

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

National Association for the Advancement  
of Colored People Minnesota-Dakotas Area  
State Conference; Susan Bergquist; Eleanor  
Wagner,

Plaintiffs,

v.

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

Defendant.

Case Type: Other Civil Court  
File No. 62-cv-20-3625  
The Honorable Sara R. Grewing

**BRIEF OF AMICI CURIAE AARP  
AND AARP FOUNDATION  
SUPPORTING PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION**

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## STATEMENT OF INTEREST OF AMICI<sup>1</sup>

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, including (as of June 2020) over 647,000 members in Minnesota, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation litigate and file amicus briefs on issues that impact these and other concerns of older adults, including laws affecting their right to vote. This voting rights work has included representation of older voters challenging photo ID requirements.<sup>2</sup> Amici also have filed amicus briefs contesting voting barriers affecting older (and younger) persons.<sup>3</sup> AARP previously participated in litigation concerning a referendum on Minnesota voter ID legislation. *See* Brief for AARP as Amicus Curiae Supporting Petitioners, *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636 (Minn. 2012). (No. A12-0920) 2012 MN S. Ct. Briefs LEXIS 12.

Amici are alarmed by Minnesota officials' failure to ease absentee voting rules to assure safe voting options for the November general election. The State laws at issue in this case pose grave risks to persons with serious medical conditions and/or disabilities—disproportionately older adults—who must leave social isolation to vote in person, or who live with others in the

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<sup>1</sup> Amici state that this brief was not authored in whole or in part by any party or their counsel, and no person other than amici, their members, or their counsel contributed any money intended to fund the preparation and submission of this brief.

<sup>2</sup> *See, e.g., Common Cause Georgia v. Billups*, 504 F. Supp. 2d 1333 (N.D. Ga. 2007).

<sup>3</sup> *See, e.g., Weinschenk v. State*, 203 S.W. 3d 201 (Mo. 2016) (affirming decision striking down a state photo ID law); *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013) (affirming decision striking down state law requiring proof of citizenship to register to vote).

same situation. Impediments to absentee voting also will lead to congestion at the polls and create undue health risks for older (and younger) voters who have no choice but to vote in person, such as those with certain disabilities, and for volunteer poll workers and election judges, who also are disproportionately older persons.

Amici support plaintiffs' motion to enjoin, for the upcoming November general election, the "Witness Requirement," Minn. Stat. §§ 203B.07, 204B.45, and 204B.46, and to require Minnesota officials to send absentee ballots to all registered voters. This relief is critical to preserving the voting rights of millions of older (and younger) Minnesotans.

### INTRODUCTION AND SUMMARY OF ARGUMENT

It is undisputed that the consequences for those who become infected with COVID-19, especially those with serious medical conditions, are severe, even life threatening. Indeed, that is the premise of the consent decree wherein Secretary of State Simon agreed not to enforce the "Witness Requirement" and to ease rules governing the submission of ballots for the August primary.<sup>4</sup> Yet, available evidence indicates that public health risks due to COVID-19 also will be great come November, if not worse.<sup>5</sup> Thus, similar steps are required consistent with the needs of the electorate and "the state's interest in public health and safety," *Studor, Inc., v. State*, 781 N.W.2d 403, 411 (Minn. Ct. App. 2010) (stating that this interest is "very strong"). For the general election, as for the primary, voters must not be made to choose between risking their health—possibly their life—and casting a ballot.

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<sup>4</sup> Stipulation and Partial Consent Decree at 2-3, 7, *LaRose v. Simon*, No. 62-CV-20-3149 (Dist. Ct. Minn. June 17, 2020) (citing and quoting federal and state coronavirus health and safety guidance) [hereinafter Decree].

<sup>5</sup> See, e.g., Len Strazewski, *Harvard Epidemiologist: Beware COVID-19's Second Wave This Fall*, AM. MED. ASS'N: PUB. HEALTH (May 8, 2020), <https://www.ama-assn.org/delivering-care/public-health/harvard-epidemiologist-beware-covid-19-s-second-wave-fall>.

Denying Minnesotans a realistic chance to vote safely by absentee ballot, and safely in-person for those who need to, would cheat them of the “fundamental right” to vote protected by the State Constitution. *See* Minn. Const. art. I, § 2, art. VII, § 1; *see also Kahn v. Griffin*, 701 N.W.2d 815, 832 (Minn. 2005); *Ulland v. Growe*, 262 N.W.2d 412, 415 (Minn. 1978). This would be especially pernicious given that older persons are the State’s most consistent and enthusiastic voters. *See State v. Holloway*, 916 N.W.2d 338, 347 (Minn. 2018) (stating that the Minn. Const. art. I, § 2 guarantees equal protection of the laws to all Minnesotans). Hence, amici respectfully urge this Court to set aside the Witness Requirement and to direct defendant Simon to deliver an absentee ballot to all eligible voters, as plaintiffs propose.

## ARGUMENT

### **I. To Assure that Many Minnesotans, including a Disproportionate Share of Older Persons, Will Be Able to Vote Safely in November, the State Must Limit High-Risk, Interpersonal Contact in the Election.**

This Court, in its *LaRose* Decree, responded to “the current public health crisis facing Minnesota caused by the ongoing spread of the novel coronavirus.” Decree, *supra* at 1. No less a response is warranted now concerning the November general election because current State election laws pose no less a risk to the health and civil rights of Minnesota voters.

