota and across the nation, life has changed dramatically because of the COVID-19 pandemic. Millions of Minnesotans, including Ms. Latimer Tanniehill and most members of LWVMN, are avoiding close contact with people outside their households to minimize the risk of contracting or spreading COVID-19. Ex. 18 (Latimer Tanniehill Decl.) ¶¶ 18-19; Ex. 19 (Witte Decl.) ¶ 20. There is no serious dispute that social distancing is necessary to minimize the spread of what can be a deadly disease, especially for people over 65 and people with certain underlying health conditions. The latest academic research supports this view. *See* Ex. 3 (Reingold Decl.) ¶¶ 8, 11, 13. The CDC agrees. Ex. 8 (CDC Guidance on Social Distancing); Ex. 20 (CDC Guidance on Individuals at Higher Risk of COVID-19). So do the Governor of Minnesota and Defendant Simon himself. Ex. 10 (Minn. Emergency Exec. Order 20-56); Ex. 16 (Def. Simon Statement on Absentee Ballots).

Under these circumstances, the requirement to meet in person with a witness makes absentee voting a health hazard for many voters, leaving these voters without *any* safe avenue to cast a ballot. The state’s failure to provide safe absentee voting—at a time when in-person voting is irreducibly dangerous—gravely burdens voters. *See Republican Party of Arkansas v. Faulkner Cty.*, 49 F.3d 1289, 1294 (8th Cir. 1995) (“[A]n alternative means of [ballot] access must be provided absent a sufficiently strong state interest”); *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329, at *19 n.20 (D.S.C. May 25, 2020) (“In-person voting, while still technically an available option, forces voters to make the untenable and illusory choice between exercising their right to vote and placing themselves at risk of contracting a potentially terminal disease.”); *see also United States v. Annis*, No. 16-195(1), 2020 WL 1812421, at *2 (D. Minn. Apr. 9, 2020) (“There is no question that COVID-19 is a cause for alarm, and the Court does not fault Annis’s concerns, given his health conditions.”).

Other district courts have recognized this reality in cases directly on point. In *Thomas v. Andino*, the court found that a group of plaintiffs—including individuals at heightened risk of severe illness from COVID-19—were “likely to prevail on their constitutional challenge to [South Carolina’s] Witness Requirement under the *Anderson-Burdick* balancing test because the character and magnitude of the burdens imposed on [the] Plaintiffs in having to place their health at risk during the COVID-19 pandemic likely outweigh the extent to which the Witness Requirement advances the state’s interests of voter fraud and integrity.” 2020 WL 2617329, at *21. The court therefore issued a preliminary injunction against enforcement of South Carolina’s witness signature requirement in the June 2020 primaries, and ordered state officials “to immediately and publicly inform South Carolina voters about the elimination of the Witness Requirement for absentee voting.” *Id.* at *30.

Similarly, in *League of Women Voters of Virginia v. Virginia State Bd. of Elections*, the court approved a partial settlement in which Virginia’s election authorities agreed not to enforce the state’s witness requirement for absentee voting in the June 2020 primary. No. 6:20-CV-00024, 2020 WL 2158249, at *1 (W.D. Va. May 5, 2020). In approving the agreement, the court found that enforcing Virginia’s witness requirement during the pandemic was “a probable violation of federal law.” *Id.* at *6. As the court explained,

[T]he measure is too restrictive in that it will force a large class of Virginians to face the choice between adhering to guidance that is meant to protect not only their own health, but the health of those around them, and undertaking their fundamental right—and, indeed, their civic duty—to vote in an election. The Constitution does not permit a state to force such a choice on its electorate.

