No. 20-3139

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

James Carson & Eric Lucero,

Plaintiffs-Appellants,

v.

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

Defendant-Appellee,

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

Intervenor-Defendants-Appellees.

On Interlocutory Appeal from the United States
District Court for the District of Minnesota
No. 20-CV-2030 (NEB/TNL)

INTERVENOR-DEFENDANTS-APPELLEES' RESPONSE TO PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Appellants ask the Court to disregard Article III, fundamental principles of comity and abstention, and the considered judgments of both state and federal courts. This is before reaching the merits of Appellants' claims, which would upend longstanding, long-settled constitutional dictates. Neither the law nor the facts support Appellants' case, an improper and disruptive collateral attack on a settled state court judgment that falls well outside the legal mainstream. The district court recognized as much, twice concluding that Appellants lack standing to even assert their claims. Indeed, as the Supreme Court has made clear, Appellants "lack a cognizable interest in the State's ability to enforce its duly enacted laws" where, as here, "state election officials support the challenged decree, and no state official has expressed opposition." *Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020) (quotation omitted). The Court should deny Appellants' motion.

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BACKGROUND

I. The State Court Action

On May 13, 2020, Intervenor-Defendants-Appellees ("Intervenors") filed an action in state court against Secretary of State Steve Simon (the "Secretary"), arguing that Minnesota's Election Day receipt deadline for mail ballots violates the

U.S. and Minnesota Constitutions. ECF 14, Ex. A.[1] The Republican Party of Minnesota, Republican National Committee, and National Republican Congressional Committee (the "Republican Committees") intervened as defendants. Intervenors sought a preliminary injunction, ECF 39, Ex. 1, which the Republican Committees opposed, *id.*, Ex. 11.

On July 17, Intervenors and the Secretary filed a proposed consent decree suspending the Election Day receipt deadline during the November election (the "Consent Decree"). *See* Emergency Mot. for Inj. Pending Appeal ("Mot."), Ex. B ("Consent Decree"). The Republican Committees filed various objections, ECF 39, Ex. 12, and the state court held a hearing on all pending motions. On August 3, after evaluating the Consent Decree under both state and federal law, the state court determined that Intervenors were "likely to succeed on the merits" of their constitutional challenges and entered the Consent Decree. ECF 14, Ex. C at 17-25 ("State Court Order").

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The Republican Committees appealed to the Minnesota Supreme Court. On August 18, the parties in the state court case and a related action signed a stipulation to dismiss the appeal, with the Republican Committees *and* Donald J. Trump for President, Inc. (the "Trump Campaign") "waiv[ing] the right to challenge in any

[1] Intervenors also challenged another aspect of Minnesota election law not at issue in this appeal.

other judicial forum" both the state court's order and Consent Decree. ECF 39, Ex. 15. The Minnesota Supreme Court dismissed the appeal pursuant to this stipulation. *Id.*, Ex. 16.

II. The Consent Decree

Under the Consent Decree, the Secretary agreed to issue guidance instructing election officials and voters that mail ballots "postmarked on or before Election Day and received by 8 p.m. within 5 business days of Election Day . . . will be counted." Consent Decree 10-11. In the rare case 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.* at 10.

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On August 28, the Secretary issued the required guidance, ECF 39, Ex. 21, which was publicized to Minnesota voters by the Secretary's website, news outlets, and voter advocacy groups. *Id.*, Exs. 17-18, 22-24. Officials began sending absentee ballots to voters on September 18, *see* Minn. Stat. § 204B.35, with ballot-return envelopes instructing voters to mail them back "on or before Election Day." *See* Mot., Ex. A at 15 ("10/11 Order"). As of that date, over 1 million voters had requested absentee ballots, a number the Secretary described as "off the charts." ECF 39, Ex. 26.

III. Appellants' Suit

Appellants waited nearly two months after the state court entered the Consent Decree before filing their complaint on September 22, alleging that the Consent Decree violates the Electors Clause (Count I) and that its postmark deadline and presumption violate federal Election Day statutes (Count II).

