Case No. A20-1362

STATE OF MINNESOTA
IN SUPREME COURT

Donald J. Trump for President, Inc., Senate Victory Fund, House Republican Campaign Committee, and Ryan J. Beam,

Petitioners,

v.

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

Respondent,

and

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

Intervenor-Respondents.

INTERVENOR-RESPONDENTS' RESPONSE TO PETITION AND PETITIONERS' INFORMAL MEMORANDUM

(Counsel listed on next page)

THE JACOBSON LAW GROUP
R. Reid LeBeau II
Benjamin N. Pachito
180 East Fifth Street, Suite 940
St. Paul, MN 55101
rlebeau@thejacobsonlawgroup.com
bpachito@thejacobsonlawgroup.com
(651) 644-4710

GREENE ESPEL PLLP
Sybil L. Dunlop, Reg. No. 0390186
Samuel J. Clark, Reg. No. 0388955
Caitlinrose H. Fisher, Reg. No. 0398358
222 South Ninth Street, Suite 2200
Minneapolis, MN 55402
sdunlop@greeneespel.com
sclark@greeneespel.com
cfisher@greeneespel.com
(612) 373-0830

KIRKPATRICK LAW OFFICE, LLC
Matthew Z. Kirkpatrick
P.O. Box 363
Menomonie, WI 54751
mzkirkpatrick@gmail.com
(715) 418-3418

Counsel for Petitioners

PERKINS COIE LLP
Abha Khanna *(admitted pro hac vice)*
Jonathan P. Hawley
1201 Third Avenue, Suite 4900
Seattle, WA 98101
akhanna@perkinscoie.com
jhawley@perkinscoie.com
(206) 359-8000

Marc E. Elias
Amanda R. Callais
700 Thirteenth Street NW, Suite 800
Washington, DC 20005
melias@perkinscoie.com
acallais@perkinscoie.com
(202) 654-6200

Will M. Conley
33 East Main Street, Suite 201
Madison, WI 53703
wconley@perkinscoie.com
(608) 663-7460

Attorneys for Intervenor-Respondents

KEITH ELLISON,
ATTORNEY GENERAL
STATE OF MINNESOTA
Jason Marisam
Assistant Attorney General
445 Minnesota Street, Suite 1400
St. Paul, MN 55101-2131
jason.marisam@ag.mn.us
(651) 757-1275

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

INTRODUCTION

Less than one week before Election Day, Petitioners Donald J. Trump for President, Inc. (the "Trump Campaign"), Senate Victory Fund and House Republican Campaign Committee (the "Republican Legislative Committees"), and Ryan J. Beam launched an improper and inequitable attack on Minnesota's election rules. Even though the consent decree temporarily replacing Minnesota's Election Day receipt deadline with a postmark deadline (the "Consent Decree") was agreed to by Respondent Steve Simon, the Minnesota Secretary of State (the "Secretary"), and Intervenor-Respondents Robert LaRose, Teresa Maples, Mary Sansom, Gary Severson, and Minnesota Alliance for Retired Americans Educational Fund (collectively, the "Alliance") in July, and entered by Ramsey County District Judge Sara Grewing *on August 3*, Petitioners waited nearly three months to bring their challenge. By that point, not only had Minnesota voters already received their ballots with the Consent Decree's instructions, but the U.S. Postal Service ("USPS") could no longer guarantee delivery of mail ballots by Election Day. Petitioners' excuse—that they opted for a wait-and-see litigation approach instead of resolving these issues in time to avoid prejudice and hardship for voters and election officials—is thoroughly uncompelling. This Court would therefore be justified in concluding that laches bars Petitioners' requested relief.

But that is not the end of this story. Minnesota Statutes section 204B.47 authorizes both the Consent Decree and the Secretary's actions pursuant to it; as a result of Judge Grewing's order entering the Consent Decree, the State's Election Day receipt deadline

could not be implemented, thus requiring the alternative procedures issued by the Secretary. Despite this straightforward application of a duly enacted Minnesota statute, the U.S. Court of Appeals for the Eighth Circuit concluded last week that section 204B.47 is inapplicable in this case. *See Carson v. Simon*, No. 20-3139, 2020 WL 6335967, at *6–7 (8th Cir. Oct. 29, 2020) (per curiam). The Eighth Circuit's reasoning ignored both the plain text of the statute and the facts underlying the Consent Decree. Given that this misinterpretation of Minnesota law risks further confusion—not to mention the later invalidation of ballots lawfully cast pursuant to the Consent Decree—this Court should address Petitioners' claims on the merits and uphold the Consent Decree. Indeed, the Eighth Circuit's injunction contemplates the entry of "a final order . . . by a court of competent jurisdiction" determining the lawfulness of the Consent Decree. *Id.* at *8. The Alliance can think of no more competent court to address both Petitioners' and the Eighth Circuit's misinterpretation of Minnesota law than the State's highest court.