Id. at *8 (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966)). Even if it were possible to mitigate the health risks by taking certain precautions in voter-witness interactions, the court found that “many would be dissuaded from exercising their vote both on account of the remaining health risks and required steps to mitigate them . . . especially those who are elderly, immunocompromised, or otherwise at grave risk from the virus.” *Id.*

The reasoning in *Thomas* and *League of Women Voters of Virginia* squarely applies here. Indeed, Minnesota’s witness requirement imposes a *greater* burden on voting during the pandemic than the witness requirements in Virginia and South Carolina. Unlike those states, Minnesota requires absentee ballot witnesses to meet stringent qualifications, increasing the number of voters who must look outside their own household to find a witness. *Compare* Minn. Stat. § 203B.07, subd. 3 (witness must be “a person who is registered to vote in Minnesota or . . . a notary public or other individual authorized to administer oaths”), *with* Va. Code §§ 24.2-706, 24.2-707 (requiring a witness but not restricting who may serve as a witness), *and* S.C. Code § 7-15-220 (same).

Other courts have similarly recognized that when state laws require in-person signature gathering to exercise First and Fourteenth Amendment rights, those requirements impose severe burdens in the context of the COVID-19 pandemic. *See, e.g., Miller v. Thurston*, No. 5:20-cv-05070-PKH, ECF No. 41, Slip Op. at 14-15 (W.D. Ark. May 25, 2020) (finding that in-person signature gathering and notarization requirements “impose severe burdens on Plaintiffs’ core political speech, especially in light of the State-recognized need for social distancing during this pandemic.”); *Goldstein v. Sec’y of Commonwealth*, 142 N.E.3d 560, 570-71 (Mass. 2020) (signature-gathering requirements “now impose a severe burden on, or significant interference with, a candidate’s right to gain access to the . . . primary ballot” in Massachusetts because “if a candidate seeks to obtain signatures on nomination papers in the traditional ways, he or she reasonably may fear that doing so might risk the health and safety not only of the person requesting the signature but also of the persons who are signing, of the families with whom they live, and potentially of their entire community”); *Garbett v. Herbert*, 2:20-cv-245-RJS, 2020 WL 2064101, at *12 (D. Utah Apr. 29, 2020) (finding severe burden because “[i]n light of nearly all public events being canceled, orders for people to stay six feet apart and to stay home, and the extraordinary impact on nearly all aspects of everyday life, it is difficult to imagine a confluence of events that would make it more difficult for a candidate to collect signatures”); *Libertarian Party of Illinois v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687, at *4 (N.D. Ill. Apr. 23, 2020). Notably, most of these cases involve the right to run for office, which is not, on its own, a fundamental right. *Libertarian Party of Illinois*, 2020 WL 1951687, at *2. The argument for finding a severe burden is even stronger here, where the constitutional interest at stake is the fundamental right to vote. *See Harper*, 383 U.S. at 670.⁵

⁵ A recent case involving Wisconsin’s witness requirement for absentee voting also supports

The facts of this case aptly illustrate why courts around the country are recognizing the severe burdens involved in obtaining physical signatures during the pandemic. For Ms. Latimer Tanniehill, complying with Minnesota’s witness requirement is such a grave health risk that it may prevent her from voting in upcoming elections, including the August and November 2020 elections. Ex. 18 (Latimer Tanniehill Decl.) ¶ 25. Given her personal background and her activism promoting democratic participation, surrendering her vote during the pandemic is not a matter Ms. Latimer Tanniehill would take lightly. *Id.* ¶¶ 7-11. The same goes for Ms. Latimer Tanniehill’s fellow members of LWVMN, who presumably joined the organization because they value democratic participation. *See* Ex. 19 (Witte Decl.) ¶ 4. These voters are at risk of losing a

finding a severe burden in this case. In *Democratic National Committee v. Bostelmann*, the district court found that “at least some isolated voters, and in particular those who are immunocompromised or elderly, will likely not be able to secure a witness certification safely even with reasonable efforts, or at minimum have reasonable concerns about their ability to do so.” No. 20-cv-249-wmc, 2020 WL 1638374, at *20 (W.D. Wis. Apr. 2, 2020). The court recognized that the witness requirement “may impose severe burdens” on these voters, and therefore ordered the defendants “to accept an unwitnessed ballot that contains a written affirmation or other statement by an absentee voter that due to the COVID-19 pandemic, he or she was unable to safely obtain a witness certification despite his or her reasonable efforts to do so, provided that the ballot is otherwise valid.” *Id.*