#### **A. The Risks of COVID-19 Infection for the November General Election Are Unacceptably High Because the Planned Methods of In-Person and Absentee Voting Will Require Close Contact with Persons Whose Compliance with Anti-Virus Measures Is Unknown.**

The Centers for Disease Control and Prevention (the “CDC”) has laid out basic principles for minimizing the risk of contracting COVID-19 illness. These stress that the COVID-19 virus is spread “[b]etween people who are in close contact with one another (within about [six] feet),” “[t]hrough respiratory droplets produced when an infected person coughs, sneezes or talks,” because “these droplets can land in the mouths or noses of people who are nearby or possibly be

inhaled into the lungs.”<sup>6</sup> The CDC adds that: “some people without symptoms may be able to spread [the] virus”; “[k]eeping distance from others is especially important for people who are at higher risk of getting very sick”; and a “cloth face cover [presumably, whether worn by oneself or by another] is not a substitute for social distancing.”<sup>7</sup> Finally, the CDC notes, inter alia, the wisdom of “[c][lean[ing] and disinfect[ing] frequently touched surfaces daily.”<sup>8</sup>

Based on these precepts, the CDC has developed guidance for the conduct of elections.<sup>9</sup> The agency endorses “a wide variety of . . . options” beyond just in-person voting and, moreover, extensive measures to render in-person voting safe.<sup>10</sup> In summary, the CDC states:

Elections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times. Lower risk election polling settings include those with: . . . any other feasible options for reducing the number of voters who congregate indoors in polling locations at the same time.<sup>11</sup>

In effect, the agency acknowledges that a voter’s risks in voting in-person are heavily dependent on the actions taken by many strangers, including i.e., other voters, election officials, and poll workers. It follows that voters generally will have little or no idea how safe it will be to vote in person, before deciding whether to do so. The same is true of absentee voting under the current rules. Some citizens, first, may need to experience close contact with others just to obtain an

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<sup>6</sup> CDC, *Protect Yourself*, (updated Apr. 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

<sup>7</sup> *Id.* (“Avoid close contact” and “Cover your mouth and nose with a cloth face cover when around others”) (emphasis in original).

<sup>8</sup> *Id.* (“Clean and disinfect”) (emphasis in original).

<sup>9</sup> See CDC, *Considerations for Election Polling Locations and Voters*, (updated June 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>. The CDC observes that “[t]he more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread.” *Id.*

<sup>10</sup> *Id.* (“Guiding principles to keep in mind”) and (“Recommendations for Election Officials and Poll Workers,” “Maintaining healthy environments”).

<sup>11</sup> *Id.* (emphasis in original).

application for a ballot, if they lack internet, fax, or other stated electronic means. Second, all absentee voters will require close contact just to comply with the Witness Requirement.

Hence, it is unsurprising that the CDC advises individual voters to

**Consider voting alternatives available in your jurisdiction that minimize contact** [since] [v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.<sup>12</sup>

In short, the agency suggests weighing the option of *not* voting in-person, if it exists.

For these reasons, this Court previously enjoined the Witness Requirement and took other measures to ease absentee voting for the August primary, explaining: “Minnesota is anticipated to be required to maintain social distancing and abide by CDC Guidelines until the crisis subsides[.]” Decree, *supra* at 2. The Court also relied on Minnesota Emergency Executive Order 20-74 (“EO 20-74”), which remains in effect. *See id.* The Court cited provisions of that document directing Minnesotans to follow State Department of Health and CDC COVID-19 guidance, *see id.* (citing EO 20-74, ¶ 6(a)), and specifically instructing that “individuals ‘at risk of severe illness from COVID-19 . . . [are] strongly urged to stay at home in their place of residence.’” *Id.* (citing EO 20-74, ¶ 4). This advice still applies.

Plaintiffs have identified several groups facing acute dangers due to inadequate alternatives to in-person voting.<sup>13</sup> These include a large share of the electorate, living alone, with one or more serious medical conditions that create a high risk of serious injury (or death) if they contract COVID-19 due to close interpersonal contact in the course of voting absentee or in-person. *See infra*, § I.B. Such persons would have to violate social distancing norms to apply for a ballot (absent access to the internet, a home computer, and a printer), to comply with the

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<sup>12</sup> *Considerations for Election Polling Locations and Voters*, *supra* note 9 (“Recommendations for voters”) (emphasis in original).

<sup>13</sup> Pls.’ Mem. of Law in Supp. of Their Mot. for Prelim. Inj., 9-14 [hereinafter Pls.’ Prelim. Inj. Mem.].

Witness Requirement, or to vote in-person. Others in the same household as medically vulnerable persons would have to endanger their co-residents to vote in-person or even, possibly, absentee, if the household lacks electronic access to a mail-in ballot. Finally, a lack of safe alternatives to in-person voting will increase risks of infection—or disenfranchisement—due to congestion at the polls, for voters who have no real choice but to vote in-person, such as persons with some disabilities, and others whose absentee ballots never arrive or come too late to be cast.

**B. Risks of Serious Harm, Including Death, Due to COVID-19 Are Unacceptably High for a Great Many Older (and Younger) Minnesotans with a Variety of Underlying Medical Conditions.**

The CDC now lists a daunting variety of “underlying medical conditions” for which significant data indicate that “[p]eople of any age . . . **are at increased risk** for severe illness from COVID-19” (emphasis in original).<sup>14</sup> The CDC also has set forth nearly as troubling a list of conditions for which more limited data indicate that people of any age “**might be at an increased risk** for severe illness from COVID-19”.<sup>15</sup>

When the CDC says that persons with various conditions are at “increased risk of severe [or serious] illness,” it “means that the person with COVID-19 may require hospitalization, intensive care, or a ventilator to help them breathe, or they may even die.”<sup>16</sup> In addition to these dangers, State health officials warn of apparent and potential long-term effects of COVID-19 for those who recover.<sup>17</sup> Such effects may include “damage to the lungs, leading to ongoing trouble with breathing,” “[n]ervous system damage,” “[h]eart damage,” and “health problems in

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<sup>14</sup> CDC, *People with Certain Medical Conditions*, (updated July 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [hereinafter *Underlying Medical Conditions*].

<sup>15</sup> *Id.* (emphasis in original).