This case should not be held in abeyance. Instead, Petitioners' action should be resolved immediately to ensure stability and confidence in the days before and after Election Day. And because all three of Petitioners' claims fail as a matter of law, this Court's timely disposition of these contested issues will further ensure that all eligible Minnesotans have their votes counted.

STATEMENT OF FACTS

I. The State Court Action

On May 13, 2020, the Alliance filed an action in state court against the Secretary, arguing that Minnesota's Election Day receipt deadline and witness-signature requirement for mail ballots violates the U.S. and Minnesota Constitutions. *See LaRose v. Simon*, No. 62-CV-20-3149 (Ramsey Cty. Dist. Ct.); Ex. 1[1]; *see also* Minn. Stat. §§ 203B.08, subd. 3, 204B.45, 204B.46; Minn. R. pts. 8210.2220, subp. 1, 8210.3000. On June 16, the Alliance and the Secretary entered into a consent decree in which the Secretary agreed not to enforce these provisions during the August primary.

The Republican Party of Minnesota, Republican National Committee, and National Republican Congressional Committee (the "Republican Party Committees") sought and were ultimately granted intervention. The Alliance moved for a temporary injunction to suspend enforcement of the challenged provisions during the November election, *see*

[1] Exhibit cites refer to the exhibits attached to the Declaration of Abha Khanna, filed concurrently with this response and the Alliance's accompanying motion to add record materials. If the Court declines to add these materials to the record, then it may take judicial notice of all exhibits, which are either record entries from related court proceedings, *see Smisek v. Comm'r of Pub. Safety*, 400 N.W.2d 766, 768 (Minn. Ct. App. 1987) (taking judicial notice of "trial court order in [a] related [] proceeding"), or "readily verifiable facts" from a government website. *In re Welfare of Clausen*, 289 N.W.2d 153, 157 (Minn. 1980); *see also* Minn. R. Evid. 201(b); *United States ex rel. Modglin v. DJO Glob. Inc.*, 48 F. Supp. 3d 1362, 1381 (C.D. Cal. 2014) (interpreting analogous federal rule and concluding that court may take judicial notice of "'government documents available from reliable sources on the Internet,' such as websites run by governmental agencies" (quoting *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 08-CV-1166-IEG (POR), 2009 WL 6597891, at *2 (S.D. Cal. Dec. 23, 2009))).

Exs. 2, 6, which was supported by more than 40 exhibits and three expert declarations. *See, e.g.*, Ex. 3. The Republican Party Committees vigorously opposed. *See* Ex. 4.

On July 17, the Alliance and the Secretary filed the proposed Consent Decree, in which the Secretary agreed not to enforce the challenged election laws during the November election. *See* Ex. 8. The Republican Party Committees filed numerous objections, claiming, among other things, that "the Secretary propose[s] to overrule Minnesota's election laws," 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. 5, at 2. On July 31, Judge Grewing held a hearing on all pending motions and objections, and on August 3, issued an order entering the Consent Decree. *See* Ex. 7.

The court evaluated the Consent Decree under both Minnesota law and a more exacting federal standard—which required "weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered," *Id.* at 17 (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981))—and noted that it "would reach the same result" under either standard. *Id.* at 18. The analysis under Minnesota law was straightforward, with Judge Grewing explaining that "the proposed consent decree is non-partisan," waives the Election Day receipt deadline "only with regard to the November 2020 election," and "affords [the Secretary] sufficient time to provide instruction and certainty to voters and local election officials before absentee voting begins on September 18." *Id*. Applying the more probing federal standard, the court determined that

Applicants were "likely to succeed on the merits" of their constitutional challenges to the receipt deadline, 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." *Id.* at 19, 24–25.

The Republican Party Committees sought and were granted an expedited appeal in this Court but ultimately chose not to pursue it. Instead, on August 18, the *LaRose* parties, joined by the parties in a related appeal, *see NAACP Minn.-Dakotas Area State Conf. v. Simon*, No. A20-1041 (Minn.), signed a stipulation to dismiss their appeals. *See* Ex. 9. In the stipulation, both the Republican Party Committees *and* the Trump Campaign—one of the Petitioners here—"waive[d] the right to challenge in any other judicial forum the August 3, 2020 Orders and the August 3, 2020 Stipulations and Partial Consent Decrees that formed the basis for the above-captioned consolidated appeals"; in other words, the Consent Decree and Judge Grewing's related orders. *Id.* at 2–3. This Court dismissed the appeal pursuant to the stipulation. *See* Ex. 10, at 2.