The Seventh Circuit stayed the district court’s injunction as to the witness requirement, primarily because the injunction came too close to the presidential primary, the state had issued guidance allowing for socially distanced signature options, and the state was considering additional accommodations. Slip Op. at 3-4, *Democratic Nat’l Comm. v. Bostelmann*, No. 20-1538 (7th Cir. Apr. 3, 2020). In that case, the district court had ordered the relief well after absentee voting was underway and less than two weeks before the election. The Seventh Circuit also suggested that it was premature to draw conclusions about the difficulty Wisconsin voters would encounter in having their absentee ballots witnessed, because the Wisconsin Election Commission had recently issued some relevant guidance and might “consider yet other ways for voters to satisfy the statutory signature requirement (if possible, for example, by maintaining the statutory presence requirement but not requiring the witness’s physical signature).” *Id.* at 4. Whatever the merits of these considerations in the Wisconsin case, they do not apply here. Minnesota’s next statewide election is not until August 11. Moreover, Minnesota has not issued formal guidance on witnessing absentee ballots safely during the pandemic, and it is clear that Minnesota law requires the witness’s physical signature.

constitutional right they treasure because the health risks of complying with the witness requirement are too serious to ignore.

B. Minnesota's interest in enforcing the witness requirement during the pandemic is slight.

Minnesota derives no substantial benefit from enforcing the witness requirement for absentee voting during the COVID-19 pandemic. The state's choice to keep this requirement in place throughout the pandemic therefore cannot pass any form of heightened scrutiny, let alone the strict scrutiny that such a severe burden on voting rights demands. *See Burdick*, 504 U.S. at 434; *Fish*, 957 F.3d at 1128.

Like every other state, Minnesota has a "legitimate interest in preventing voter fraud and safeguarding voter confidence." *Brakebill v. Jaeger*, 932 F.3d 671, 678 (8th Cir. 2019). This interest can justify a restriction on voting, but only if the restriction is appropriately tailored to address the actual threat to election integrity, accounting for the severity of the burden on voters and the availability of other means to serve the state's interest. *See Burdick*, 504 U.S. at 434; *Thomas*, 2020 WL 2617329, at *20 ("While states certainly have an interest in protecting against voter fraud and ensuring voter integrity, the interest will not suffice absent 'evidence that such an interest made it necessary to burden voters' rights.") (quoting *Fish*, 957 F.3d at 1133).

The witness requirements at issue in *Thomas* and *League of Women Voters of Virginia* failed this test, based on facts remarkably similar to this case. In both cases, the courts found no evidence that requiring a witness signature was effective in preventing absentee voter fraud. *League of Women Voters of Virginia*, 2020 WL 2158249, at *9; *Thomas*, 2020 WL 2617329, at *21. Indeed, both witness requirements shared a feature that undermined their effectiveness at preventing fraud: Virginia and South Carolina could not or would not verify the witness's signature to confirm that the ballot was properly witnessed. *League of Women Voters of Virginia*,

2020 WL 2158249, at *9; *Thomas*, 2020 WL 2617329, at *20-*21. The court in *League of Women Voters of Virginia* further noted that Virginia had “other means of combatting voter fraud integrated into the absentee-voting system,” including “serious felony charges for absentee voting malfeasance.” 2020 WL 2158249, at *9. “For the fraudster who would dare to sign the name of another qualified voter at the risk of being charged with Class 4 and Class 5 felonies . . . writing out an illegible scrawl on an envelope to satisfy the witness requirement would seem to present little to no additional obstacle[.]” *Id.*