<sup>16</sup> CDC, *Older Adults*, (updated June 25, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> [hereinafter *Older Adults*].

<sup>17</sup> Minn. Dep’t of Health, *About COVID-19*, <https://www.health.state.mn.us/diseases/coronavirus/basics.html> (last visited July 27, 2020) [hereinafter *About COVID-19*].

children.”<sup>18</sup> State officials also stress the uncertain nature of COVID-19’s overall health impact: “We know some of the negative effects it can have, but we do not yet know all of the negative effects it may have.”<sup>19</sup>

While the CDC stresses that conditions posing high or elevated risk due to COVID-19 exposure are extremely dangerous at “any age,” data also show that older persons constitute a disproportionate share of individuals who experience most of these conditions.<sup>20</sup> This applies to CDC high-risk conditions such as cancer,<sup>21</sup> chronic kidney disease,<sup>22</sup> COPD (chronic obstructive pulmonary disease),<sup>23</sup> obesity (i.e., body mass index (“BMI”) of 30 or higher),<sup>24</sup> “serious heart

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<sup>18</sup> *Id.* (Scroll down to “Physical health effects”).

<sup>19</sup> *Id.* (Scroll down to “Many unknowns”).

<sup>20</sup> “As you get older, your risk for severe illness from COVID-19 increases. For example, people in their 50s are at higher risk for severe illness than people in their 40s. Similarly, people in their 60s or 70s are, in general, at higher risk for severe illness than people in their 50s. The greatest risk for severe illness from COVID-19 is among those aged 85 or older.” Older Adults, *supra* note 16. Specifically, “8 out of 10 COVID-19 deaths in the United States have been in adults over the age of 65.” *Id.* State health officials agree: “Risk for severe illness [from COVID-19] increases with age.” About COVID-19, *supra* note 17 (“Severity”). A correlation between age and COVID-19 illness may be due to the increasing incidence of underlying conditions among progressive cohorts of older persons.

<sup>21</sup> The estimated nationwide incidence of “invasive” cancers (2017, all ages, including children 0-17) is between 1.4 and 1.7%. CDC, *United States Cancer Statistics, Data Visualizations*, <https://gis.cdc.gov/Cancer/USCS/DataViz.html> (go to “Prevalence”, scroll to “All Types of Cancer, Estimated Prevalence Percentages, by Age, Race, and Sex, 5-year Limited Duration, United States, Invasive Cancers only, on January 1, 2017”). The incidence exceeds 1% for all groups age 40 and above and is much less than 1% for age groups 20-29 (0.1712%) and 30-39 (0.4347%). *Id.*

<sup>22</sup> CDC, *Chronic Kidney Disease (CKD) Surveillance System*, <https://nccd.cdc.gov/CKD/FactorsOfInterest.aspx?type=Age> (“CKD becomes more common with increasing age. After the age of 40, kidney filtration begins to fall by approximately 1% per year. In addition to the natural aging of the kidneys, many conditions that damage the kidneys are more common in older people including diabetes, high blood pressure, and heart disease.”).

<sup>23</sup> “Chronic obstructive pulmonary disease, or COPD, refers to a group of diseases that cause airflow blockage and breathing-related problems. It includes emphysema and chronic bronchitis.” CDC, *Chronic Obstructive Pulmonary Disease (COPD)*, <https://www.cdc.gov/copd/index.html> (click on menu, click on “Basics About COPD,” scroll down to “What is COPD?”). “People aged 65 to 74 years and ≥75 years” were “more likely to report COPD in 2013.” *Id.* (click on menu, click on “Basics About COPD,” scroll down to “Who has COPD?”). COPD is less common in Minnesota than nationally, but the prevalence of COPD is still 3.5%-4.7% of the population at or over age 18. *Id.* fig. 3 (click on menu, click on “Data and Statistics,” scroll down to “COPD Prevalence in the United States”). 3.5% of the State’s total registered voter population, as of July 1, 2020 (3,402,412) is 119,084. *see, Voter Registration Counts*, OFF. MINN. SECRETARY ST.: ELECTION ADMIN. & CAMPAIGNS, <https://www.sos.state.mn.us/election-administration-campaigns/data-maps/voter-registration-counts/> (last visited July 27, 2020) [hereinafter *Voter Registration Counts*].

<sup>24</sup> As of 2018, the CDC reports, the incidence of obesity among Minnesotans age 18 or over was between 29.2 and 30.9%, a very substantial share (albeit lower than roughly half the states). CDC, *Nutrition, Physical Activity, and Obesity: Data, Trends and Maps*, [https://nccd.cdc.gov/dnpao\\_dtm/rdPage.aspx?rdReport=DNPAO\\_DTM.ExploreByTopic&isIClass=&isITopic=OWS1&isIYear=](https://nccd.cdc.gov/dnpao_dtm/rdPage.aspx?rdReport=DNPAO_DTM.ExploreByTopic&isIClass=&isITopic=OWS1&isIYear=) (go to “explore by topic”, under Category, click “obesity/ weight status”, see fig. 1).

conditions, such as heart failure, coronary artery disease, or cardiomyopathies,”<sup>25</sup> and Type 2 diabetes mellitus.<sup>26</sup> The same is true of entries on the list of conditions due to which people of any age “might be at an increased risk of severe illness“ due to COVID-19.<sup>27</sup> These conditions include hypertension/high blood pressure and neurologic conditions, such as dementia.<sup>28</sup>

The prevalence of the two remaining high-risk factors<sup>29</sup> is more difficult to assess. Persons in an “immunocompromised state” encompasses a great many conditions with diverse features and affected populations.<sup>30</sup> “[S]ickle disease,” while relatively rare in the U.S., afflicts a very high proportion of African Americans: 1 in 365.<sup>31</sup>