II. The Consent Decree

Under the Consent Decree, the Secretary agreed to issue guidance instructing local election officials and voters that Minnesota's Election Day receipt deadline would be replaced by a postmark deadline in November, providing 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." Ex. 8, at 10–11. 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.* at 10. The Consent Decree also included a postmark presumption, which provided that "[w]here 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*.

On August 28, the Secretary issued the prescribed guidance to local election officials and provided them with voter education materials about the postmark deadline. *See* Ex. 14. The Secretary also updated his office's website to directly inform voters about the change, *see* Ex. 15, at 1, and numerous news outlets made similar announcements. *See, e.g.*, Exs. 16–17. Groups dedicated to voter education and engagement—including the Alliance—began informing Minnesotans of the deadline in reliance on the Consent Decree. *See* Exs. 12–13. On September 18, election officials began sending absentee ballots, with ballot-return envelopes instructing that the postmark deadline would be used and that ballots should be mailed back "**on or before Election Day**." Ex. 14, at 8; *see also* Minn. Stat. § 204B.35; Minn. R. pt. 8210.0500. As of that date, over 1 million voters had requested absentee ballots, a number that the Secretary described as "off the charts." Ex. 18, at 1.

III. The Federal Court Action

Nearly two months later, James Caron and Eric Lucero, two Republican Party presidential electors (the "Electors"), filed suit in the U.S. District Court for the District of

Minnesota, raising claims similar to Petitioners' and moving for a preliminary injunction to prevent the counting of any mail ballots received after 8 p.m. on Election Day. *See* Ex. 11. The Alliance intervened and, along with the Secretary, opposed the Electors' requested injunction on jurisdictional grounds, the merits, and the equities. The district court ultimately denied the Electors' motion for preliminary injunction on standing grounds without reaching the merits, *see Carson v. Simon*, No. 20-CV-2030 (NEB/TNL), 2020 WL 6018957, at *14–15 (D. Minn. Oct. 12, 2020), and after the Electors' noticed their appeal and filed a motion for injunction pending appeal, the district court reached the same conclusion. *See Carson v. Simon*, No. 20-CV-2030 (NEB/TNL), 2020 WL 6117687, at *2 (D. Minn. Oct. 16, 2020).

On October 29, the Eighth Circuit reversed. After first concluding that the Electors had standing as candidates for office, *see Carson*, 2020 WL 6335967, at *3–5, the court addressed whether "the Secretary's actions in altering the deadline for mail-in ballots [] violates the Electors Clause." *Id.* at *6. The court asserted that "the Secretary has no power to override the Minnesota Legislature," and then addressed the Alliance's and the Secretary's argument that "the Minnesota Legislature has delegated its authority to the Secretary by means of a general statute in the election code." *Id.* (citing Minn. Stat. § 204B.47). The Eighth Circuit concluded that the statute did not authorize the Consent Decree:

> [N]othing in this statute authorizes the Secretary to override the Legislature's ballot deadlines due to public health concerns. By its terms, Section 204B.47 only authorizes alternate rules where an election statute "cannot be implemented as a *result*" of a court order. Here, the Secretary initiated the

> court order in cooperation with litigants. And even then, the order does not declare the statute invalid.

Id. (citation omitted) (quoting Minn. Stat. § 204B.47).

Based on this conclusion, and after further determining that the counting of ballots under the Consent Decree "will inflict irreparable harm on the Electors" and would not serve the public interest, *id.* at *7, the Eighth Circuit instructed the district court "to immediately enter the following order granting a preliminary injunction":

> The Secretary and his respective agents and all persons acting in concert with each or any of them are ordered to identify, segregate, and otherwise maintain and preserve all absentee ballots received after the deadlines set forth in Minn. Stat. § 203B.08, subd. 3, in a manner that would allow for their respective votes for presidential electors pursuant to Minn. Stat. § 208.04, subd. 1 (in effect for the President and Vice President of the United States) to be removed from vote totals in the event a final order is entered by a court of competent jurisdiction determining such votes to be invalid or unlawfully counted. The Secretary shall issue guidance to relevant local election officials to comply with the above instruction.

Id. at *8.

Circuit Judge Jane Kelly dissented from the opinion, concluding among other things that "Minnesota's legislature has expressly delegated some of its lawmaking authority to the Minnesota Secretary of State where elections are concerned" through section 204B.47. *Id.* at *9–10 (Kelly, J., dissenting).

