No. 20-3139

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAMES CARSON and ERIC LUCERO,

Plaintiffs–Appellants,

v.

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

Defendant–Appellee,

and

ROBERT LAROSE, TERESA MAPLES, MARY SANSOM, GARY SEVERSON, and MINNESOTA ALLIANCE FOR RETIRED AMERICANS EDUCATION FUND

Intervenor-Defendants–Appellees

On Appeal from the United States District Court
For the District of Minnesota, No. 0:20-cv-02030-NEB-TNL
The Honorable Nancy E. Brasel

Emergency Motion for Injunction Pending Appeal and Expedited Consideration

NATHAN M. HANSEN
(MN Bar 0328017)
2440 Charles Street North
Suite 242
North St. Paul, MN 55109
Phone: (651) 704-9600
Fax: (651) 704-9604

ANDREW M. GROSSMAN
DAVID B. RIVKIN
RICHARD B. RAILE
JENNA M. LORENCE
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Attorneys for Plaintiffs–Appellants

Table of Contents

Introduction

Pursuant to Rule 8, Appellants James Carson and Eric Lucero move for a provisional injunction of the Minnesota Secretary of State's actions altering the voting deadline for the presidential election. Exercising its power under Article II's Electors Clause, the Minnesota Legislature prescribed that mail-in votes must be received at polling places by 8:00 p.m. on Election Day. But the Secretary has announced that ballots may be received for up to a *week* after that deadline and may even be *mailed* after Election Day so long as no affirmative evidence proves the actual mailing date. This policy violates the Electors Clause and federal law establishing a single nationwide Election Day. If not enjoined now, the Secretary's actions threaten the disenfranchisement, through post-election challenges, of thousands of voters whose ballots are received after Election Day.

The district court did not address these infirmities because it reached the remarkable conclusion that Appellants—Minnesota voters and candidates for elector—lack Article III and prudential standing. It held that only Congress has power to assert preemption arguments, that candidates for office lack standing to challenge the rules governing *their own elections*, and that "vote dilution is a paradigmatic generalized grievance that cannot support standing." Exhibit A, Order 21. Its decision contravenes decades of precedent.

Prompt action is necessary. Early voting is ongoing, and voters need to know what rules will govern their votes. The Court should enter an injunction pending appeal and expedite this motion and appeal.[1]

BACKGROUND

A. Article II of the Constitution establishes state and federal roles in enacting the laws governing presidential elections. The Electors Clause defines states' role as: "appoint[ing] in such Manner as the *Legislature* thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." Article II, § 1, cl. 2 (emphasis added). The Election Day Clause provides that "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." Article II, § 1, cl. 4.

Congress set Election Day "on the Tuesday next after the first Monday in November, in every fourth year…." 3 U.S.C. § 1. This "mandates holding all elections for…the presidency on a single day throughout the Union." *Foster v. Love*, 522 U.S. 67, 69–70 (1997), which is November 3 this year. Congress set the time for electors appointed in each state to meet and vote, which is December 14. 3 U.S.C. § 7. And Congress provided a statutory safe harbor to allow states to ensure recognition of their elector appointments. 3 U.S.C. § 5. To qualify, a

[1] Appellants moved the district court for an injunction pending appeal and requested a ruling rule by noon, Thursday, October 15. ECF 61. As of this filing, the district court has not ruled. Given the exigencies of this matter and the need for timely review, Appellants are now moving in this Court and will update the Court if and when the district court rules.

state must have "provided, by laws enacted prior to the day fixed for the appointment of electors," a means of determining "any controversy or contest concerning the appointment of" electors, and must have completed the process "at least six days before the time fixed for the meeting of the electors," 3 U.S.C. § 5, which is December 8.

The Minnesota Legislature exercised its authority by assigning its electors to the presidential candidate who receives the "highest number of votes" statewide. Minn. Stat. § 208.05. Following federal law, it set the election for the first Tuesday after the first Monday of November. Minn. Stat. § 204D.03 Subd. 2. Voters may vote in person, *id.* § 204B.16, and those who do must arrive at polling places before 8:00 p.m. *Id.* § 204C.05. Minnesota law also authorizes in-person absentee voting "during the 46 days before the election," *id.* § 203B.081, and mail voting, *id.* §§ 203B.04, 203B.08. Minnesota law mandates that absentee ballots not be counted if they arrive at polling places on Election Day "either (1) after 3:00 p.m., if delivered in person; or (2) after 8:00 p.m." *Id.* § 203B.08 subd. 3.