Minnesota’s interest in election integrity similarly fails to justify the severe burden that its witness requirement imposes on voters during the pandemic. To begin with, fraudulent absentee voting is vanishingly rare throughout the U.S., and *especially* in Minnesota. A comprehensive study covering all elections from 2000 to 2012 found 491 cases of alleged absentee ballot fraud nationally, and just one in Minnesota. Ex. 1 (Election Fraud Database). By way of comparison, over 21.8 *million* Americans, including 255,141 Minnesotans, voted by domestic absentee ballot in the November 2012 election *alone*. Ex. 2 (Election Assistance Commission 2012 Voter Survey); *see also Thomas*, 2020 WL 2617329, at *20 n.21 (noting further evidence that absentee voter fraud is rare). Minnesota expanded the availability of absentee voting in 2013, *see* 2013 Minn. Sess. Law Ch. 131 (H.F. 894), but there is no evidence that this legislation has led to any pattern of absentee voting fraud.

Without its witness requirement, Minnesota would still have robust safeguards against absentee voting fraud. Like Virginia, Minnesota imposes serious criminal penalties for fraudulent absentee voting. *See* Minn. Stat. § 203B.03 (creating felony offenses for fraud and other misconduct in absentee voting); Minn. Stat. § 201.014 (any person who votes in Minnesota

despite knowing that she is ineligible to vote is guilty of a felony); Minn. Stat. § 609.03 (felonies punishable by imprisonment for up to five years, a fine of up to \$10,000, or both).

If a fraudulent absentee ballot were returned in defiance of these criminal prohibitions, the ballot would not automatically be counted, but would be subjected to rigorous verification process along with all other absentee ballots. Each absentee ballot is rejected unless it satisfies *six* independent criteria, as judged by a ballot board composed of trained officials who generally must include members of different political parties. *See* Minn. Stat. § 203B.121, subd. 2; Minn. Stat. § 204B.45, subd. 2; Minn. R. 8210.2450, subp. 1. Five of the six criteria have nothing to do with the required witness statement. Minn. Stat. § 203B.121, subd. 2; *see also supra* at 5-6.

Even if requiring a witness signature could in theory make a meaningful contribution to preventing fraud, Minnesota's witness requirement would fail to do so, due to an "enforcement weakness[]" apparent in the statute" and its implementing regulations. *League of Women Voters of Virginia*, 2020 WL 2158249, at *9. As in Virginia and South Carolina, local ballot boards in Minnesota *will not* reject a ballot on the ground that the witness's name, address, or signature fails to match a name, address, or signature contained in the witness's voter registration record. *See* Minn. R. 8210.2450, subp. 5. Instead, the witness requirement is automatically deemed satisfied if the witness's portion of the certificate is filled out with a signature and any one of the following: a Minnesota address, a title indicating that the witness is eligible to administer oaths, or an affixed notarial stamp. *Id.* "For the fraudster who would dare" commit absentee ballot fraud in the first place, adding a signature and address for a fictional witness whose existence will never be verified "would seem to present little to no additional obstacle[.]" *League of Women Voters of Virginia*, 2020 WL 2158249, at *9. Luckily, Minnesota has much stronger anti-fraud mechanisms in place. *See supra* at 3-6. No doubt the requirement that the voter provide her

Minnesota driver's license, state identification number, or the last four digits of her Social Security number is a much higher barrier for a would-be fraudster than a witness signature.

Like the witness requirements in Virginia and South Carolina, the witness requirement in Minnesota has “not been justified by countervailing, demonstrated interests.” *Id.* at *8. By all means, the Court should give “adequate consideration to the state’s interests” and permit Minnesota to maintain overall statutory scheme that “gives . . . effect to the state’s substantial interest in combatting voter fraud.” Slip Op. at 3-4, *Democratic Nat’l Comm. v. Bostelman*, No. 20-1538 (7th Cir. Apr. 3, 2020). But the evidence in this case shows that applying the witness requirement during the COVID-19 pandemic—and effectively disenfranchising many voters in the process—is not remotely necessary to vindicate this interest. Plaintiffs are therefore likely to succeed on the merits of their as-applied challenge to Minnesota’s witness requirement.