The following day, pursuant to the Eighth Circuit's mandate, the district court entered the required injunction. *See* Ex. 19.

IV. Petitioners' Suit

After oral argument in the Eighth Circuit, but before that court issued its opinion, Petitioners initiated this action on October 28. Like the Electors in federal court, Petitioners contend that (1) the Secretary's actions implementing the Consent Decree violate enactments of the Minnesota Legislature and, accordingly, the Electors and Elections Clauses of the U.S. Constitution, *see* Pet. Pursuant to Minn. Statute § 294B.44 ("Pet.") ¶¶ 71–74, 80–86, and (2) the Consent Decree's postmark deadline violates federal Election Day statutes, *see id.* ¶¶ 75–79.

The following day, this Court responded with an order and briefing schedule, outlining the procedural history of the Consent Decree and instructing Petitioners to "address[] why this petition could not have been filed at an earlier date and why laches should not apply." Order 4.

ARGUMENT

I. This case should not be held in abeyance.

Petitioners "request the Court to hold this case in abeyance in light of the" Eighth Circuit's injunction. Pet'rs' Suppl. Informal Mem. ("Mem.") 1. The Alliance respectfully urges the Court to decline this invitation. As discussed in Part III.A *infra*, both the petition and the Eighth Circuit's injunction are premised on an incorrect interpretation of Minnesota law, a legal error that this Court can now address by considering Petitioners' claims. Indeed, not only have Petitioners sought a determination of this issue in this Court, but the

Eighth Circuit itself invited a final determination on the lawfulness of the Consent Decree from "a court of competent jurisdiction." *Carson*, 2020 WL 6335967, at *8.

Moreover, although the Eighth Circuit's injunction and the relief requested by Petitioners are superficially similar, *compare id.*, *with* Pet. 16, there is a critical legal distinction between this case and *Carson*. In *Carson*, the Electors have challenged the lawfulness of the Consent Decree only under the *Electors* Clause. *See* 2020 WL 6335967, at *3; Ex. 11; *see also* U.S. Const. art. II, § 1, cl. 2. Accordingly, any relief granted in that case would extend only to the presidential election, and *not* to the State's contests for the U.S. Senate or House of Representatives (governed by the Elections Clause of the U.S. Constitution, *see* U.S. Const. art. I, § 4, cl. 4) or any state and local races (governed by state law). Petitioners, by contrast, have raised claims under Minnesota law, the Elections Clause, and the Electors Clause. *See* Pet. ¶¶ 71–74 (alleging that Secretary violated state law); *id.* ¶¶ 80–86 (alleging that Secretary violated Electors *and* Elections Clauses).

Ultimately, Petitioners *chose* to invoke this Court's jurisdiction and raise a multitude of critical issues on the eve of the election. They cannot now ask the Court to turn a blind eye, especially given the Eighth Circuit's invitation to "a court of competent jurisdiction" to weigh in. Minnesotans' ability to meaningfully and confidently participate in the November election has been called into question by Petitioners' suit. Accordingly, this case should be resolved immediately and not held in abeyance.

II. Petitioners' requested relief is barred by laches.

The relief Petitioners seek—in an action filed months after entry of the Consent Decree and less than one week before Election Day—is barred by laches.[2]

When there has been "such an unreasonable delay in asserting a known right" that it "result[s] in prejudice to others," the doctrine of laches prohibits granting the relief requested. *Piepho v. Bruns*, 652 N.W.2d 40, 43 (Minn. 2002) (per curiam) (quoting *Fetsch v. Holm*, 52 N.W.2d 113, 115 (Minn. 1952)). Here, the Consent Decree that Petitioners challenge was entered by Judge Grewing on August 3. The Trump Campaign subsequently dismissed its appeal before this Court—and then Petitioners did nothing. They waited, as August, September, and October passed. During that time, the Secretary, state and local officials, voter education groups, and the media publicized the Consent

