STATE OF MINNESOTA

IN SUPREME COURT

A20-1362

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

Petitioners,

vs.

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

Respondent.

RESPONSE OF STEVE SIMON TO MINN. STAT. § 204B.44 PETITION AND MOTION TO DISMISS

The Secretary of State objects to Petitioners' request to hold this matter in abeyance, because some Petitioners waived their right to make the claims asserted, and those that haven't waived that right are barred by laches. It is important for this Court to clarify those two legal issues in dismissing this Petition, so that similar contests are not made in other Minnesota courts, causing additional confusion and chaos. Furthermore, the Eighth Circuit injunction that Petitioners cite applies only to the presidential election, not the many other races on Minnesota ballots, all of which are subject to this Petition.

On the eve of the election, Petitioners are challenging the validity of a consent decree that has been in place for three months and already been appealed to this Court. On August 3, a Ramsey County judge approved the consent decree establishing that, for the 2020 general election, absentee ballots are timely if they are postmarked by election

day, instead of received by election day. The Republican Party of Minnesota and Republican National Committee appealed to this Court, but quickly dropped their appeal. They, along with Petitioner Donald J. Trump for President, Inc., expressly waived their rights to challenge the consent decree in any judicial forum. Two months later, electors for President Trump brought the federal lawsuit to challenge the consent decree, only as it applies to the presidential election. The federal district court denied their motion for an injunction. The Eighth Circuit reversed and issued an injunction requiring segregation of ballots that arrive after election day.

Voting in Minnesota began on September 18. As of October 30, nearly 1.6 million Minnesota voters have returned absentee ballots. About 390,000 additional voters have requested absentee ballots that have not yet been returned and accepted.[1] These ballots come with instructions explaining the postmark rule in place for this election. Nearly three months after the consent decree was entered, Petitioners claim the postmark rule in the decree violates state and federal law. They ask this Court to order the segregation of all ballots received after election day. They hope that, after election day, a court will discard the segregated ballots and disenfranchise the voters who cast them, even though they were cast in reliance on the postmark rule in place since August 3 and the ballot instructions.

[1] *See* Office of the Minnesota Secretary of State, Absentee Data, https://www.sos.state.mn.us/election-administration-campaigns/data-maps/absentee-data/.

This Petition fails for three reasons. First, Petitioner Donald J. Trump for President already waived its rights to challenge the consent decree. It is frivolous and sanctionable for it to bring another challenge. Second, Petitioners' claims are barred by laches, because they sat on their rights for three months before challenging the consent decree. If Petitioners had valid concerns about the consent decree, they should have raised them months ago, when it was being litigated in state district court and before this Court. It is too late now to challenge the consent decree. Third, their claims are meritless. In particular, under state law, the Secretary's implementation of the consent decree is authorized by Minn. Stat. § 204B.47.

FACTS

I. MINNESOTA'S ABSENTEE VOTING SYSTEM AND CERTIFICATION OF RESULTS.

A. Minnesota's Election Day Receipt Rule.

Early and absentee voting begins 46 days before election day in Minnesota, which was September 18, 2020, for the November 3 general election. Minn. Stat. § 203B.081, subd. 1. While a voter may apply for an absentee ballot up to one day before the election, Minnesota law states that absentee ballots must be received either by 3:00 p.m. (if hand-delivered) or 8:00 p.m. (if delivered by mail) on election day. Minn. Stat. § 203B.08 subd. 3; Minn. R. 8210.2200 subp. 1 (the "election day receipt rule"). Ballots received after these times are marked late and not counted.