B. In May 2020, a group of Minnesota voters and an organization ("State Plaintiffs") sued the Secretary in state court, challenging *inter alia* the Election Day receipt requirements applicable to mail-in absentee ballots. ECF 14, Foix Decl. Ex. A. The Secretary struck a deal with the State Plaintiffs providing that, "[f]or the November General Election [Secretary Simon] shall not enforce the Election Day Receipt Deadline for mail-in ballots, as set out in Minn. Stat. §§ 203B.08 subd. 3, 204B.45, and 204B.46 and Minn. R. 8210.2220

subp. 1, and 8210.3000, that ballots be received by 8:00 p.m. on Election Day…" Exhibit B, Consent Decree. The Secretary agreed to "issue guidance instructing all relevant local election officials to count all mail-in ballots in the November General Election that are otherwise validly cast and postmarked on or before Election Day but received by 8 p.m. within 5 business days of Election Day (i.e., seven calendar days, or one week)." *Id.* at VI.D. The agreement also provides that, when "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 Secretary and the State Plaintiffs presented the agreement to the state court as a consent decree. The court entered it, determining that the Secretary's choice to agree to extend the ballot-receipt deadline was "reasonable." Foix Ex. A at 21. It did not assess the deadline's constitutionality.

C. Appellants James Carson and Eric Lucero are Minnesota voters and presidential elector candidates. They filed this action on September 22, 2020, claiming (1) that the Secretary's extension of the ballot-receipt deadline conflicts with Article II's delegation of authority to "the Legislature" of Minnesota and (2) that this extension is preempted by the federal statute setting Election Day on November 3. They moved for a preliminary injunction. ECF Nos. 12–16.

The State Plaintiffs intervened, and they and the Secretary contended that Appellants lack Article III and prudential standing, are bound by the consent-decree order due to intervention of various Republican Party entities in the state

litigation, brought this case too late to impact the November 3 election, and identified no violation of federal law. The Court held a hearing and, on October 12, denied the injunction motion on the grounds that Appellants lack Article III and prudential standing.

ARGUMENT

The injunction-pending-appeal standard is identical to the preliminary-injunction standard. *Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998). The "issuance of a preliminary injunction depends upon a 'flexible' consideration of (1) the threat of irreparable harm to the moving party; (2) balancing this harm with any injury an injunction would inflict on other interested parties; (3) the probability that the moving party would succeed on the merits; and (4) the effect on the public interest." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012).

I. This Appeal Is Likely To Succeed

A. The Merits

The Secretary's actions violate the Electors Clause and are preempted by federal law setting the Election Day.

1. The Secretary's Actions Violate the Electors Clause

The Secretary's decision to count ballots received after the statutory Election Day deadline violates the Electors Clause, which vests the power to determine the "manner" of selecting electors exclusively in the "Legislature" of each state. The Secretary has no authority to override the Minnesota Legislature's determination.

a. The Electors Clause confers on state legislatures a share of *federal* lawmaking authority. "[I]n the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 73–74 (2000). This provision "convey[s] the broadest power of determination" and "leaves it to the legislature *exclusively* to define the method" of appointment of electors. *McPherson*, 146 U.S. at 27 (emphasis added). Accordingly, only the Minnesota Legislature, not the Secretary, may establish regulations governing the presidential election, and the Secretary's attempt to override the Legislature's regulations is invalid.

b. The Secretary's contention that the statutory deadline may conflict with the Minnesota Constitution is irrelevant. Because "[t]his power is conferred upon the legislatures of the States by the Constitution of the United States," it "cannot be taken from them or modified" even by "their State constitutions." *McPherson*, 146 U.S. at 27; *see also Palm Beach*, 531 U.S. at 76–77 (vacating state-court injunction on that basis).