II. Plaintiffs will suffer irreparable injury in the absence of preliminary relief.

Minnesota’s witness requirement has caused and will continue to cause Plaintiffs irreparable damage absent a preliminary injunction. A violation of the right to vote in any election constitutes irreparable injury. After an election has passed, the right to vote is lost permanently and the harm cannot be redressed. *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016); *see also Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

A. Ms. Latimer Tanniehill and other members of LWVMN face a choice between their safety and their vote.

Enforcing Minnesota’s witness requirement during the pandemic would irreparably harm Ms. Latimer Tanniehill and other members of LWVMN by forcing them to risk their health or refrain from voting.

Ms. Latimer Tanniehill fears that she will have to put her life on the line in order to vote in the upcoming August and November 2020 elections. Ex. 18 (Latimer Tanniehill Decl.) ¶¶ #21, 25. She is Black, over 65 years old, asthmatic, and an open-heart surgery survivor who takes a blood-thinning medication daily for her cardiac health. *Id.* ¶¶ 7, 17.⁶ Ms. Latimer Tanniehill is therefore particularly vulnerable to becoming severely or fatally ill if she contracts COVID-19. In light of her particular vulnerability to the disease, Plaintiff Latimer Tanniehill does not allow anyone inside her home, including her own adult children and grandchildren. *Id.* ¶ 19. Her youngest daughter visits by standing outside on the sidewalk while Plaintiff Latimer Tanniehill talks to her from an upstairs window. When Plaintiff Latimer Tanniehill's oldest daughter and grandchildren visit to help her with lawn work outside, they wear face masks and gloves while practicing social distancing. *Id.* 19.

In order for Plaintiff Latimer Tanniehill to vote absentee, she would have to violate the social distancing guidelines she has been following by inviting someone inside her home or traveling outside of her home to visit someone else. Ex. 18 (Latimer Tanniehill Decl.) at ¶ 25. She would then have to show that person her blank ballot and have that person sign a statement after she finishes filling out the ballot. This would require her to touch an object immediately after a person who lives outside her household touches it, a process which the CDC has warned may lead to transmission of COVID-19. Ex. 22 (CDC Report on How COVID-19 Spreads). Ms. Latimer Tanniehill's only other option is to risk voting in person, which would involve waiting in line with other voters, interacting with poll workers, and touching voting equipment that might

⁶ The CDC has reported that older persons and those with certain preexisting health conditions are at higher risk of contracting, developing serious illness, and dying from COVID-19. *See* Ex. 20 (CDC Report on Higher Risk Populations). The CDC has also reported that certain racial and ethnic minorities, including Black individuals, are at higher risk of serious illness or death from the virus. *See* Ex. 21 (CDC Report on COVID-19 and Racial and Ethnic Minorities).

be contaminated. This form of prolonged exposure to other individuals at a crowded polling place would also put her at serious risk of contracting COVID-19.

If the witness requirement for absentee voting stays in place through the pandemic, Ms. Latimer Tanniehill does not know whether she will be able to vote in the August and November 2020 elections by absentee ballot. Ex. 18 (Latimer Tanniehill Decl.) at ¶ 25. While she would rather tolerate a small risk of COVID-19 infection than give up her right to vote, if the risk of infection is too high, she may make the painful choice not to vote. *Id.* Either of these outcomes would irreparably harm Ms. Latimer Tanniehill.

Many other members of LWVMN are in the same position of choosing between two irreparable harms. Many LWVMN's members are over age 65, and Ms. Latimer Tanniehill is far from the only one with health conditions that elevate the risk of becoming severely ill or dying from COVID-19. Ex. 19 (Witte Decl.) at ¶ 11. Nor is it unusual for LWVMN members to live alone, or to live in households without anyone qualified to witness an absentee ballot. *Id.* ¶ 12. If the witness requirement stays in place through the pandemic, some LWVMN members will forego voting because they reasonably fear exposing themselves to COVID-19 by interacting with a witness. *Id.* ¶ 32. LWVMN members, including Ms. Latimer Tanniehill, therefore face imminent and irreparable harm in the absence of a preliminary injunction.