Together, the CDC’s high-risk conditions—principally obesity, diabetes, and heart disease—likely affect at least one-third and possibly as much as (or more than) one-half of the electorate. The share of older voters affected by at least one of these scourges is still higher. Considering the CDC’s list of conditions that “may” portend at least some degree of elevated

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<sup>25</sup> Underlying Medical Conditions, *supra* note 14. CDC data from 2015-17 show that 11.6% of Minnesotans at or over age 45 had coronary heart disease (“CHD”) or had had a stroke, or both. CDC, NAT’L ASS’N OF CHRONIC DISEASE DIRS., CORONARY HEART DISEASE, MYOCARDIAL INFARCTION, AND STROKE — A PUBLIC HEALTH ISSUE 5 fig. 3 (2019), . Significantly, over 30% of such individuals reported living alone. *Id.* at 5. Only about 3% of Coronary artery disease (CAD) cases occur in individuals under age 40. Lloyd W. Klein & Sandeep Nathan, *Coronary Artery Disease in Young Adults*, 41 J. AM. C. CARDIOLOGY 529, 529 (2003).

<sup>26</sup> An estimated 6.9% of the population of Minnesota has either “Type 2” or “Type 1” diabetes. CDC, *National and State Diabetes Trends*, [https://www.cdc.gov/diabetes/library/reports/reportcard/incidence-2017.html#:~:text=About%201.4%20million%20new%20cases,population%2C%20had%20diabetes%20in%202015](https://www.cdc.gov/diabetes/library/reports/reportcard/incidence-2017.html#:~:text=About%201.4%20million%20new%20cases,population%2C%20had%20diabetes%20in%202015.). (scroll down to Table 1, “Percentage of US Adults Aged 18 or Older with Diagnosed Diabetes, by State, 2015”). Ninety-to ninety five percent of these individuals are Type 2. *See* CDC, NATIONAL DIABETES STATISTICS REPORT 2020 1 (2020). The incidence of diabetes (diagnosed and undiagnosed, combined) varies by age from 26.8% for those at or over age 65, to 17.5% for those between ages 45-64 and 4.2% for those ages 18-44. *Id.* at 2 tbl.1a. 6.9% of the State’s total registered voter population, as of July 1, 2020 (3,402,412) is 234,766. *See Voter Registration Counts*, *supra* note 23.

<sup>27</sup> Underlying Medical Conditions, *supra* note 14.

<sup>28</sup> *Id.* Of these conditions, hypertension is especially common: “During 2015–2016, the prevalence of hypertension was 29.0% and increased with age: age group 18–39, 7.5%; 40–59, 33.2%; and 60 and over, 63.1%.” NAT’L CTR. FOR HEALTH STATISTICS, CTR. FOR DISEASE CONTROL, NO. 289, HYPERTENSION PREVALENCE AND CONTROL AMONG ADULTS: UNITED STATES, 2015–2016 1 (2017).

<sup>29</sup> Underlying Medical Conditions, *supra* note 14.

<sup>30</sup> *Id.*

<sup>31</sup> CDC, *Sickle Cell Disease (SCD)*, <https://www.cdc.gov/ncbddd/sicklecell/data.html> (“Data & Statistics on Sickle Cell Disease,” “In the United States”).

health risk, the share of the electorate affected overall almost certainly exceeds 50%, and the share of AARP-member-age voters (50+) likely reaches well over a majority.

The health risks Minnesota voters face due to COVID-19 are unacceptably high. Both the potential consequences of unsafe in-person voting and the uncertainty inherent in voting in-person—i.e., requiring voters to trust in the adequacy of safety measures that *may* (or may not) be taken at the polls *by others*—demands robust further steps to assure true access to real “voting alternatives,” such as absentee voting. Only such measures can avoid the specter of deadly risks for medically vulnerable Minnesotans in November.

**C. An Unacceptably High Risk Exists that the COVID-19 Crisis—and Dangers Due to Voting Methods Involving a High Likelihood of Interpersonal Contact—Will Still Be Present in Minnesota at the Time of the November General Election.**

Dangers posed by the COVID-19 pandemic have not changed since issuance of the Decree regarding the August primary. And they show no signs of abating. Rather, there is strong evidence that the virus still will be a serious threat in the Fall, in the run-up to and during the general election. At very least, prospects of containing the virus before November, and thereby rendering unnecessary safety steps like those included in the Decree, are highly uncertain. It would be irresponsible to plan on conducting the general election safely without taking significant additional steps.

Two months ago, the local press reported that “nationally renowned University of Minnesota epidemiologist Michael Osterholm and a team of researchers” had concluded that “[t]he growing COVID-19 pandemic could last up to two years, with a potential second wave in the fall[.]”<sup>32</sup> Since then a great many entities have issued projections about COVID infections, as well as

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<sup>32</sup> Glen Howatt, *COVID-19 Cases Could Surge in Fall, Last Two Years, University of Minnesota Report Says*, MINNEAPOLIS STAR-TRIB. (May 3, 2020), <https://www.startribune.com/covid-19-cases-could-surge-in-fall-last-2-years-u-report-predicts/570130602/>.

hospitalizations and deaths, but most are quite limited in the detail they provide about periods beyond several weeks into the future.<sup>33</sup> To the extent current trends are evidence of likely future results, State data show COVID-19 cases on the rise since mid-June 15 to levels previously reached in late April.<sup>34</sup> One major academic study, however, recently announced forecasts extending out to the beginning of November.<sup>35</sup> While this report conveyed a range of results, even the most conservative of these suggested a steady growth in COVID-19 infections up to the time of the general election.<sup>36</sup>

Despite uncertainties and disputes about data and trends in the COVID-19 crisis, areas of consensus exist. These strongly support an approach to voting in November premised on a high likelihood that conditions will be no (or at most minimally) better in November than they are today. There is broad agreement that a “second wave” of COVID-19 infection is quite possible in the Fall and may coincide with—and be exacerbated by—the annual flu season.<sup>37</sup> Second, predictions about the timing of a widely available and effective COVID -19 vaccine—the development most likely to

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<sup>33</sup> The CDC tracks data from multiple forecasts of nationwide hospitalizations (6) and deaths (20+) and similar state data, but none now extend beyond mid-August. CDC, *Hospitalization Forecasts*, (updated July 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/hospitalizations-forecasts.html> ;see also CDC, *Forecasts of Total Deaths*, (updated July 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/forecasting-us.html>.