c. Nor did the Minnesota Legislature authorize the Secretary's actions. The Secretary and State Plaintiffs relied below on Minnesota Statutes § 204B.47, which authorizes the Secretary "adopt alternative election procedures" only "[w]hen a provision of the Minnesota Election Law cannot be implemented as a result of an order of a state or federal court…." But this clause

cannot authorize the overriding of *legislative* control over election regulation. *See Palm Beach*, 531 U.S. at 110–11 (rejecting reliance on similar statute conferring power on state courts in favor of clearly expressed legislative intent). Nor does it. First, Section 204B.47 assumes a valid exercise of judicial authority, and, as described, a conflict between federally-authorized election laws and a state constitution must be resolved in favor of the federally-authorized laws. Second, it is not the case that the receipt deadline "*cannot* be implemented as a *result*" of a state-court order. Instead, the *Secretary* decided that the deadline should not be implemented and asked a state court to rubberstamp that determination. Had the Secretary not requested this, the Legislature's deadline would stand.

2. The Secretary's Actions Are Preempted by Federal Law

Congress exercised its constitutional authority to establish November 3 as the *sole* day for choosing electors, 3 U.S.C. § 1. This provision "mandates holding all elections for…the presidency on a single day throughout the Union." *Foster*, 522 U.S. at 69–70. It preempts the Secretary's policy of counting votes received *seven days* after Election Day in two respects.

First, the Secretary's policy changes Election Day. The term "the election" in the federal statute "plainly refer[s] to the combined actions of voters *and officials* meant to make a final selection of an officeholder." *Foster*, 522 U.S. at 71 (emphasis added). That is what makes Election Day, unlike other days, the "consummation" of the voting process. *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001); *see also Millsaps v. Thompson*, 259 F.3d 535, 547 (6th Cir. 2001) (holding that this "combined action…to make a final selection"

must occur on Election Day); *Lamone v. Capozzi*, 912 A. 2d 674, 692 (Md. 2006) ("the 'combined actions' must occur, [and] voting must end, on federal election day"). Yet, under the Secretary's policy, election officials will not even have all the ballots, and the election will not be consummated, until a full week after the federal Election Day. This conflicts with federal law and is preempted.

Second, the Secretary's policy goes further by permitting voters to mail ballots after the federal Election Day so long as they are received before November 10 and do not affirmatively evidence their late mailing. The Secretary calls this a mere "presumption," but there is no circumstance under which election officials could ever have a basis to suspect that an un-postmarked ballot received on (say) November 8 was mailed after Election Day. This is no hypothetical scenario: ballots may be "stuck together and one is cancelled out while the other is not," ECF 39, Khanna Decl. Ex. 19 ¶ 6, and *Gallagher v. New York State Board of Elections*, 2020 WL 4496849 (SDNY Aug. 3, 2020), found that thousands of mail-in ballots in New York went un-postmarked in a single recent election. At a minimum, the Secretary's policy of counting ballots both mailed and received after Election Day violates federal law.

B. Article III Standing

Appellants' standing as voters and candidates is well established by governing precedent.

1. Candidate Standing

Appellants have standing as candidates for the office of elector. *See* Minn. Stat. § 208.03 (providing for the election of "Presidential electors"). As

candidates, Appellants have a direct and personal stake in the conduct of their election consistent with governing federal law—in particular, Article II's Presidential Electors Clause. Practically every major case enforcing the Electors Clause has been brought by candidates. That includes *McPherson v. Blacker*, 146 U.S. 1 (1892), a pre-election suit by elector candidates challenging a state's manner of appointing electors as inconsistent with the Electors Clause. More recently, the Supreme Court adjudicated similar claims by candidates in *Palm Beach*, 531 U.S. at 76, and then *Bush v. Gore*, 531 U.S. 98, 103 (2000) (hereinafter "*Bush*"). As in those latter cases, Appellants will be injured by the tallying of votes in violation of federal law.