[2] Notably, the Trump Campaign and the Republican Legislative Committees are also barred from launching this collateral attack on the Consent Decree based on the stipulation of dismissal in the prior state court action, in which the Trump Campaign and the Republican Party Committees "waive[d] the right to challenge in any other judicial forum" both Judge Grewing's orders and the Consent Decree. Ex. 9, at 2–3; *see also Hentschel v. Smith*, 153 N.W.2d 199, 203 (Minn. 1967) (absent fraud, valid judgment entered by agreement or consent has 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*" (emphasis added) (quoting *Pangalos v. Halpern*, 76 N.W.2d 702, 706 (Minn. 1956))). The Trump Campaign signed the stipulation, so is indisputably bound by it. The Republican Legislative Committees, in turn, are in privity with the Republican Party Committees. Both the Senate Victory Fund and House Republican Campaign Committee claim to be "Minnesota political party unit[s]" as defined by Minnesota Statutes section 10A.01, subdivision 30. Pet. ¶¶ 8–9. They are therefore "party unit[s]" of their corresponding "major political party," which is the "aggregate of all its political party units in this state," Minn. Stat. § 10A.01 subds. 29–30—and which was a signatory to the stipulation through its state and national committees. The Alliance does not argue that the stipulation is similarly binding on Petitioner Beam given the facts alleged in the petition.

Decree's provisions, and on September 18, election officials began distributing mail ballots with instructions that a postmark deadline would be used during the November election. Petitioners should have known of this critical date, since it was emphasized in both Judge Grewing's order, *see* Ex. 7, at 18, and the Consent Decree itself, *see* Ex. 8, at 3, 6. October 27 marked the last day recommended by USPS to ensure delivery of mail ballots by Election Day. *See* Ex. 20, at 2 (USPS "recommend[s] that domestic, non-military voters mail their completed ballots before Election Day and *at least one week prior* to [the applicable] deadline") (emphasis added)). And yet Petitioners waited until the following day to commence this action, disrupting the voting process that had been underway for weeks and threatening to upend the election with a last-minute challenge to the Consent Decree *after* voters could ensure compliance with an Election Day receipt deadline.

Although the relief Petitioners seek only requires the segregation of ballots that arrive after the Election Day receipt deadline, even this would cause—and indeed, as a result of the Eighth Circuit's injunction, *already has caused*—uncertainty. Minnesota voters had received consistent guidance on the postmark deadline since the Consent Decree was entered on August 3, including the instructions printed on the ballot-return envelopes *in voters' hands right now*. Petitioners' requested relief would prevent voters from knowing for certain which rules will apply during tomorrow's election—and, for any voters who have not yet mailed their ballots, whether they will need to vote in person and risk exposure to COVID-19 or else mail their ballots back without assurance that they will be delivered by Election Day. Moreover, the segregation of ballots necessarily casts a cloud of

uncertainty over the entire election, leaving voters to wonder—and worry—whether their ballots will even be counted.

Petitioners' excuse for their unreasonable delay is that they monitored other cases in the hope that someone else would secure the relief they now seek. *See* Mem. 4. But this wait-and-see approach resulted in a passage *of nearly three months*, during which time officials and voters alike operated under the rules imposed by the court-ordered Consent Decree. Petitioners shrug their shoulders at the hardships imposed by their delay, suggesting that "there is no harm to any party, only the avoidance of harm," *id.*—a cavalier characterization that wholly ignores the confusion and uncertainty caused by late-hour changes to settled election rules. The inevitable prejudice to voters who have relied on the Consent Decree militates against granting the relief Petitioners sought less than one week before Election Day. *See Memphis A. Philip Randolph Inst. v. Hargett*, No. 20-6141, 2020 WL 6140480, at *1–2 (6th Cir. Oct. 19, 2020) (denying relief where "[p]artly from [movants'] own doing, the electoral calendar works against their request" and "injury to potential voters . . . is great").

III. Petitioners' claims fail on the merits.

While laches might bar the relief Petitioners seek, it need not preclude this Court from addressing the merits of their claims. *See Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992) (choosing to resolve election challenge on merits even where petitioner might not have "acted with dispatch in asserting [the] challenge"). Indeed, the Court can and should address the merits and conclude that the Consent Decree and the Secretary's actions

pursuant to it are lawful. Such a ruling would restore the settled rules of this election, end the confusion caused by the Eighth Circuit's preliminary injunction, and prevent the disenfranchisement of Minnesota voters.

Petitioners contend that the Secretary will violate Minnesota law if he does "not enforce the state mail-in ballot deadline and thereby accept[s] and count[s] ballots that do not comply with state law and federal law and the U.S. Constitution." Pet. ¶ 72. But because the Consent Decree is consistent with both state *and* federal law, Petitioners' claims fail on the merits.

A. The Secretary has not violated Minnesota law.

Petitioners' claim that the Consent Decree violates state law, *see id.* ¶¶ 71–74, is premised on a selective reading of the State's election statutes that ignores section 204B.47. Indeed, contrary to Petitioners' contentions, the Secretary has acted squarely within the authority granted to him by the Minnesota Legislature.