B. The Counting of Absentee Ballots.

Ballot boards appointed by county and municipal governments determine whether absentee ballots have been properly cast. Minn. Stat. § 203B.121. After the polls close

on election day, the boards tally the accepted ballots, which are added to the in-person votes. *Id.*, subd. 5. The totals are reported to a county canvassing board. Minn. Stat. §§ 204C.19, 204C.31, subd. 3. The county canvassing boards meet to certify county results between three and ten days after the election. Minn. Stat. § 204C.33, subd. 1. The county boards transmit their certified results to the Secretary of State. *Id*. On the third Tuesday following election day, the State Canvassing Board meets to certify the official statewide results and declare the winners. *Id.*, subd. 3.

C. The Secretary of State's Authority.

The Secretary of State is a constitutional officer and Minnesota's chief elections official. Minn. Const. art. VII, § 8; *Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008). He has the authority to adopt rules for the receipt of absentee ballots in addition to those set by the legislature. Minn. Stat. § 203B.08, subd. 4. When provisions of Minnesota's election laws cannot be implemented "as a result of an order of a state or federal court," the Minnesota legislature has directed that the Secretary "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." Minn. Stat. § 204B.47.

II. PROCEDURAL HISTORY.

A. *LaRose v. Simon*

On May 13, 2020, a group of plaintiffs filed suit against Secretary Simon in state court. They sought to enjoin enforcement of Minnesota's election day receipt rule,

generally and as applied during the Covid-19 pandemic. *LaRose v. Simon*, No. 62-CV-20-3149, Minn. 2d Judicial Cir., County of Ramsey.

After arms-length negotiations, the plaintiffs and the Secretary entered into a consent decree for the August 11 primary. *LaRose v. Simon*, 62-CV-20-3149, Minn. 2d Judicial Cir., County of Ramsey (June 17, 2020 Consent Decree). It established a postmark rule, under which ballots are timely if postmarked by election day. *Id.* Judge Grewing signed the consent decree on June 17. *Id.* Local election officials implemented the required changes, and the primary election was held with no significant problems, despite record-level turnout. *See* Tim Harlow, *More than 100,000 voters cast ballots in primary in Minneapolis*, Star Trib. (Aug. 12, 2020).

After plaintiffs filed for an injunction as to the November 3 general election, the parties again negotiated a consent decree, which they filed on July 17. *LaRose*, 62-CV-20-3149 (Aug. 3, 2020 Consent Decree). Similar to the primary election, this consent decree establishes that ballots postmarked by election day, and received within seven days, are timely. Specifically, it provides:

> For the November General Election Defendant shall not enforce the Election Day Receipt Deadline for mail-in ballots, as set out in Minn. Stat. §§ 203B.08 subd. 3, 204B.45, and 204B.46 and Minn. R. 8210.2200 subp. 1, and 8210.3000, that ballots be received by 8:00 p.m. on election day if delivered by mail. Instead, the deadline set forth in paragraph VI.D below shall govern.
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> . . .
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> Defendant shall issue guidance instructing all relevant local election officials to count all mail-in ballots in the November General Election that are otherwise validly cast and postmarked on or before Election Day but received by 8 p.m. within 5 business days of Election Day (i.e., seven calendar days, or one week). For the purposes of this Stipulation and Partial Consent Decree, postmark shall

> refer 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. Where a ballot does not bear a postmark date, the election official reviewing the ballot should presume that it was mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day.

Id.

The consent decree contains undisputed stipulated facts justifying these changes. *Id.* (stating that a surge in absentee voting due to the pandemic "threaten[s] to slow down the process of mailing and returning absentee ballots" and "[m]ail deliveries could be delayed by a day or more" due to Covid-19).