The district court's dismissal of this basis of standing was wrong. It first concluded that *McPherson*—one of the leading Article II precedents—was wrongly decided or upended by subsequent doctrinal developments. Order 31-32. It then proceeded to acknowledge that Appellants' claims are appropriate for consideration in "post-election litigation with tangible, concrete harms"—as in the *Bush* litigation—but drew a distinction with this *pre*-election challenge. Order 32. But this contention—which concerns ripeness, not standing—does not identify a material difference between this case and *Bush* respecting ripeness or standing.

First, Candidate Gore in that litigation contended that the vote totals "included illegal votes and omitted legal votes," Order 33, but it was as true there as here that there was "no reason to infer, much less conclude, that the challenged…ballots would tend to favor one candidate or the other," Order 33

n.20. That is because candidates in election contests must litigate over the rules *first* and *then* accept the results that follow from them. Gore could not have proven that the votes he wanted counted were for him and that those he did not want counted were for Candidate Bush.

Candidates are obligated to raise challenges like Appellants' before ostensibly unlawful ballots are counted and may not wait to determine whether they like those votes. Appellants are unaware of any case holding that candidates lack standing to challenge the validity under law of yet-to-be-counted ballots cast in their own election; such challenges are, of course, routine.

Second, the Court's order erroneously assumes that standing was only relevant in the *Bush* litigation insofar as Gore sought the jurisdiction of the lower courts. Order 32–34. But Article III's standing requirements applied equally to Bush's invocation of the Supreme Court's jurisdiction. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Bush could not have proved that the position he took would have prevented a "diminished likelihood" winning, as the court below required. Order 33. For all Bush could prove, he might have won the race under Gore's proposed rules or vice-versa.

Third, the injuries to electors from an unlawfully conducted election are obvious and acute. A vote tally that is unlawfully derived is subject to challenge, litigation, and overruling in courts or before contest adjudicators. All candidates are therefore injured by an unlawfully conducted race. The court below disagreed, but only because it assumed the *merits* of Appellants' claims against them, concluding that the Secretary has "provided" "certainty" through his

seven-day extension policy, that "the Electors are in danger of creating confusion rather avoiding it," and that the "record is replete with information provided to Minnesota voters about the Postmark Deadline." Order 24–26.

This was yet another error. The policies the court identified as *curing* uncertainty are the *cause* of uncertainty because they are unlawful. "The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim." *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007), *aff'd District of Columbia v. Heller*, 554 U.S. 570 (2008); *Warth v. Seldin*, 422 U.S. 490, 502 (1975). The district court was obligated to assume that the Secretary's challenged actions are invalid, which would necessarily threaten the election's validity. *See also infra* § I.B.3. And there is no basis to conclude that Appellants lack standing under that assumption.

2. Voter Standing

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

a. Since at least *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court has recognized that plausible allegations of vote dilution confer standing. *Id.* at 207–09. "A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a *stuffing of the ballot box*." *Id.* at 208 (citations omitted) (emphasis added). The Court's landmark decision *Reynolds v Sims* recognized the same. 377 U.S. 533, 555 (1964) ("The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." (citations omitted)).

Standing in these cases is "premised on the understanding that the injuries giving rise to those claims were 'individual and personal in nature.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (quoting *Reynolds*, 377 U.S. at 561). It does not follow that vote dilution inflicted on many individuals is insufficiently particularized to confer standing. "The fact that other citizens or groups of citizens might make the same complaint…does not lessen [the] asserted injury." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449–50 (1989). Indeed, the D.C. Circuit upheld voters' standing to challenge a congressional rule change that diluted the votes of *all voters in all states*. *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994). "That all voters in the states suffer this injury, along with the appellants, does not make it an 'abstract' one." *Id.*

b. The court below, however, held that "vote dilution is a paradigmatic generalized grievance that cannot support standing." Order 21.

First, that conflicts with *Baker, Reynolds*, *Mitchell*, and too many other decisions to cite and would, if upheld, call into question any individual voter's right to challenge dilution. The district court's citation of several recent cases alleging vote dilution through the potential for future voter fraud conflates the theoretical possibility of fraud in those cases with the *certainty* here that ballots will be counted in alleged violation of federal law. Order 22. While the claim that a state is not adequately enforcing laws like those against vote-fraud is a classic generalized grievance, a challenge to an unlawful policy that directly impairs an individual's voting rights through dilution is anything but that. Indeed, the district court found that "tens of thousands" of ballots are likely to arrive late. Order 11. The Secretary intends to count them and thereby dilute Appellants' votes by markedly increasing the pool of votes counted. That injury is concrete.