Section 204B.47 provides that

> [w]hen 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.

See Clark v. Pawlenty, 755 N.W.2d 293, 299 (Minn. 2008) (per curiam). 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.

This is precisely what happened here. The Alliance sued the Secretary, challenging, among other things, the Election Day receipt deadline. Two weeks after the Alliance filed a motion for temporary injunction—which included more than 40 exhibits and three unrebutted expert declarations, and which the Republican Party Committees forcefully opposed—the parties agreed to the Consent Decree, which was submitted to the state court and *also* vigorously opposed by the Republican Party Committees, both on the papers and at oral argument. After undertaking a rigorous analysis, Judge Grewing determined that the Alliance was likely to succeed on the merits of its constitutional challenges to the receipt deadline and entered the Consent Decree. *See* Ex. 7, at 19–25. The Secretary therefore *had* to "adopt alternative election procedures to permit the administration" of the November election. Minn. Stat. § 204B.47. He did so, issuing guidance and instructions consistent with the Consent Decree. *See* Exs. 14–15. These actions were both contemplated and required by the legislative scheme enacted by the Minnesota Legislature, and thus consistent with Minnesota law.

Petitioners unsurprisingly rely on the opinion of the Eighth Circuit, *see* Mem. 2, which concluded that section 204B.47 does not apply here. *See Carson*, 2020 WL 6335967, at *6. But that court's analysis relied on both a misreading of the statute and a mischaracterization of the facts.

First, the Eighth Circuit asserted that "nothing in this statute authorizes the Secretary to override the Legislature's ballot deadlines due to public health concerns." *Id*. While true, this is simply not relevant. The Secretary did *not* override the Legislature; instead, he adopted remedial procedures when Judge Grewing issued the order, *as required by the Legislature's enactment*.

The Eighth Circuit next suggested that section 204B.47 is inapplicable here because "the Secretary initiated the court order in cooperation with litigants." *Id*. But *the Alliance*, not the Secretary, initiated the state court suit. Moreover, the Consent Decree was the result of an adversarial process, not a judicial rubberstamp. It was vigorously opposed by the Republican Party Committees and subjected to thorough examination by Judge Grewing under both state and federal standards.[3] And at any rate, the statute does not impose any conditions on the source of the court order at issue.

Finally, the Eighth Circuit indicated that section 204B.47 is inapplicable because Judge Grewing's order did not "declare the statute invalid." *Id*. Even setting aside the fact that Judge Grewing *did* conclude that the Alliance was likely to prevail on the merits of its constitutional challenges, *see* Ex. 7, at 23–25, nothing in section 204B.47 requires a state court order at issue to "declare the statute invalid." *Cf. Am. Broad. Cos. v. Ritchie*, Civil

[3] As Judge Kelly noted in dissent, "[t]here is no allegation of collusion between the state court parties to manufacture a dispute, nor is there any allegation of fraud on the state court." *Carson*, 2020 WL 6335967, at *11 (Kelly, J., dissenting). Indeed, in applying Minnesota law to the consideration of the Consent Decree, Judge Grewing concluded that there was "no evidence that the . . . Consent Decree is the product of fraud, neglect or the absence of consent." Ex. 7, at 19.

No. 08-5285 (MJD/AJB), 2011 WL 665858, at *2, *4 (D. Minn. Feb. 14, 2011) (noting that section 204B.47 required adoption of remedial procedures after court determined that plaintiffs were likely to succeed on merits of constitutional claim and issued preliminary injunction). All it requires is a court order precluding implementation of a provision of Minnesota's election laws. Once Judge Grewing entered the Consent Decree, the Secretary *could not* have applied the Election Day receipt deadline without violating Judge Grewing's order.

The Eighth Circuit—and Petitioners—might not agree with the plain text of section 204B.47, but they cannot rewrite the Minnesota Legislature's duly enacted statutes or pick and choose which aspects of its election laws to follow. And whatever their views on the wisdom of the state court's order, neither the Eighth Circuit nor this Court has been called upon to assess Judge Grewing's reasoning or conclusions. Once Judge Grewing entered the Consent Decree, the Secretary was required by section 204B.47 to "adopt alternative election procedures." The actions he took to implement the Consent Decree were thus required by—and therefore wholly consistent with—Minnesota law. *See Carson*, 2020 WL 6335967, at *11 (Kelly, J., dissenting).

B. The Secretary has not violated the Elections or Electors Clause.

Because the Secretary acted consistently with the Minnesota Legislature's election statutes, he has not violated the Elections and Electors Clauses. *See* Pet. ¶¶ 80–86.