The district court heard argument on the consent decree on July 31. By that time, the Republican Party of Minnesota, the Republican National Committee, and the National Republican Congressional Committee had moved to intervene, and the court allowed them to participate in the arguments. On August 3, the court signed the consent decree and entered an accompanying order explaining the decision and why plaintiffs were likely to succeed on the merits. *Id.* The court found that the requirements of the Minnesota Constitution will be carried out by the implementation of the decree. *Id.*

On August 10, the intervening parties appealed directly to this Court, which granted their petition for accelerated review. *LaRose v. Simon*, A20-1040, Minn. Sup. Ct. (Aug. 12, 2020 PFR Grant). However, a few days later, the Republican Party of Minnesota, the Republican National Committee, and the National Republican Congressional Committee voluntarily dismissed their appeal of the Minnesota consent decree and waived their rights to challenge it in any other forum. *LaRose*, A20-1040

(Aug. 18, 2020 Stipulation). This waiver of rights also applies to Donald J. Trump for President, the Trump campaign, which was party to a consolidated case at the Minnesota Supreme Court and joined in waiving its rights to challenge the consent decree. *Id.* This Court dismissed the appeal, on August 18, based on the stipulation of dismissal. *LaRose*, A20-1040 (Aug. 18, 2020 Order).

On August 28, the Secretary of State's Office, pursuant to the consent decree, sent absentee ballot instructions to local election officials. In large letters, these instructions inform voters: "Your returned ballot must be postmarked **on or before** Election day (November 3, 2020) & received by your Absentee Voting Office within 7 days of the election . . . to be counted." *See Carson v. Simon*, __ F. Supp.3d __, 2020 WL 6018957, at *5 (D. Minn. Oct. 12, 2020). Voters began receiving ballots with these instructions on September 18, when absentee and early voting began in Minnesota.

B. *Carson v. Simon*

Nearly two months after state court approval of the consent decree, two electors for President Trump challenged the consent decree in federal court. They claimed that it violates the Electors Clause of Article II and 3 U.S.C. §1 for the state court to approve and order a postmark rule for a presidential election. On October 12, after full briefing and a hearing, the federal district court judge issued a 38-page order denying the motion because they lack standing. *Carson v. Simon*, __ F. Supp.3d __, 2020 WL 6018957 (D. Minn. Oct. 12, 2020). On October 29, the Eighth Circuit Court of Appeals reversed the district court decision and directed the federal district court to enter an injunction requiring Minnesota election officials to segregate absentee ballots according to when

they are received. *Carson v. Simon*, __ F.3d __, 2020 WL 6335967 (8th Cir. Oct. 29, 2020).

C. *Trump v. Simon*

Petitioners, including Donald J. Trump for President, filed this Petition on October 28. They bring three claims. First, they claim it violates state law for the Secretary to implement the postmark rule, even though section 204B.47 expressly authorizes the Secretary "to adopt alternative election procedures to permit the administration of any election affected by [a court] order," such as the court order and consent decree in *LaRose.* Minn. Stat. § 204B.47. Second, they claim the postmark rule violates federal law setting November 3 as election day, even though nothing in consent decree changes the day of the election. Third, they claim the consent decree violates federal constitutional clauses granting state legislatures the power to determine the manner of federal elections, even though the U.S. Supreme Court has held that these clauses do not exempt state legislative actions from complying with state constitutions and being subject to judicial review.

Petitioners request an order to segregate all ballots that arrive after election day, even though those ballots will have been cast in reliance on the August 3 consent decree and the instructions accompanying the ballots.

ARGUMENT

This Court should not hold the Petition in abeyance because the Eighth Circuit's opinion as to the presidential election does not moot this matter, which also concerns the other federal elections and all state elections on this year's ballot. The Petition fails for

three reasons. First, Petitioner Donald J. Trump for President already waived its rights to challenge the consent decree. Second, Petitioners' claims are barred by laches, because they sat on their rights for three months before challenging the consent decree. It is too late to challenge the consent decree and the postmark rule. Third, all claims fail on the merits.

I. THIS MATTER IS NOT MOOT.

The Eighth Circuit's injunction in *Carson v. Simon* only applies to the presidential election and is based on federal law. That lawsuit is brought by Republican presidential electors who only challenge the consent decree's application to the presidential election. The injunction does not apply to federal congressional and senate races, or to any state races, all of which are the subject of this Petition.