Appellants moved for a preliminary injunction, which the district court denied for lack of both Article III and prudential standing. 10/11 Order 20-37. Appellants subsequently noticed their appeal and moved for injunction pending appeal with the district court. ECF Nos. 60-62. Without waiting for the district court's ruling, as required by this Court's rules, Appellants filed their emergency motion.[2] The following day, the district court denied Appellants' motion for injunction pending appeal. ECF 71 at 4 ("10/16 Order").

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ARGUMENT

A motion for injunction pending appeal prompts "the same inquiry as when [the Court] reviews the grant or denial of a preliminary injunction." *Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982). The movant's burden is "heavier when, as here, granting the preliminary injunction will in effect give the movant

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[2] This provides a threshold basis to deny Appellants' motion. Appellants' impatience (itself perplexing, given that they waited two months to even file suit) cannot justify ignoring this Court's procedural requirements.

substantially the relief it would obtain after a trial on the merits." *Calvin Klein Cosmetics Corp. v. Lenox Lab'ys, Inc.*, 815 F.2d 500, 503 (8th Cir. 1987).

As a threshold matter, the purpose of an injunction pending appeal is "to maintain the status quo until the court rules on the merits of the legal action." *Walker*, 678 F.2d at 70. But the status quo here *is the Consent Decree*. Its legal status has been conclusively resolved for over two months. And "the rules used in [Minnesota's] last election"—the August primary—were identical to those prescribed by the Consent Decree. *Common Cause R.I.*, 2020 WL 4680151, at *1; *see also Memphis A. Philip Randolph Inst. v. Hargett*, No. 20-6141, slip op. at 4 (6th Cir. Oct. 19, 2020) ("Consistency in the weeks ahead of an election is important to avoid voter confusion.").[3]

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Beyond this threshold issue, however, Appellants have not satisfied their burden. They are unlikely to succeed on the merits. And the absentee ballots in voters' hands—right now—promise that their ballot will be counted if "postmarked on or before Election Day" and received "within 7 days of the election." 10/11 Order 16. Neither Appellants' legally cognizable interests nor the public interest will be served by an injunction.

[3] The Sixth Circuit's order is attached.

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I. Appellants cannot succeed on the merits.

A. This suit is an improper collateral attack.

The Republican Committees' and Trump Campaign's stipulation of dismissal before the Minnesota Supreme Court, "waiv[ing] the right to challenge in any other judicial form" the state court's order or Consent Decree, ECF 39, Ex. 15, binds Appellants and precludes this suit.

Under governing Minnesota law, a valid judgment entered by agreement has the same preclusive effect "as if it had been rendered after contest and full hearing and is binding and conclusive upon the parties and those in privity with them." *Hentschel v. Smith*, 153 N.W.2d 199, 203 (Minn. 1967) (quotation omitted). Whether there is "privity must be determined by the facts of each case." *Benson v. Hackbarth*, 481 N.W.2d 375, 377 (Minn. Ct. App. 1992) (quotation omitted).

Appellants are in privity with the Republican Committees and Trump Campaign. *First*, as Republican voters and candidates, Appellants were expressly represented by the Republican Committees, which intervened in state court "[o]n behalf of their supported candidates[and] voters." ECF 39, Ex 13. *Second*, as Republican electors, Appellants were *nominated and certified* by the Republican Party of Minnesota. *See* Minn. Stat. § 208.03. And *third*, as electors, Appellants are essentially functionaries of the Trump Campaign. *See id.* §§ 208.43, 208.45; *Chiafalo v. Washington*, 140 S.Ct. 2316, 2322 (2020).

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Because their "interests are represented" by the Republican Committees and Trump Campaign, Appellants are bound by the stipulation "as if they were parties," *Rucker v. Schmidt*, 768 N.W.2d 408, 413 (Minn. Ct. App. 2009) (quotation omitted), and cannot challenge the state court's order or Consent Decree in any other forum—including this one.

B. This Court should abstain under *Pennzoil*.

In *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), the losing party in a state proceeding brought a federal challenge to the state judgment. The Supreme Court, noting "the importance to the States of enforcing the orders and judgments of their courts," concluded it must abstain. *Id.* at 13-14. It emphasized that abstention was appropriate where constitutional claims could have been raised in state court. *See id.* at 14-16; *Aaron v. Target Corp.*, 357 F.3d 768, 774 (8th Cir. 2004).