B. LWVMN also faces irreparable injury in the form of diverted resources.

If the witness requirement remains in force throughout the pandemic, LWVMN will have to divert resources from its core activities to take new and unprecedented steps to facilitate absentee voting, with a particular focus on educating voters about the witness requirement for absentee voting and helping them connect with witnesses as safely as possible. Ex. 19 (Witte

Decl.) at ¶¶ 29-30. This diversion of resources is already happening, and will only increase absent injunctive relief.

Until recently, the witness requirement had not been a major focus of LWVMN's programming because most Minnesota voters usually vote in person. *Id.* ¶ 24. However, because of the COVID-19 pandemic, LWVMN expects to see an unprecedented surge in absentee voting throughout Minnesota in the August 2020 state primary and the November 2020 general election. *Id.* ¶ 25. LWVMN will encourage its members to vote absentee if possible, and expects that most of its members will do so. Therefore, LWVMN will have to increase its involvement in educating voters about absentee voting. *Id.* ¶ 26.

If Minnesota had no witness requirement for absentee voting, LWVMN's voter education efforts on absentee voting would be relatively simple and straightforward: it would focus on raising awareness of the fact that all registered Minnesota voters have the right to vote absentee. *Id.* ¶ 27. However, the witness requirement complicates things significantly. LWVMN must inform voters not only that absentee voting requires a witness, but that that witness must be a registered Minnesota voter, a notary, or another person authorized to give oaths. *Id.* ¶¶ 23, 27. LWVMN is developing a communications campaign to tackle the challenge of educating voters about the requirements for absentee voting, particularly the witness requirement. *Id.* ¶¶ 29. LWVMN's office staff is currently spending time and energy on developing strategies to educate the public about the witness requirement—time and energy that it would otherwise invest in adapting its core activities, such as voter registration drives and forum events, to the new COVID-19 reality. *Id.* ¶ 29.

LWVMN's office staff is also spending significant time and energy developing plans for how voters can have their absentee ballots witnessed as quickly and safely as possible during the

pandemic. *Id.* ¶ 30. LWVMN is in the early stages of creating a program that would allow voters to request a witness and be connected with others who are eligible and willing to witness absentee ballots. *Id.* ¶ 30. However, developing this program is an expensive and time-consuming task. LWVMN has no existing technology or infrastructure for connecting voters with witnesses, and no experience brokering these peer-to-peer connections. *Id.* ¶ 31.

The resources that LWVMN is expending to address the State's witness requirement cannot be recovered at a later date. "Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009). Further, Plaintiffs do not and could not seek damages from Defendant Simon because he is a state official. When a plaintiff sues a state official alleging a violation of federal law, the federal court may not award retroactive monetary relief. *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994). Therefore, the harm that LWVMN faces in the absence of a preliminary injunction will be irreparable.

III. The public interest and balance of harms weigh heavily in favor of the preliminary injunction.

Once a party moving for a preliminary injunction "makes a threshold showing that it is likely to prevail on the merits, the district court should then proceed to weigh the other *Dataphase* factors," which include the threat of irreparable injury to the movant, the balancing of harms among interested parties, and the effect on the public interest. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)). While the usual inquiry on a motion for preliminary injunction "calls for assessing the harm to the opposing party and weighing the public interest,"

“[t]hese factors merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

A. The general public would benefit from the preliminary injunction.

The Supreme Court has held that “voting is of the most fundamental significance under our constitutional structure.” *Burdick*, 504 U.S. at 433 (internal citations omitted). Because the right to vote is “preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Thus, it is clear that the public has a strong interest in all eligible voters being able to vote, because “it is always in the public interest to protect constitutional rights.” *Phelps-Roper v. Nixon*, 509 F.3d 480, 485 (8th Cir. 2007), *modified on reh’g*, 545 F.3d 685 (8th Cir. 2008); *see also Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) (“[T]he public interest favors protecting core First Amendment freedoms.”).