In addition, this Court's exceptions to mootness have relevance here. In a previous elections case, this Court noted it "will not deem a case moot if it implicates issues that are capable of repetition, yet likely to evade review," or if the case is "functionally justiciable" and is an important public issue of statewide significance. *Kahn v. Griffin*, 701 N.W.2d 815, 821-22 (Minn. 2005).

Here, both exceptions apply. Plaintiffs in privity with the Republican Party and Trump Campaign have brought at least two lawsuits (this Petition and *Carson*), challenging the consent decree after waiving their right to do so. That issue of waiver has evaded review. Petitioners seek to avoid it again here by placing this matter in abeyance.

Ensuring that all Minnesotans who cast valid ballots in reliance on the consent decree have their ballot counted is an important statewide issue. The issues of waiver and laches are functionally justiciable and are now fully briefed.

II. PETITIONER DONALD J. TRUMP FOR PRESIDENT WAIVED ITS RIGHTS TO CHALLENGE THE CONSENT DECREE.

Petitioner Donald J. Trump for President expressly waived its right to challenge the consent decree in any judicial forum. *LaRose*, A20-1040 (Aug. 18, 2020 Stipulation). This waiver was an express condition of the stipulation to dismiss the appeal challenging the consent decree when the consent decree was before this Court in August. The stipulation states: "Appellants waive 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." *Id.* "Appellants" in this stipulation refers to several entities, including Donald J. Trump for President. This Court then entered an order dismissing these appeals pursuant to the joint stipulation.

Donald J. Trump for President's decision to attack the consent decree in this Petition, after waiving its rights to do so before this Court, is frivolous and sanctionable.

In addition, Donald J. Trump for President is in privity with the Republican electors who brought the federal challenge, which effectively makes this his third chance to challenge the consent decree. Privity is determined by the facts of each case. *Johnson v. Hunter*, 447 N.W.2d 871, 874 (Minn. 1989). The presidential electors are clearly in privity with the Trump Campaign. They were, under state law, "nominated" and "certif[ied]" to serve as electors for the Republican nominee. Minn. Stat. § 208.03. They

are functionaries of the Trump Campaign and are pledged "to serve and to mark [] ballots for president and vice president for the nominees for those offices of the party that nominated [them]"—that is, President Trump and Vice President Pence. *Id*. § 208.43. The electors are essentially performing a ministerial duty for the Trump campaign. This Court should find that, as a matter of state law, the presidential electors are in privity with Donald J. Trump for President, making this the Trump campaign's third bite at the apple.[2] Once was enough.

Trump for President also comes to this case with unclean hands. This Court subscribes to the maxim that "he who seeks equity must do equity, and he who comes into equity must come with clean hands." *Hruska v. Chandler Assocs., Inc*., 372 N.W.2d 709, 715 (Minn. 1985). President Trump blocked funding for the Postal Service and publicly stated that he opposed the funding because he does not want to see the money used for mail-in voting for the general election. *See* Elle Kaufman et al., *Trump says he opposes funding USPS because of mail-in voting,* CNN.com (Aug. 13, 2020); Barbara Sprunt, *Trump Admits He Opposes Funding for Postal Service to Block More Voting by Mail*, NPR.org (Aug. 13, 2020). The consent decree was designed to ensure that pandemic conditions and Covid-related cuts to the Postal Service do not disenfranchise Minnesota voters. Because the President misused his power over the Postal Service to

[2] The issue of privity is a state law issue that the Eighth Circuit did not address. In its rush to reach the merits days before the election, the Eighth Circuit ignored the argument that, under state law, the electors are in privity with the Trump campaign and Republican Party, both of which waived their rights to challenge the decree in a submission to this Court.

suppress mail voting, he does not come to his challenge to the consent decree with clean hands.