<sup>34</sup> Minn. Dep’t of Health, *Weekly COVID-19 Report 7*, (July 16, 2020), <https://www.health.state.mn.us/diseases/coronavirus/stats/covidweekly29.pdf> (“Positive COVID-19 Cases”).

<sup>35</sup> Inst. for Health Metrics & Evaluation, Univ. of Wash., *New IHME Forecasts Show More Than 200,000 US Deaths by November 1*, , IHME (July 7, 2020), <http://www.healthdata.org/news-release/new-ihme-forecasts-show-more-200000-us-deaths-november-1>.

<sup>36</sup> Inst. for Health Metrics & Evaluation, Univ. of Wash., *COVID-19 Projections*, IHME (July 22, 2020), <https://covid19.healthdata.org/united-states-of-america>. ; see also Christopher J.L. Murray, Opinion, *My Research Team Makes COVID-19 Death Projections. Here’s Why Our Forecasts Often Change*, L.A. Times (July 10, 2020 at 3:05 AM), <https://www.latimes.com/opinion/story/2020-07-10/covid-forecast-deaths-ihme-washington> (describing IHME’s recently issued “third model”).

<sup>37</sup> See, e.g., Cory Stieg, *What A ‘Second Wave’ of COVID-19 Could Look Like and How to Prevent It*, CNBC (updated June 29, 2020), <https://www.cnbc.com/2020/06/28/what-second-wave-of-covid-19-means-and-how-to-prevent-it.html> (quoting Dr. Anthony Fauci, as well as experts at Harvard, Emory, and Columbia Universities, and the Mayo Clinic); Christopher Brito, *CDC Director Says Potentially Worse Second Wave of Coronavirus Could Come Along With Flu Season*, CBS NEWS (April 23, 2020), <https://www.cbsnews.com/news/coronavirus-second-wave-cdc-director-robert-redfield-warning-flu-season/>.

dramatically reduce risks to Minnesotans due to the coronavirus—virtually all identify some time in 2021 as the likely earliest date for this to occur.<sup>38</sup>

Despite these areas of agreement, there is little certainty about how severe the COVID-19 crisis is likely to be in Minnesota in late October and early November. Amici submit that this very uncertainty strongly supports a careful path focused on preserving the fundamental right to vote and the health of the medically vulnerable. Voting options should be expanded to make sure that electoral participation is robust and public health is protected.

**D. The Failure of State Officials to Adjust Voting Rules and Procedures to the Dangers of COVID-19 Is Especially Perverse Given the High Levels of Electoral Participation of Older Voters Who Are Those Most at Risk.**

Older voters cast ballots at rates out of proportion to their share of the electorate, amplifying the adverse impact of rules putting that population at risk. For instance, a survey of “validated” 2016 voters nationwide showed that voters age 50 and above constituted 57% of the electorate in the immediate prior Presidential Election year, while the same age group represented a much smaller portion (33%) of non-voters; in contrast, voters age 18-49 represented 43% of voters nationwide and 66% of non-voters.<sup>39</sup>

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<sup>38</sup> See, e.g., Jonathan Corum, et al., *Coronavirus Vaccine Tracker*, N.Y. TIMES (updated July 27, 2020), <https://www.nytimes.com/interactive/2020/science/coronavirus-vaccine-tracker.html> (“Vaccines typically require years of research and testing before reaching the clinic, but scientists are racing to produce a safe and effective vaccine by next year.”); Mayo Clinic, “COVID-19 (Coronavirus) Vaccine: Get The Facts” (June 10, 2020), <https://www.mayoclinic.org/coronavirus-vaccine/art-20484859> (scroll down to “The vaccine development timeline”) (“[I]t’s unlikely that a COVID-19 vaccine will become available sooner than six months after clinical trials start. Realistically, a vaccine will take 12 to 18 months or longer to develop and test in human clinical trials. And we don’t know yet whether an effective vaccine is possible for this virus.”). Cf. John Bacon, *Coronavirus Updates: GOP Senators Consider \$600 Extension; US Orders 100 Million Vaccine Doses From Pfizer; California Cases Top NY*, USA TODAY (July 22, 2020), <https://www.usatoday.com/story/news/2020/07/22/coronavirus-covid-19-and-vaccines-trump-masks-and-ex-cdc-director/5484636002/> (“Pfizer hopes for approval of vaccine as soon as October”). Presumably approval in October would not permit widespread vaccinations before November 3. In any event, the State’s duty to protect public health and the democratic process demands planning for reasonably likely, dangerous possibilities, not just the rosier scenario.

<sup>39</sup> PEW RESEARCH CTR., *An Examination of the 2016 Electorate, Based on Validated Voters, in FOR MOST TRUMP VOTERS, ‘VERY WARM’ FEELINGS FOR HIM ENDURED 10-17* (2018), <https://www.pewresearch.org/politics/2018/08/09/an-examination-of-the-2016-electorate-based-on-validated-voters/>.