The Elections and Electors Clauses vest authority in "the Legislature" of each state to regulate federal elections. U.S. Const. art. I, § 4, cl. 4; 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))).[4]

Far from "depart[ing] from the plain text of Minnesota law," Pet. ¶ 85, the Secretary acted consistently with it—specifically, by implementing alternative procedures pursuant to section 204B.47 after Judge Grewing entered the Consent Decree. Therefore, because he has followed the Minnesota Legislature's election laws, he has not violated the Elections or Electors Clause. *See Carson*, 2020 WL 6335967, at *11 (Kelly, J., dissenting).[5]

[4] Although *Arizona State Legislature* 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* 576 U.S. at 839 (Roberts, C.J., dissenting) (noting that Electors Clause is "a constitutional provision with considerable similarity to the Elections Clause"); *Foster v. Love*, 522 U.S. 67, 69 (1997) (referring to Electors Clause as Elections Clause's "counterpart for the Executive Branch"). Cases interpreting "the Legislature" in the context of the Elections Clause thus inform application of the Electors Clause.

[5] Indeed, if this Court granted Petitioners' requested relief and interfered with the Secretary's compliance with section 204B.47, then the State would be "barr[ed] from conducting this year's elections pursuant to a statute enacted by the Legislature," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018), and Minnesota's legislative scheme for elections would be violated, not vindicated.

C. The Consent Decree's postmark deadline is consistent with federal Election Day statutes.

Lastly, Petitioners suggest that the Secretary's actions under the Consent Decree "will violate the federal law establishing a single elections day by allowing the acceptance of mail-in ballots received—and potentially even ballots actually cast after—the federally-mandated election date." Pet. ¶¶ 75–79. This is incorrect; the Consent Decree's postmark deadline is consistent with, and not preempted by, federal Election Day statutes.

"[A] state's discretion and flexibility in establishing the time, place and manner of" federal elections 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); *see also* 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1, nothing in the Consent Decree alters that date. To the contrary, the Consent Decree requires that, to be counted, mail ballots must be voted "*on or before Election Day*." Ex. 8, at 10 (emphasis added).

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). Petitioners have not pointed to any federal statute dictating to states how to determine the timeliness of mail ballots. Therefore, because Congress has *not* codified a receipt deadline

that competes with the Secretary's, "compliance with both [the Consent Decree] and the federal election day statutes does not present 'a physical impossibility,'" and 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)); *see also United States v. Gradwell*, 243 U.S. 476, 485 (1917) (observing that Congress "leave[s] the conduct of the election of its members to state laws" and "that whenever it has assumed to regulate such elections it has done so by positive and clear statutes"). The Consent Decree's postmark presumption avoids preemption for the same reasons. Congress has not enacted a law prescribing a conflicting method of determining when ballots were mailed, and the presumption merely effectuates the federal Election Day by ensuring that timely cast ballots are counted.

This case is therefore readily distinguishable from *Foster*, on which Petitioners rely, *see* Pet. ¶ 18, since 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." *Foster*, 522 U.S. at 72. Quite the contrary, it mandates that ballots be cast by Election Day. Moreover, *Foster* and its progeny explained that the federal Election Day statutes were enacted "to prevent States that voted early from unduly influencing those voting later, to combat fraud by minimizing the opportunity for voters to cast ballots in more than one election, and to remove the burden of voting in multiple elections in a single year." *Millsaps*, 259 F.3d at 541. None of these objectives is hindered by the Consent Decree's postmark deadline or presumption. And at any rate, "all 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." *Id.* at 545; *accord Bomer*, 199 F.3d at 777 ("[W]e cannot conceive that Congress intended the federal election day statutes to have the effect of impeding citizens in exercising their right to vote."). Accordingly, neither *Foster* nor the federal Election Day statutes should be used to invalidate election laws that make voting easier where, as here, those laws do not conflict with federal law.

Significantly, similar postmark deadlines have been used nationwide for decades,[6] and yet Petitioners do not cite *a single case* where such policies were found to conflict with federal law. *Cf. Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *31 (Pa. Sept. 17, 2020) (adopting postmark deadline and presumption similar to Consent Decree's), *stay denied sub nom. Republican Party of Pa. v. Boockvar*, No. 20A54, 2020 WL 6128193 (U.S. Oct. 19, 2020); *Donald J. Trump for President, Inc. v. Way*, Civil Action No. 20-10753 (MAS) (ZNQ), 2020 WL 5912561, at *10–12 (D.N.J. Oct. 6, 2020) (concluding that New Jersey's postmark presumption is *not* preempted).