The President's misuse of power over the Postal Service is not mere speculation. A federal court has found strong evidence that delays in mail service "are the result of an effort by the current [Trump] Administration to use the Postal Service as a tool in partisan politics, which violates the spirit and purpose of the Postal Reorganization Act and the Postal Accountability and Enhancement Act." *Washington v. Trump*, -- F.Supp. 3d --, 2020 WL 5568557, at *5 (E.D. Wa. Sept. 17, 2020).

III. THE PETITION IS BARRED BY LACHES.

Petitioners bring this challenge nearly three months after entry of the consent decree and just days before election day. By sitting on their rights for months, they forfeited their ability to challenge the consent decree.

This Court applies the equitable doctrine of laches to "prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." *Monaghen v. Simon*, 888 N.W.2d 324, 328–29 (Minn. 2016). This Court has repeatedly denied election challenges due to laches. *See Clark v. Reddick*, 791 N.W.2d 292, 294–96 (Minn. 2010); *Clark v. Pawlenty*, 755 N.W.2d 293, 303 (Minn. 2008); *Marsh v. Holm*, 55 N.W.2d 302, 304 (Minn. 1952). The reason is that the "very nature of matters implicating election laws and proceedings routinely requires expeditious consideration and disposition by courts facing considerable time constraints imposed by the ballot preparation and distribution process." *Peterson v. Stafford*, 490 N.W.2d 418, 419 (Minn.1992). Laches requires dismissal when "there has been such an

unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for." *Monaghen*, 888 N.W.2d at 328-29.

Petitioners sat on their rights for nearly three months before challenging the consent decree. If they had sued or intervened in August—or, in the case of the Trump Campaign, not waived their right to challenge the consent decree—these issues could have been resolved before voting began on September 18 and before voters received their absentee ballots and instructions. Under the equitable doctrine of laches, they are too late now. By sitting on their rights through August and September and most of October, and waiting until the eve of the election, Petitioners forfeited their rights.

Petitioners' request for ballot segregation assumes that, even if it is too late to challenge the postmark rule now, it could still be challenged after the election. This is an absurd position. It will still be too late to challenge the decree after election day. In fact, the lateness will have become only more problematic, because a challenge would seek to disenfranchise numerous voters who cast their ballots in reliance on the August 3 consent decree and the instructions on their ballots.

Even if a court later invalidates the consent decree, votes cast based on the consent decree will be valid and counted because they will have been cast in reliance on the rule in place at the time. A recent U.S. Supreme Court order on a change to an election rule in South Carolina illustrates the point. In late September, a federal district court in South Carolina enjoined enforcement of the state's requirement that a witness certify an absentee ballot, due to concerns about COVID-19. *Middleton v. Andino*, __ F. Supp.3d __, 2020 WL 5591590 (Sept. 18, 2020 D.S.C.). On October 5, the Supreme Court

reversed the injunction. *Andino v. Middleton*, Sup. Ct. Docket No. 20A55 592 U.S. __ (Oct. 5, 2020) (order on application for stay). The Court, however, ordered that all ballots cast without a witness during the period when the district court order was in place would be valid and counted. *Id.* The reason was straightforward: a change in rules after the ballots were cast should not disenfranchise voters who relied on the rules in place when they voted.

Even more recently, the U.S. Supreme Court declined to reverse North Carolina's decision to extend its ballot deadline, in a case similar to this one. On September 15, the North Carolina State Board of Elections decided to extend by six days the deadline for county boards to receive mailed ballots. *Wise v. Circosta*, __ F.3d __, 2020 WL 6156302 (4th Cir. Oct. 20, 2020). On October 28, the U.S. Supreme Court denied a request for an injunction that would have eliminated the extension. *Moore v. Circosta*, Sup. Ct. Docket No. 20A72, 592 U.S. __ (Oct. 28, 2020) (order on application for injunctive relief). Although the Court did not state its reasons, it is reasonable to infer that they included the common-sense principle that the extension had been in place for a long time and voters were relying on it. An injunction at that late date would have disenfranchised voters who put their ballots in the mail based on the extension from the state board. These are the same principles that support denial of the challenge to the postmark rule that has been in place in Minnesota since August 3 and which voters expect to be in place when they cast their ballots.