Without injunctive relief, *many* Minnesotans who are otherwise eligible to vote will face a severe—and potentially insurmountable—burden on their ability to vote. According to U.S. Census Bureau data, approximately 26 percent of voting-age Minnesotans live alone. Ex. 23 (Census Bureau Data). Although under normal circumstances most Minnesotans may be able to find an eligible individual to witness their absentee ballot, the extraordinary circumstances of the COVID-19 pandemic prevent a significant portion of Minnesota’s electorate from effectively exercising the franchise without causing harm to themselves and their communities by spreading the disease. The Eighth Circuit has recognized that even “extreme measures” are justified by the global pandemic; this minor alteration to Minnesota’s absentee laws to ensure safe access to the right to vote is certainly justified. *In re Rutledge*, 956 F.3d at 1029.

Critically, an injunction temporarily lifting the witness signature requirement for absentee ballots will do nothing to impede the interests of those Minnesota voters who do live with someone who can witness their ballot without risking infection or spread of COVID-19. Even those voters who *are* able to fulfill the requirement have an interest in the health of Minnesota’s democracy and the perception of a legitimate election—both of which are served by the removal of a barrier that forces Minnesotans to risk either disenfranchisement or their health. That interest is shared by the State, which has an affirmative interest in protecting voters’ confidence in the integrity of elections. *See Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

In addition to the election-related interests, an injunction would also serve the public by protecting public health. *See In re Rutledge*, 956 F.3d at 1031 (relying on “the State’s admittedly legitimate interests in protecting or promoting the public’s health and safety during the COVID-19 pandemic”); *see also J.S.G. ex rel. Hernandez v. Stirrup*, No. SAG-20-1026, 2020 WL 1985041, at *11 (D. Md. Apr. 26, 2020) (“[G]ranting relief that reduces the risk of the further spread of COVID-19 also significantly furthers the public interest.”). The only ways to limit the spread of COVID-19 are self-isolation, social distancing, frequent handwashing, and disinfecting surfaces. *See Ex. 3* (Reingold Decl.) at ¶ 11. Social distancing requires the maintenance of at least six feet of distance between individuals who do not live in the same household. *Id.* Critically, requiring someone to come into close proximity with someone outside their household will place them at greater risk of infection, especially for those at greater risk of complications and death from COVID-19. *Id.* ¶ 19. It is in all Minnesotans’ interest to slow the spread of COVID-19. For that reason, Minnesota officials have not only implemented policies to restrict gatherings and encourage social distancing, *see Ex. 10* (Minn. Emergency Exec. Order 20-56),]

but also encouraged Minnesota voters to cast absentee ballots by mail in order to reduce crowding at in-person polling locations and reduce transmission of the virus during upcoming elections. Ex. 16 (Def. Simon Statement on Absentee Ballots).

B. Plaintiffs are seeking appropriately tailored relief.

The public interest would be served by a Court order granting preliminary relief as to the August and November 2020 elections.

To begin, it is not too late for the Court to grant relief that improves the August 2020 primary. Judicial orders issued shortly before elections are sometimes disfavored if they “can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). This motion is being filed well over two months in advance of the next election, leaving ample time for implementation. In any event, the injunction Plaintiffs seek would not cause confusion and depressed voter participation, which were the Supreme Court’s chief concerns in *Purcell*. The relief sought here is narrowly tailored and would make absentee voting easier for both voters and election administrators without threatening the integrity of the election. Temporary suspension of the witness requirement would cause *more* voter participation, not less.