Minnesota voting data show the same pattern. In 2016, 68.7% of U.S. citizens in Minnesota voted.<sup>40</sup> This group included a higher percentage of those over age 45—72.6%—compared to 54.7% of those age 18-24, 64.5% of those 25-34, and 70.1% of those age 35-44.<sup>41</sup> In 2018, these disparities were still greater. Minnesota citizens ages 65+ and 45-64 voted at rates of 78.7% and 67.1%, respectively, compared to 42.7% of those between ages 18-24, 47.4% of those 25-34, and 64.2% of those 35-44.<sup>42</sup>

Other nationwide data strongly suggest that Minnesota absentee voting rules also are especially likely to harm the voting rights of older persons by disadvantaging people with disabilities prone to serious harm from COVID-19 infection. Roughly 20% of Americans have “severe” disabilities.<sup>43</sup> Of these individuals, a greater than average share are over age 55—41.6% of those age 65+ and 26.1% of those 55-64, while fewer than average are age 18-54—7.7% of those age 18-24, 8.4% of those age 25-34, 12.4% of those 35-44, and 18.6 % of those 45-54.<sup>44</sup> The most recent data for Minnesota indicate a voting age population of people with disabilities of approximately 560,000 persons.<sup>45</sup> Of this cohort, close to half (an estimated 264,808) were age 65 or above; far greater shares of all Minnesotans age 65-74 (21.1%) and 75+ (44.8%) are in the group with disabilities, compared to those between ages 35-64 (10.4%) or 18-34 (5.9%).<sup>46</sup>

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<sup>40</sup> U.S. Census Bureau, *Voting and Registration in the Election of November 2016*, CENSUS.GOV (May 2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>, (Table 4a “Reported Voting and Registration, for States: November 2016”).

<sup>41</sup> *Id.*, (Table 4c “Reported Voting and Registration by Age, for States: November 2016”).

<sup>42</sup> U.S. Census Bureau, *Voting and Registration in the Election of November 2018*, CENSUS.GOV (Apr. 2019), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html> (Table 4c “Reported Voting and Registration, for States: November 2016”).

<sup>43</sup> DANIELLE M. TAYLOR, U.S. CENSUS BUREAU, No. P70-152, AMERICANS WITH DISABILITIES: 2014 4 tbl.1 (2018), <https://www.census.gov/library/publications/2018/demo/p70-152.html>.

<sup>44</sup> *Id.*

<sup>45</sup> U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY tbl. S1810, (2018), [https://data.census.gov/cedsci/table?q=S1810&g=0400000US27&tid=ACSST1Y2018.S1810&hidePreview=false&vintage=2015&layer=VT\\_2015\\_040\\_00\\_PP\\_D1&cid=S1810\\_C01\\_001E](https://data.census.gov/cedsci/table?q=S1810&g=0400000US27&tid=ACSST1Y2018.S1810&hidePreview=false&vintage=2015&layer=VT_2015_040_00_PP_D1&cid=S1810_C01_001E), (“Disability Characteristics”).

<sup>46</sup> *Id.*

## **II. The Witness Requirement as Applied to the November General Election Violates the Minnesota State Constitution by Creating an Unacceptably High Risk of Serious Injury for Many Minnesota Voters, Including Older Voters.**

### **A. Governing Legal Standards.**

Amici concur with plaintiffs' cogent analysis, *see* Pls.' Prelim. Inj. Mem. 16-19, of the exacting standards imposed by Minnesota law on "any potential infringement" of the "fundamental right" to vote. *Kahn*, 701 N.W.2d at 832. Enforcement of the Witness Requirement in the November general election cannot be justified under such standards. First, it cannot survive application of "strict scrutiny," which requires that enforcement be "narrowly tailored to serve a compelling government interest," *State v. Trahan*, 870 N.W.2d 396, 404 (Minn. Ct. App. 2015), *aff'd* 886 N.W.2d 216 (Minn. 2016), *see also Mitchell v. Steffen*, 487 N.W.2d 896, 903 (Minn. Ct. App. 1992) (strict scrutiny is "almost always insurmountable, and a statute will rarely survive [it]"). Second, it cannot satisfy the alternative balancing test, which compares "the character and magnitude of the burden imposed on voters' rights against the interests the state contends justifies that burden, [considering] the extent to which the state's concerns make the burden necessary." *Kahn*, 701 N.W.2d at 833; *see also Ulland*, 262 N.W.2d at 415 (requiring proof of a "sufficiently direct infringement on fundamental franchise rights").

### **B. Evidence of Unacceptably High Risk.**

The Witness Requirement presents many Minnesotans with an impossible choice in November: foregoing the opportunity to vote or subjecting themselves to unacceptable risk of COVID-19 infection. Many eligible voters are medically vulnerable, live alone, and lack a trusted person with whom they can safely interact to witness their absentee ballot. *See* Pls.' Prelim. Inj. Mem. 19-21. Leaving isolation to find a witness (e.g., at a neighbor's residence, or a local store, or the county library), creates other—and possibly greater—risks of interpersonal

contact and, thus, exposure to possible COVID-19 carriers. The number of persons who may be disenfranchised or endangered by the Witness Requirement in November is likely to far outstrip the number of those who will be at risk in the August primary. *See id.* at 20. Indeed, as of July 10, “[a] record number of Minnesotans have requested absentee ballots —350,516 . . . compared to 12,936 at this time in 2016 and 21,043 in 2018.”<sup>47</sup>

Plaintiffs Bergquist and Wagner demonstrate the dilemma for medically vulnerable Minnesotans and, at ages 68 and 78,<sup>48</sup> respectively, they also exemplify the disproportionate impact on older voters of impediments to absentee balloting for those “at increased risk of serious illness from COVID-19,” according to the CDC. Further evidence of these realities is provided by two AARP members in Minnesota with similar challenges.