Second, the ruling below is incorrect that this dilution "is a generalized grievance" because it "affect[s] all Minnesota voters in the same way." Order 23. Setting aside that sheer numerosity is irrelevant, *see Michel*, *supra*, the premise is wrong. Those whose votes are received after the statutory deadline *benefit* from the Secretary's policy at the expense of those whose votes are timely: only the latter suffer dilution. This is no different from districting schemes that over-populate and under-populate districts, injuring only those in over-populated districts, whose standing to sue is well-established. *See Baker*, 369 U.S. at 207–08.

3. Statewide Disenfranchisement

Finally, the Secretary's actions jeopardize Minnesota's participation in the Electoral College and Appellants' ability to serve as electors, injuring them as both voters and elector candidates. The Secretary's attempt to override the Legislature violates the "safe harbor" provision of 3 U.S.C. § 5 because it is not a "*law[] enacted* prior to the day fixed for the appointment of the electors." This injury arises by operation of law: if the Secretary's actions are invalid—as Appellants allege—then Minnesota will be ineligible for the safe harbor. It was to avoid *that precise result* that the Supreme Court terminated Florida's 2000 recount, and Appellants' interest here as candidates is identical. *Bush*, 531 U.S. at 110.

The district court's standing analysis was confused and, at best, improperly assumed the merits of this argument fail. It recognized that Minnesota could forfeit its safe-harbor protection if it were to "change the procedures it uses to appoint electors after Election Day," Order 27, but found Appellants' position "speculative," on the view that Minnesota has not yet changed procedures "after Election Day," Order 28 n.15. But the problem is that the Secretary's actions violate the safe harbor because they depart from the "laws enacted" by the Minnesota Legislature. 3 U.S.C. § 5. The court was bound to assume, for standing purposes, that this theory is correct, and so was bound to accept for standing purposes that Minnesota's safe-harbor status will be forfeited.

The court also found that loss of safe-harbor status would not necessarily prove fatal to Minnesota's electors voting in the Electoral College, Order 29, but safe-harbor status is a substantial state benefit that exists to eliminate risk. *See Palm Beach*, 531 U.S. at 77–78. Standing is triggered not only where harm is certain or consummated but also where there "is increased risk" of a harm. *Mo. Coal. for Env't v. F.E.R.C.*, 544 F.3d 955, 957 (8th Cir. 2008); *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 573–74 (6th Cir. 2005) ("The courts have long recognized that an increased risk of harm…is an injury-in-fact."). The automatic loss of safe-harbor status marks the dramatic increased risk that Minnesota's electors will not be recognized. The district court's contrary conclusion effectively treats the safe harbor as a non-factor in presidential elections, but that was not the Supreme Court's view in *Bush*, which regarded the loss of safe-harbor status as sufficiently injurious to require terminating a recount. 531 U.S. at 110.

C. Prudential Standing

The district court also found that Appellants lack prudential standing on the basis that their preemption claim asserts the rights of Congress and their Electors Clause claim asserts the rights of the Minnesota Legislature. But Appellants are asserting their own interests, and no third-party standing issue is even implicated.

A plaintiff claiming that he has been injured state action that conflicts with federal law does not "assert claims of injury that…Congress suffered." Order 34. If that were true, only Congress would have standing to assert preemption. That

is not the law. *See, e.g.*, *Springfield Television, Inc. v. City of Springfield, Mo.*, 462 F.2d 21, 23 (8th Cir. 1972) (finding that television franchisor had standing to assert preemption under FEC regulations).