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Such is the case here. Appellants seek to render the state court's adjudication nugatory by enjoining enforcement of the Consent Decree. But that underlying state action is ongoing, *see* ECF 70, Ex. 1, and *that* forum, not this one, is the proper venue for their challenge. This Court should therefore "defer[] on principles of comity to the pending state proceedings." *Pennzoil*, 481 U.S. at 17.[4]

[4] Appellants' participation in the state court action "is not a prerequisite" because their interests are "closely related to those of parties in pending state proceedings"—see Part I.A. *supra*—"and the federal action seeks to interfere with pending state proceedings" by challenging the state court's authority to enter the Consent Decree.

C. Appellants lack standing.

1. Article III Standing

Appellants' claimed harms are speculative, generalized, or both, and thus cannot support Article III standing.

a. Candidate Standing

Appellants maintain that "[a]s candidates, [they] have a direct and personal stake in the conduct of their election consistent with governing federal law." Mot. 9. But Appellants' candidate status does not excuse their failure to satisfy Article III. They must still demonstrate a cognizable injury-in-fact traceable to the Consent Decree, and they cannot do so.

Appellants repeatedly suggest that the Consent Decree's alleged unlawfulness is *itself* a sufficient injury, but harms "amounting only to the alleged violation of a right to have the Government act in accordance with law are not judicially cognizable" and "cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992); *accord Lance v. Coffman*, 549 U.S. 437, 442 (2007). If Appellants were correct, then *any* candidate would automatically have standing to challenge *any* law, simply by arguing it is "unlawful." But candidates are not absolved of the obligation

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Cedar Rapids Cellular Tel., L.P. v. Miller, 280 F.3d 874, 881-82 (8th Cir. 2002) (quotation omitted).

to establish an injury-in-fact *resulting* from the challenged action. *See Lujan*, 504 U.S. at 574 (plaintiffs must show "not only that the statute is invalid but that [they have] sustained or [are] immediately in danger of sustaining some direct injury as the result of its enforcement" (quotation omitted)); *see also Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *6-7 (D. Nev. Sept. 18, 2020) (rejecting candidate standing where plaintiffs failed to demonstrate actual injury).

Appellants also invoke the specter of a post-election dispute, but this is pure conjecture. Despite Appellants' repeated claim that "challenges" such as theirs "are . . . routine," Mot. 10, they fail to identify a *single case* where candidates successfully mounted a pre-election challenge based on nothing more than speculative post-election disputes. This is unsurprising—Article III prohibits advisory opinions based on controversies that have not yet materialized. *See* 10/16 Order 5-6.

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Bush v. Palm Beach County Canvassing Board, 531 U.S. 70 (2000), and *Bush v. Gore*, 531 U.S. 98 (2000), are distinguishable. Both involved *actual* post-election challenges to recounts in which each candidate had a particularized, non-hypothetical interest in either safeguarding his victory (Bush) or rectifying his defeat (Gore). *See* 10/16 Order 6. And *McPherson v. Blacker*, 146 U.S. 1 (1892), "preceded the development of the standing doctrine by approximately 30 years, and therefore

cannot be relied upon to establish standing today." 10/11 Order 5. Not only did *McPherson* make no mention of standing, no court has relied on it as authority for standing.

b. Voter Standing

Like virtually every court to consider the issue, *see* 10/11 Order 22 (listing cases), the district court correctly rejected Appellants' "claim of vote dilution [as] a paradigmatic generalized grievance that cannot support standing." *Id.* at 21. Appellants attempt to distinguish these cases by suggesting the district court "conflate[d] the theoretical possibility of fraud in those cases with the *certainty* here that ballots will be counted in alleged violation of federal law." Mot. 13. But Appellants speculatively presume, without explanation, that any allegedly unlawful ballots will harm the presidential candidate Appellants support, rather than help him. Appellants also ignore that the cases the district court cited determined that plaintiffs lacked standing not only because vote dilution was unduly speculative, but also because it was impermissibly generalized. *See, e.g.*, *Trump for President*, 2020 WL 5626974, at *4 ("The alleged [vote-dilution] injuries are speculative as well, but their key defect is generality." (citation omitted)); *Martel v. Condos*, No. 5:20-cv-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) ("If every voter suffers the same incremental dilution of the franchise . . . then these voters have experienced a generalized injury."). The same is true here. Any purported dilution caused by the

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Consent Decree would affect *all* Minnesota voters, not just Appellants, and is thus an impermissibly generalized grievance. *See Lujan*, 504 U.S. at 573-74.