In short, it is too late to challenge the consent decree, and it will still be too late after election day.

IV. PETITIONERS' MINNESOTA STATUTORY CLAIM FAILS ON THE MERITS.

Petitioners' state law claim – that it violates state law for the Secretary to implement the changes in the consent decree – ignores the plain language of Minn. Stat. § 204B.47. This statute provides: "When a provision of the Minnesota Election Law cannot be implemented as a result of an order of a state or federal court, the secretary of state shall adopt alternative election procedures to permit the administration of any election affected by the order." Minn. Stat. § 204B.47. This authority specifically includes procedures for "the voting and handling of ballots cast after 8:00 p.m. as a result of a state or federal court order." *Id.*

The consent decree and accompanying order are a judgment and order from a state court establishing that the election day receipt rule cannot be implemented in 2020. *See Hentschel v. Smith*, 153 N.W.2d 199, 206 (Minn. 1967) (consent decrees have the force of a court judgment). By implementing this court judgment, the Secretary is acting pursuant to this express legislative enactment. There is no violation of state law. To the contrary, the Secretary was and is following state law by implementing the consent decree.

To the extent Petitioners are suggesting the Secretary was required to oppose the motion for an injunction in *LaRose*, instead of agreeing to a consent decree, the First Circuit Court of Appeals recently pointed out the strangeness of this argument. In the litigation over a Rhode Island consent decree altering an election rule due to Covid-19, the First Circuit rejected the argument that the Secretary of State was required to litigate a defense, instead of entering into the decree. *Common Cause Rhode Island v. Gorbea*,

970 F.3d 11 (1st Cir. 2020). The First Circuit held: "if state officials fairly conclude, as credibly happened here, that enforcement of a law is unconstitutional in certain circumstances, one can hardly fault them for so acknowledging." *Id.* at 17. "And it would be odd indeed to say that a plaintiff cannot get relief from an unconstitutional law merely because the state official charged with enforcing the law agrees that its application is unconstitutional." *Id*.

This Court should also reject the odd theory that the Secretary of State cannot present a consent decree to a state court and must engage in costly defense litigation, even when the plaintiffs are likely to succeed on the merits of their constitutional claims.

In dismissing this claim on the merits, this Court should issue an order that makes clear that the Secretary's implementation of the consent decree is a valid exercise of state law.

V. PETITIONERS' FEDERAL STATUTORY CLAIMS FAIL ON THE MERITS BECAUSE THE CONSENT DECREE DOES NOT CHANGE THE DATE OF THE ELECTION.

Petitioners incorrectly claim that the consent decree violates federal law because it changes the date of the federal election. The decree does no such thing.

Petitioners rely on a single sentence in the decree: "Where a ballot does not bear a postmark date, the election official reviewing the ballot should presume that it was mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day." *LaRose*, 62-CV-20-3149 (Aug. 3, 2020 Consent Decree).

This sentence, though, does not alter the rule that a ballot must be mailed by election day. It just establishes a presumption to ensure that voters are not disenfranchised when they timely submit their ballots but, for no fault of their own, the Postal Service inadvertently does not postmark their ballots.

When a ballot lacks a postmark, due to inadvertence or negligence by the Postal Service, it can lead to post-election litigation over whether to count the ballot. *See, e.g., Gallagher v. New York State Bd. of Elections*, No. 20 CIV. 5504, 2020 WL 4496849 (S.D.N.Y. Aug. 3, 2020). Unfortunately, this kind of post-election litigation about the validity of ballots cast for particular candidates "threatens to undermine voter confidence in the electoral process and potentially to undermine confidence in the judiciary as well." Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 Stan. L. Rev. 1, 5 (2007).