Equally untenable is the district court's ruling that Appellants, as voters and electors, lack prudential standing to litigate the constitutionality of state law under Article II. In addition to the preemption point, which applies equally to Appellants' Article II claim, it is well established that "private parties can litigate the constitutionality or validity of state statutes, with or without the state's participation, so long as each party has a sufficient personal stake in the outcome of the controversy…." *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 430 (6th Cir. 2008); *see, e.g.*, *Bryant v. Yellen*, 447 U.S. 352, 367–68 (1980). Again, this is not a matter of asserting the rights of others, like the Minnesota legislature, but of asserting *Appellants' own interests* as voters and candidates.

Moreover, the Electors Clause and Election Day Clause of Article II are among the Constitution's federalism provisions that serve to "protect[] the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond v. United States*, 564 U.S. 211, 222 (2011). *Bond* held that individuals "can assert injury from governmental action taken in excess of the authority that federalism defines." *Id.* at 220. An individual's "rights in that regard do not belong to a State," *id.*, a point that carries the day equally under Article III and "prudential standing rules," *id.* at 225. That is so in this context: the aberrant prudential standing limitations the district court applied would have barred adjudication in

each of the Electors Clause cases discussed above, including *McPherson* and *Palm Beach*. *See also Foster*, 522 U.S. at 67 (voter challenge under Article I's Elections Clause).

II. The Equities Favor an Injunction

An injunction is essential to protect Appellants and all Minnesota voters from the irreparable harm caused by the Secretary's unlawful actions.

A. As an initial matter, *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), which requires a federal court to entertain "considerations specific to election cases and its own institutional procedures" before issuing an injunction impacting election procedures, *id.* at 4–5, is not a bar to an injunction because those considerations favor an injunction here. The issue of which ballots are validly cast, can be, and often is, litigated *after* the election. *See Bush*, 531 U.S. at 106–11; *Bush v. Hillsborough Cty. Canvassing Bd.*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000). This is not a case involving something like a redistricting plan, a voter-identification law, or the candidates included on the ballot. Challenges to those features of an election concern what happens *before* the election, but this challenge concerns what happens *after* it—i.e., which ballots will be counted. And it would be far better for voters to know *now* what the rules are then find out after they voted when their ballots may be disqualified.

B. Appellants will suffer irreparable harm absent an injunction. The Secretary has ordered votes cast in violation of Minnesota law to be counted, and the district court found that many votes will be cast after Election Day. Order 11. Vote dilution is irreparable harm. *See Bush*, 531 U.S. at 1047 (Scalia,

J., concurring in order issuing stay pending appeal) (the "counting of votes that are of questionable legality…threaten[s] irreparable harm"); *Montano v. Suffolk Cty. Legislature*, 268 F. Supp. 2d 243, 260 (E.D.N.Y. 2003); *Patino v. City of Pasadena*, 229 F. Supp. 3d 582, 590 (S.D. Tex. 2017); *Day v. Robinwood W. Cmty. Improvement Dist.*, 2009 WL 1161655, at *3 (E.D. Mo. Apr. 29, 2009); *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 2016 WL 6584915, at *17 (D.N.J. Nov. 5, 2016) (collecting cases). This imposes a special injury on Appellants, who are not only voters, but also candidates for office. *Burdick v. Takushi*, 504 U.S. 428, 438 (1992); *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

In addition, the legal infirmity of the Secretary's actions has created significant uncertainty about the rules governing the November election and whether *any* Minnesota citizens will have their votes counted. The policies the Secretary will implement in the November 3 election will not satisfy the safe harbor of 3 U.S.C. § 5 because they are not "laws enacted prior to the day fixed for the appointment of electors." *See Bush*, 531 U.S. at 111. A further harm is that the Secretary's election deadlines risk placing the resolution of the contest past dates Congress set for the safe harbor and the actual vote of the Electoral College. There is a real risk that Appellants' votes will be rendered meaningless, and that they will be deprived of the ability to serve as electors, if either Minnesota loses its representation in the Electoral College or its asserted results do not qualify for the safe harbor.