Moreover, under Petitioners' theory, a host of other routine activities that occur after Election Day—from decisions to hold polls open past midnight to allow voters already in

[6] *See, e.g.*, Alaska Stat. § 15.20.081; D.C. Code § 1-1001.05(a)(10A); Iowa Code § 53.17(2); Kan. Stat. Ann. § 25-1132(b); Miss. Code Ann. § 23-15-637(1)(a); N.J. Stat. Ann. § 19:63-22; N.C. Gen. Stat. § 163-231(b)(2); Ohio Rev. Code § 3509.05; Tex. Elec. Code Ann. § 86.007(a)(2); Utah Code Ann. § 20A-3a-204(2)(a); Va. Code Ann. § 24.2-709(B); W. Va. Code § 3-3-5(g)(2). Several of these states also apply postmark presumptions. *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); N.D. Cent. Code § 16.1-07-09; Wash. Rev. Code § 29A.40.110(4).

line to cast ballots, *see* Minn. Stat. § 204C.05, subd. 2(a) (requiring that "voting shall continue until those individuals" who are waiting in line "have been allowed to vote"), to tabulations of ballots that regularly occur in the days and weeks following Election Day, *see id.* § 204C.33, subd. 1 (allowing county boards to canvass returns up to ten days after Election Day)—would *also* be preempted by federal law. This Court should decline Petitioners' invitation to invalidate a host of commonplace election laws that have been upheld for decades. *See Millsaps*, 259 F.3d at 545–46 & n.5 ("Providing various options for the time and place of depositing a completed ballot does not change 'the day for the election.'" (quoting *Voting Integrity Project, Inc. v. Keisling*, Civ. No. 98-1372-AA, slip op. at 8 (D. Or. Mar. 22, 1999))).

Setting aside the momentous implications of a decision that would threaten postmark deadlines and other critical voting laws less than one week before a presidential election, Petitioners' preemption claim fails as a matter of law. The postmark deadline and presumption are wholly consistent with federal law because they merely set a standard for election officials to determine whether ballots were timely cast on Election Day, as required by federal statute. Therefore, the Consent Decree—which ensures that voters who cast their ballots by November 3 are not arbitrarily disenfranchised if the postal system, through no fault of the voters, fails to deliver ballots in a timely manner or affix legible postmarks—is not preempted.

CONCLUSION

Neither the law nor the facts support Petitioners' suit, which threatens to upend the November election on the eve of Election Day. Although the equitable doctrine of laches supports denial of Petitioners' requested relief based solely on their prejudicial delay, this Court should address Petitioners' claims on the merits, since it would be *more* inequitable to allow the continued misinterpretation of Minnesota law to threaten the validity of ballots cast pursuant to the Consent Decree. Accordingly, this Court should remedy the confusion and uncertainty that has been injected into this election and undertake a necessary course-correction that will vindicate the Minnesota Legislature's election laws, restore the status quo established by the Consent Decree, promote confidence on Election Day, and ensure that no Minnesota voter is incorrectly or arbitrarily disenfranchised. There is, after all, "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)).

For these reasons, the Alliance respectfully requests that this Court deny Petitioners' requested relief.

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GREENE ESPEL PLLP

/s/ Sybil L. Dunlop

Sybil L. Dunlop, Reg. No. 0390186
Samuel J. Clark, Reg. No. 0388955
Caitlinrose H. Fisher, Reg. No. 0398358
222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402
sdunlop@greeneespel.com
sclark@greeneespel.com
cfisher@greeneespel.com
(612) 373-0830

PERKINS COIE LLP
Abha Khanna *(admitted pro hac vice)*
Jonathan P. Hawley
1201 Third Avenue, Suite 4900
Seattle, WA 98101
akhanna@perkinscoie.com
jhawley@perkinscoie.com
(206) 359-8000

Marc E. Elias
Amanda R. Callais
700 Thirteenth Street NW, Suite 800
Washington, DC 20005
melias@perkinscoie.com
acallais@perkinscoie.com
(202) 654-6200

Will M. Conley
33 East Main Street, Suite 201
Madison, WI 53703
wconley@perkinscoie.com
(608) 663-7460

Attorneys for Intervenor-Respondents

CERTIFICATION PURSUANT TO MINN. R. APP. P. 132

This brief was prepared using Microsoft Word 2016 in 13-point Times New Roman font. The brief complies with the type face limitations set forth in Minn. R. App. P. 132.01, subd. 3, and contains 6,330 words.

/s/ Sybil L. Dunlop
Sybil L. Dunlop