Marie Maher, age 77, is a retired counselor, psychologist, and professor of psychology. She has a Ph.D. in Psychology and held teaching positions at various institutions of higher education in the upper Midwest, including Winona State University and the University of Minnesota at Rochester. Marie now resides in Rochester at the Pillars of Shorewood Landing. The Pillars is senior living community with some residents, like Marie, living independently. Others are in assisted living or memory care units. Marie has a compromised immune system and takes prednisone for her ailments, which further impedes the vitality of her immune system. To protect herself from COVID-19 infection, she has not left her apartment in over four months. “No one, not even staff, comes into my apartment.” Not needing a witness made it possible for Marie to vote absentee (already) for the August primary. She is very concerned about being to

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<sup>47</sup> Greta Kaul, *Want to Avoid the Polls This Year? Here’s Everything You Need to Know About Absentee Voting in Minnesota*, MINNPOST: POLS. & POL’Y (July 16, 2020), <https://www.minnpost.com/politics-policy/2020/07/want-to-avoid-the-polls-this-year-heres-everything-you-need-to-know-about-absentee-voting-in-minnesota/>.

<sup>48</sup> Complaint for Declaratory and Injunctive Relief at 11-12 ¶¶ 18, 21.

vote safely in November if the Witness Requirement is enforced for the general election. Marie identifies as a Democrat.

Dorothy Lundquist, age 87, identifies as a Republican. She also lives independently at the Pillars of Shorewood Landing in Rochester, Minnesota. Born in South Minneapolis, she earned a B.A. from the University of Minnesota and worked for many years as a school teacher. After traveling to Nebraska this spring for a grandson's high school graduation, Dorothy went into quarantine. Since then, to assure she is safe from COVID-19 infection, she spends all her time in her room, with trays left at her door for meals. She has no interaction with others even with masks and gloves. Dorothy has Chronic Obstructive Pulmonary Disease (COPD) and is on oxygen at night. She "never misses" a chance to vote. She wants to have confidence in being able to vote safely by absentee in November without having to find a witness.

Enjoining enforcement of the Witness Requirement would allow Marie and Dorothy to vote safely via absentee ballot in the general election. If the Witness Requirement remains in effect, both would have to modify their isolation regime to vote and thereby compromise their efforts to minimize risks of contracting the coronavirus. Neither they, nor the individual plaintiffs, nor other Minnesotans similarly situated, should have to do so to exercise their fundamental right to vote.

**C. There Is a Lack of Significant Countervailing State Interests.**

Amici concur with plaintiffs' general contention and specific supporting arguments that "the Secretary cannot show that, [especially] during [this] pandemic, [the Witness Requirement] is narrowly tailored to achieve a compelling governmental interest," in particular, combatting voter fraud. Pls.' Prelim. Inj. Mem. at 21; *see also id.* at 22-24. Impediments to voting must be "narrowly tailored" to any supposed interest they serve or, at least, the burdens they cause must

be “necessary” and far outweighed by the “interests the state contends justify that burden.” Pls.’ Prelim. Inj. Mem. at 17 (quoting *Kahn*, 701 N.W.2d at 833).

In the context of the COVID-19 pandemic, the Witness Requirement threatens to deny the opportunity to vote safely for many thousands of older, minority voters and voters with disabilities in the form of medical vulnerabilities to the coronavirus. At least for the November general election, this impediment is not “necessary.” Its harms are out of proportion to its supposed benefit in reducing vote fraud. It is unfair and discriminatory. It should be set aside.

**D. The Witness Requirement Should Be Enjoined for the General Election in November.**

Amici adopt plaintiffs’ analysis of the *Dahlberg* factors governing this Court’s discretion to grant preliminary relief. *See* Pls.’ Prelim. Inj. Mem., at 18, 21, 36-37; *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965). Because the Witness Requirement is likely to seriously harm public health and voting rights without adequate justification, the Court should grant plaintiffs’ request for an order enjoining its enforcement for the general election.

**III. The System in Place for Obtaining Absentee Ballots Violates the State Constitution by Creating an Unacceptably High Risk of Serious Illness due to COVID-19 for Large Groups of Minnesotans Planning to Vote in November, a Disproportionate Share of Whom Are Older.**

Amici also concur with plaintiffs that the Court should apply strict scrutiny or, in the alternative, an exacting balancing test, to assess the existing system of obtaining absentee ballots for the upcoming November general election. *See* Pls.’ Prelim. Inj. Mem. at 25, 29-32. Applying either standard in circumstances dominated by the COVID-19 crisis reveals the current system to be fatally flawed. Doing so likewise demonstrates the soundness of plaintiffs’ proposed solution: an order directing defendant Simon to deliver an absentee ballot to each registered voter.

**A. The Current System for Obtaining an Absentee Ballot Is Onerous and Dangerous for Those Who Lack Safe, Private Access to the Internet and Computer/Printer Hardware.**

While Minnesota permits voting absentee without providing an excuse, State procedures make it difficult to obtain an absentee ballot in the first place. Voters must request permission to cast an absentee ballot *in writing* via an *official application form*. The form may be obtained in-person, online, or via email, fax, or regular mail. Yet, a full quarter of Minnesotans have no internet capability, rendering the in-home receipt and printing of such forms impossible or, at best, extremely difficult.<sup>49</sup> Even obtaining the form by mail simply *to apply for* a ballot can be challenging, given that the state provides no easily-obtainable designated phone number to call to request that mailing of the ballot application. These means are highly problematic for many low-income older (and younger) voters who lack computers or printers and who need to isolate during the COVID-19 crisis. For a significant vulnerable segment of voters, it would be an answer to these impediments for the State to send them an absentee ballot, as plaintiffs propose.