To avoid this post-election problem, the consent decree establishes a presumption that ballots without postmarks are timely, if they are received within seven days and there is no evidence, such as other markings or dates, showing they were mailed after election day. This presumption is based on the Postal Service's own guidance regarding how long it takes for a ballot to go through the postal system and be delivered to election officials. *See* State and Local Election Mail—User's Guide, United States Postal Service, January 2020; Office of Inspector General, U.S.P.S., Rpt. No. 20-235-R20, Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Center Service Area 6-7 (2020).

Recent reports have found that "postal districts across the country are missing by wide margins the agency's own goals for on-time delivery, raising the possibility that scores of mailed ballots could miss deadlines for reaching local election offices if voters

wait too long." Anthony Izaguirre and Pia Deshpande, *Records: Mail delivery lags behind targets as election nears*, Star Trib. (Sept. 24, 2020). In light of these reports, it is even more important that voters have protections to ensure they are not disenfranchised if, through no fault of their own, the Postal Service fails to postmark their ballot.

Most importantly, though, the presumption in the consent decree does not change the date of the election. It simply establishes an evidentiary presumption for determining whether a ballot was mailed on election day. Under the consent decree, election day remains November 3.

Federal law does not address what methods states may or may not use to determine whether a ballot was cast on election day. While the relevant statute sets the day for holding federal elections, it says nothing about procedures for determining whether a mail ballot was properly cast. 3 U.S.C. § 1. Congress could regulate these procedures but has chosen not to. Several states have enacted or adopted rebuttable presumptions that resemble the one in the consent decree.[3] These rebuttable presumptions do not conflict with anything in the statute, because Congress has chosen not to regulate these types of procedures. Instead, Congress has left the issue to the states.

[3] *See, e.g.,* Nev. Rev. Stat. AB 4, § 20(2) ("If a mail ballot is received by mail not later than 5 p.m. on the third day following the election and the date of the postmark cannot be determined, the mail ballot shall be deemed to have been postmarked on or before the day of the election."); N.J. Stat. Ann. § 19:63-31(m) (adopting a similar standard as long as the ballot arrives within two days of Election Day).

Recently, the Pennsylvania Supreme Court issued nearly identical relief to the consent decree at issue here. It ordered that, because of delays in mail service due to COVID-19, absentee ballots are timely if they are postmarked by election day, instead of received by election day. *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020). Also, as with the consent decree, the court established that ballots "will be presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day." *Id.* at *31. On October 19, on direct review of the state court order, the U.S. Supreme Court denied an emergency motion to stay the order. *Republican Party of Pennsylvania v. Boockvar*, 20A54, 592 U.S. __ (Oct. 19, 2020 order in pending case); *Scarnati v. Boockvar*, 20A53, 592 U.S. __ (Oct. 19, 2020 order in pending case).

Petitioners are incorrect to claim that Congress intended to prevent states from establishing the kind of presumption that several states, including Minnesota in the consent decree, have set for ballot timeliness.

To the extent Petitioners argue that it violates federal law for any state to have a postmark rule because it pushes the completion of the election administration process past election day, their position is absurd. They are challenging the legality of the laws in as many as nineteen states that have a postmark rule for ballot timeliness.[4]

[4] *See* National Conference of State Legislatures, Receipt and Postmark Deadlines for Absentee Ballots, https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx (listing states).

In addition, Petitioners' suggestion that the consent decree is problematic because it will cause Minnesota's election administration process to be completed after election day ignores Minnesota election law. Minnesota's election administration process is never completed by midnight on election night. Instead, Minnesota law expressly contemplates that the election administration process, including the initial tabulation of the votes cast on election day, can take more than 24 hours from the time the polls close – that is, they may not be complete even the day after election day. *See, e.g.,* Minn. Stat. § 204C.28, subd. 1 ("Every county auditor shall remain at the auditor's office to receive delivery of the returns, to permit public inspection of the summary statements, and to tabulate the votes until all have been tabulated and the results made known, or until 24 hours have elapsed since the end of the hours for voting, whichever occurs first."). The official county canvassing of results cannot even begin until three days after the election and need not be complete until ten days after election day. *See* Minn. Stat. § 204C.33. There is no merit to Petitioners' argument regarding the need to complete the election administration process on election day.