C. The balance of equities weighs decidedly in favor of an injunction. "[I]t is always in the public interest to protect constitutional rights" and "[t]he

balance of equities generally favors…constitutionally-protected freedom[s]." *Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019) (cleaned up). The Secretary has no interest in setting rules that the Constitution does not allow him to set. And the Secretary's interest in settling a meritless lawsuit—challenging the age-old rule requiring votes to be in on Election Day—carries zero weight. *Cf. Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (holding that a state has "no…interest in avoiding meritless lawsuits"). Further, even if the Secretary is (somehow) vindicated by the final resolution of this case, the harm of an erroneous ruling at this stage would be non-existent: the Secretary would simply be compelled to conduct this election the way every Minnesota Secretary of State has conducted elections for generations. And the State's interest is for the valid laws enacted by its Legislature to be enforced. *See, e.g., Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1144 (8th Cir. 2005) (recognizing a "State's interest in enforcing its laws").

D. The public interest most of all weighs in favor of an injunction. "[I]t is always in the public interest to protect constitutional rights," *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), and the right to vote of each Minnesota citizen hangs in the balance and is directly threatened by the Secretary's unlawful actions.

In addition to disenfranchisement of the State's voters through losing their say in the Electoral College and selection of the President, the Secretary's actions threaten widespread disenfranchisement of individual voters. If Appellants are right that the Secretary's actions are unlawful, then voters who rely on those

actions to cast late-received ballots face the prospect that their votes will be tossed out through challenges on and after Election Day. By contrast, an injunction would define the rules of the election in advance so that voters can act accordingly and avoid total loss of their votes. In this way, an injunction best serves the Secretary's stated goal of minimizing voter confusion. And, even if the Secretary's view of the merits were ultimately to prevail, an injunction at this stage would cause no harm to the public interest, as the only effect would be to encourage voters to ensure that their ballots are received by 8:00 p.m. on Election Day—something that they can achieve through slightly earlier mail-in voting, in-person early or Election Day voting, or using a drop-box. In this respect, the public interest is one-sided, favoring the protection of Minnesota's voters against the Secretary's reckless disregard of federal law.

CONCLUSION

The Court should enter an injunction pending appeal and expedite consideration of this appeal and this motion.

Date: October 15, 2020

Respectfully submitted,

/s/ Andrew M. Grossman
DAVID B. RIVKIN
ANDREW M. GROSSMAN
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Suite 1100
Washington, DC 20036
Phone: (202) 861-1697
Fax: (202) 861-1783
agrossman@bakerlaw.com

NATHAN M. HANSEN
2440 Charles Street North
Suite 242
North St. Paul, MN 55109
Phone: (651) 704-9600
Fax: (651) 704-9604

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. 27(a) because it is 5,197 words. It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Calisto MT font, a proportionally spaced face with serifs.

/s/ Andrew M. Grossman
ANDREW M. GROSSMAN
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697 (phone)
(202) 861-1783 (fax)
agrossman@bakerlaw.com

Attorney for Plaintiffs–Appellants

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2020, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and will be served via electronic filing upon all counsel of record who have appeared or will appear in this case. I also certify that on the same day the following counsel have been served via electronic mail and overnight delivery.

Jason Marisam
Minnesota Attorney General's Office
Solicitor General
445 Minnesota Street
Ste 1100
St. Paul, MN 55101
651-757-1275
jason.marisam@ag.state.mn.us

Counsel for Steve Simon

Abha Khanna
Jonathan Patrick Hawley
Perkins Coie LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101-3099
206-359-8312
akhanna@perkinscoie.com

Amanda Callais
Marc E. Elias
Perkins Coie LLP
700 13th Street NW
Suite 800
Washington, D.C. 20005
202-654-6396
acallais@perkinscoie.com

Will McDonnel Conley
Perkins Coie LLP
33 East Main Street
Suite 201
Madison, WI 53703
608-663-7460
wconley@perkinscoie.com

Samuel J. Clark
Sybil L. Dunlop
Green Espel PLLP
222 S. 9th St.
Suite 2200
Minneapolis, MN 55402
612-373-8372
sclark@greeneespel.com

Counsel for Intervenor-Defendants

/s/ Andrew M. Grossman
ANDREW M. GROSSMAN
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697 (phone)
(202) 861-1783 (fax)
agrossman@bakerlaw.com

Attorney for Plaintiffs–Appellants