Nor is it too early for the Court to grant relief from the witness requirement for absentee voting in the November 2020 general election. As explained above, the witness requirement imposes a severe burden on voting rights at this time—not because any given voter is *certain* to catch COVID-19 from a witness, but because every interaction outside the voter’s own household creates a *risk* of such transmission. *See Thomas*, 2020 WL 2617329, at *21 (noting that witness requirement requires voters “to place their health at risk during the COVID-19 pandemic”). This reality will not change between now and November. As Plaintiffs’ expert

epidemiologist Dr. Arthur Reingold confirms, the U.S. will likely see resurgences of COVID-19 transmissions throughout 2020 and into 2021. Ex. 3 (Reingold Decl.) at ¶ 16. Even if infection rates drop over the summer, colder weather in the fall and winter of 2020 may lead to a spike in transmission. *Id.* ¶ 18. Given this outlook, the risk of COVID-19 will continue to deter voters from meeting with witnesses during the absentee voting period for the November election, regardless of the precise infection rate at that time. And the public is served when, to the extent possible, the rules of an election are set in advance so voters and election officials can plan accordingly.

Finally, if the Court withholds relief as to the November election until the exact health risks around Election Day are known, it may then prove too late to provide fully effective relief. For example, if COVID-19 cases surge one week before the November election, the Court would not be able to as effectively provide the necessary relief to voters (i.e. printed materials with the witness requirement may already be in voters' hands). Plaintiffs and the broader public would therefore be prejudiced by any undue delay in settling the question of whether the witness requirement will apply in the November election.

C. The burden imposed by a preliminary injunction on Defendant, if any, would be far less severe than the irreparable harm Plaintiffs currently face.

Plaintiffs' requested relief would impose little, if any, burden on Defendant. First, Defendant has encouraged Minnesota voters to cast absentee ballots, particularly in the 2020 elections. *See* Ex. 16 (Def. Simon Statement on Absentee Ballots). Injunctive relief facilitating absentee voting for many thousands of Minnesota voters by temporarily lifting the onerous witness requirement would *further* Defendant's goals, not frustrate them.

Operationally, it would not be difficult for Defendant to suspend the witness requirement for the August and November 2020 elections. Under Minnesota law, the Secretary of State

unambiguously has the authority to both issue instructions to local election officials and modify or create standard forms sent to absentee voters statewide, such as envelopes and instructions. *See* Minn. Stat. §§ 203B.125; 204B.27; 204B.45, subd. 3. Most importantly, the Secretary has the specific authority to “adopt alternative election procedures to permit the administration of any election” affected by a judicial order from a state or federal court. Minn. Stat. § 204B.47. Defendant can quickly and easily utilize this authority to suspend the witness requirement for upcoming elections if directed to do so by the court, for example by removing the necessary fields from absentee ballot envelopes and directing local election officials not to reject absentee ballots that lack a witness signature.

Plaintiffs’ requested injunction would impose no additional administrative burdens on the State. The requested relief would not require Defendants to develop or implement any new procedures for processing absentee ballots; in fact, if anything, it would *lessen* the administrative burden on the state by removing a step from the absentee ballot verification process.

Nor would Defendant be unduly burdened by an order to educate the public about the suspension of the witness requirement for the 2020 elections. Defendant is already engaged in publicly promoting absentee voting. *See* Ex. 16 (Statement of Def. Simon re: Absentee Ballots). If the witness requirement is suspended for the 2020 elections, it is not too much to ask that Defendant expand his existing public education efforts to include up-to-date information, preventing potential absentee voters from being deterred by the mistaken belief that a witness is required. *See Thomas*, 2020 WL 2617329, at *30 (ordering defendants to “immediately and publicly inform South Carolina voters about the elimination of the Witness Requirement” through channels including “all relevant websites and social media outlets”). The less public

education Defendant does on this matter, the more this task will fall to LWVMN, a private organization without the State's resources.

Finally, an injunction would not compromise Minnesota's interest in secure elections. Plaintiffs share Minnesota's interest in maintaining the integrity of its elections and ensuring that Minnesota voters have confidence in the fairness and security of their elections. As noted above, Minnesota has a variety of other safeguards that adequately serve the State's interest in election integrity and preventing absentee ballot fraud. Even absent the witness requirement, Defendant and local Minnesota election officials will undertake a rigorous process to ensure that only validly cast absentee ballots from eligible voters are counted.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Preliminary Injunction.

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Respectfully submitted,

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