Absentee ballot applications—once received—may be submitted in person, online, by email, by fax, or by mail. This second phase of the mandatory application process presents yet another set of challenges that automatic mailing of ballots does not. Once again, many low-income vulnerable older (and younger) voters lack any safe electronic option to send in the application to receive a ballot. Further, sending in the application by mail and then receiving a ballot by mail in time to return it in a timely fashion also may pose great difficulties, given the likelihood that voting by mail will be far more prevalent in the general election in Minnesota

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<sup>49</sup> Pls.' Prelim. Inj. Mem. 10 (citing Exhibit 30, Ellen Wolter, *Three Questions About Internet Access in Greater Minnesota*, Minn. Compass (Sept. 2019), <https://www.mncompass.org/trends/insights/2019-08-27-three-questions-about-internet-access>).

than ever before. State officials have not identified measures to alleviate these concerns. An order directing defendant Simon to provide all eligible voters an absentee ballot would do so.

**B. By Driving Many Minnesotans to Vote In-Person, despite Their Desire Not to Do So, the Flawed Absentee Ballot Application System Will Compound Health Risks for Poll Workers and Election Judges, Who Are Disproportionately Older Persons.**

Amici are disturbed by plaintiffs' proffered evidence that the current system threatens to cause serious and unnecessary injury to Minnesotans, disproportionately older persons, who volunteer their time as poll workers and election judges. *See* Pls.' Prelim. Inj. Mem. at 27 (citing Jordan, Bergquist, Moran, Cotti, and Reingold declarations). As plaintiffs note, "health risks to everyone involved increase with greater numbers of people voting in person ... [t]he fewer people contained in an enclosed area, the easier it is for voters and election officials to distance and sanitize to decrease exposure to the virus." *Id.*

The goal of polling station volunteers is to help elections run smoothly and thereby enhance confidence in the electoral process. The State will much better serve this purpose by easing absentee ballot restrictions and thereby reducing the risks to its poll station volunteers—and voters—as opposed to defending the current highly risky procedures with baseless predictions of voter fraud.<sup>50</sup> The failure to anticipate and address dangers to poll station volunteers could have the effect of making in-person voting *more dangerous* by requiring *consolidation of polling places* due to a shortage of polling station volunteers.<sup>51</sup>

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<sup>50</sup> *See* discussion of *Considerations for Election Polling Locations and Voters*, *supra* note 9, and related text.

<sup>51</sup> *See, e.g.,* Michelle Ye Hee Lee, *In New Guidance, CDC Recommends Alternatives in Addition to in-Person Voting to Avoid Spreading Coronavirus*, WASH. POST: POLS. (July 7, 2020), [https://www.washingtonpost.com/politics/in-new-guidance-cdc-recommends-alternatives-to-in-person-voting-safety-precautions-for-in-person-voting/2020/07/07/5b62cbba-c078-11ea-b178-bb7b05b94af1\\_story.html](https://www.washingtonpost.com/politics/in-new-guidance-cdc-recommends-alternatives-to-in-person-voting-safety-precautions-for-in-person-voting/2020/07/07/5b62cbba-c078-11ea-b178-bb7b05b94af1_story.html) ("[i]n some states, recent primaries have led to mass consolidation of polling places and hours-long lines for voters because of a shortage of poll workers, many of whom fear the risk of contracting the coronavirus on Election Day.").

**C. Defects in the Current System for Obtaining Absentee Ballots Will Drive Voters to Cast Ballots In-Person and thereby Create Major Additional Health Risks for Voters Who *Need* to Vote In-Person, including Many Older (and Younger) Voters with Disabilities.**

Some voters will simply have no choice but to vote in-person. Such individuals include people with disabilities requiring equipment available only at polling stations, such as “individuals who are blind as well as those with physical, intellectual, or developmental disabilities who may require in-person accommodations to vote privately.”<sup>52</sup> Homeless persons, who lack a permanent address, as well as many low-income people, who change their address frequently, are also reliant on in-person voting.<sup>53</sup> And unless the relief sought by plaintiffs is granted, it will also include persons hoping to vote absentee, but unable to apply for or obtain mail-in ballots electronically, whose ballots do not arrive in time via regular mail. A disproportionate share of the latter group is likely to be medically vulnerable older voters. For all such persons, the goal of preserving the option of safe in-person is linked to the objective of easing access to absentee voting. This is so because facilitating absentee voting is critical to reducing congestion at polling stations, minimizing related risks of COVID-19 infection, and assuring enough polling station volunteers feel safe to serve. Hence, ironically, all individuals reliant on in-person voting have a significant stake in this lawsuit and the prospect it presents of defendant Simon being directed to deliver an absentee ballot to all eligible Minnesota voters.

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<sup>52</sup> Danielle Root et al., *In Expanding Vote by Mail, States, Must Maintain In-Person Voting Options During the Coronavirus Pandemic*, CTR. FOR AM. PROGRESS (Apr. 20, 2020), <https://www.americanprogress.org/issues/democracy/news/2020/04/20/483438/expanding-vote-mail-states-must-maintain-person-voting-options-coronavirus-pandemic/>.

<sup>53</sup> See, e.g., Lacrai Mitchell, Adam Brewster & Sara Ewall-Wice, *Activists Warn Mail-In Voting Needed But Could Hurt Some Voters If Poorly Implemented*, CBS News (May 20, 2020), <https://www.cbsnews.com/news/vote-by-mail-necessary-coronavirus-pandemic-implementation/>.

**D. The Court Should Order Defendant Simon to Send an Absentee Ballot to All Eligible Voters, as Plaintiffs Propose.**

Given the serious harms to public health and voting rights that the current absentee ballot application system will cause in the November election, amici urge the Court to order defendant Simon to send an absentee ballot to every eligible voter in Minnesota. The State's justifications for declining to take such a step are lacking and the *Dahlberg* factors favor plaintiffs on this issue. *See* Pls.' Prelim. Inj. Mem. at 25-37; *Dahlberg Bros., Inc.*, 137 N.W.2d at 321-22.

**CONCLUSION**

For the reasons set forth above, amici urge the Court to grant plaintiffs' Motion for a Preliminary Injunction.

Respectfully submitted,

Dated: July 30, 2020

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