VI. PETITIONERS' ELECTORS AND ELECTIONS CLAUSE CLAIMS FAIL ON THE MERITS.

Petitioners' claim under the Elections and Electors Clauses fail because their constitutional theory has no grounding in the clauses' text or binding precedent. Nothing in these clauses prevents a state court judge from reviewing state election laws under the state constitution.

The Elections Clause grants state legislatures the power to set time, place, and manner rules for federal senate and congressional elections. The Electors clause similarly grants state legislatures the power to set the manner for the appointment of presidential electors from the state. Specifically, the Elections Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of chusing Senators." Art. I, § 4, cl. 1. The Electors Clause provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." Art. II, § 1, cl. 2.

The clauses have "considerable similarity," and they are governed by the same precedent. *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting); *see also Donald J. Trump for President, Inc. v. Bullock*, No. CV 20-66-H-DLC, 2020 WL 5810556, at *11 (D. Mont. Sept. 30, 2020) (finding that the term "Legislature" has the same meaning in both clauses).

The Supreme Court has repeatedly held that nothing in the Elections Clause alters a state court's authority to review state election laws and provide relief from them. In a case arising out of Minnesota, *Smiley v. Holm*, 285 U.S. 355 (1932), the Court held that the Elections Clause does not "render[ ] inapplicable the conditions which attach to the making of state laws" and does not "endow the Legislature of the state with power to

enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id*. at 365, 368.

More recently, the Supreme Court has explained: "Nothing in that [Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 817-18 (2015).

However, even if they are right that the Elections and Electors Clauses require a legislative enactment to authorize the Secretary to implement the relief in the consent decree, Minnesota has such a statute. As discussed, section 204B.47 provides: "When a provision of the Minnesota Election Law cannot be implemented as a result of an order of a state or federal court, the secretary of state shall adopt alternative election procedures to permit the administration of any election affected by the order." Minn. Stat. § 204B.47. This authority specifically includes procedures for "the voting and handling of ballots cast after 8:00 p.m. as a result of a state or federal court order." *Id.*

Furthermore, the issue of whether the Minnesota Legislature properly delegated that power to the Secretary of State is a pure question of state law, on which this Court has the final word.[5]

[5] Legislative delegations of authority are viewed liberally "in order to facilitate the administration of laws which…are complex in their application." *State v. King*, 257 N.W.2d 693, 697 (Minn. 1977). The Minnesota Constitution expressly divides the powers of government into the legislative, executive, and judicial departments. Minn. Const. art. III, § 1. A legislative delegation may grant discretion to the executive branch (Footnote Continued on Next Page.)

The consent decree and accompanying order are a judgment and order from a state court establishing that the election day receipt rule cannot be implemented in 2020. By implementing this court judgment, the Secretary is acting pursuant to this express legislative enactment.

CONCLUSION

For the above reasons, the Court should deny the Petition.

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(Footnote Continued From Previous Page.)
"in order to facilitate the administration of laws as the complexity of economic and governmental conditions increase." *Anderson v. Comm'r of Highways*, 126 N.W.2d 778, 780-81 (Minn. 1964). As stated in *Anderson*, "it is impossible for the legislature to deal directly with the many details in the varied and complex conditions on which it legislates[.]" *Id.* at 781. It is well established that the legislature can enact statutes which provide flexibility for the executive branch officials to implement, and the legislature frequently leaves details and particular decisions pursuant to a law to the "reasonable discretion" of the executive branch. *Id.*