To salvage their theory, Appellants take the concept of vote dilution out of context, attempting to fashion a new legal wrong from a well-established—and readily distinct—doctrine. As the district court noted, the cases on which Appellants rely, *see* Mot. 12-13, concern vote dilution in the context of apportionment and representation, where plaintiffs alleged that laws structurally devalued their community's votes vis-à-vis another's. *See* 10/16 Order 8-9. Appellants cannot bootstrap their generalized fears of unlawful voting using a distinct, inapposite doctrine.[5]

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c. Statewide Disenfranchisement

Appellants' claim that the Consent Decree "jeopardize[s] Minnesota's participation in the Electoral College," Mot. 14, is also impermissibly speculative. *See* 10/11 Order 27-30. Even under liberal pleading standards, Appellants still must

[5] For the same reasons, Appellants' attempt to characterize themselves as "timely" voters whose votes will be "diluted" by later-arriving ballots, Mot. 13, cannot support standing. If Appellants were correct, then any citizen could challenge any election practice by claiming they acted "lawfully" while the law permitted others to act "unlawfully." *But see Lance*, 549 U.S. at 442 (finding claim that Elections Clause "has not been followed" to be "precisely the kind of undifferentiated, generalized grievance" Court has previously rejected, distinguishing it from "the sorts of injuries alleged by plaintiffs in voting rights cases [like *Baker v. Carr*, 369 U.S. 186, 207-08 (1962)] where we have found standing").

assert plausible facts. *See Va. House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945, 1951 (2019). Yet Appellants provide no explanation as to why disenfranchisement of Minnesota's electors, or even an increased risk of disenfranchisement, would result under Congress's safe harbor. As the district court explained, "even if a state fails to meet the safe harbor deadline, Congress is not simply free to disregard the state's election results at will. . . . Although meeting the safe harbor deadline effectively ensures that Congress will count a state's electoral votes, the inverse is not necessarily true." 10/11 Order 29. Indeed, Congress rejected a state's electoral votes "in only one election," which occurred "prior to the enactment of the Electoral Count Act of 1887." *Id.* at 30 & n.18.

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Appellants' only response is to rely on their allegations' presumed truth.[6] But they *have made no allegations* to support the parade of horribles they claim will result if Congress questions Minnesota's results under the safe-harbor statute—a predicate that is itself purely speculative, since the lawfulness of the Consent Decree was *fully resolved in state court*. Because Appellants' theory of disenfranchisement

[6] The closest Appellants come to addressing the district court's compelling historical treatment is a citation to *Bush v. Gore*. *See* Mot. 15. But that decision's remedy was motivated by the practical difficulty of effectuating the Florida Legislature's stated goal to resolve the presidential contest by the safe-harbor deadline, which fell on the very day it issued its opinion, 531 U.S. at 10, *not* a conviction that Florida's electorate would be disenfranchised if the safe harbor were violated.

"requires a good deal of speculation," it too is insufficient under Article III. 10/11 Order 29.

2. Prudential Standing

Appellants separately lack prudential standing to bring Count I because it "rest[s] . . . on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quotation omitted).

Count I is predicated solely on *the Minnesota Legislature's* purported rights under the Electors Clause. *Cf. Corman v. Torres*, 287 F.Supp.3d 558, 571 (M.D. Pa. 2018) ("[T]he Elections Clause claims asserted in the verified complaint belong, if they belong to anyone, only to the Pennsylvania General Assembly."); *Lance*, 549 U.S. at 442 (observing that "decisions construing the term 'Legislature' in the Elections Clause [were] filed by a relator on behalf of the State rather than private citizens acting on their own behalf").[7] But Appellants are not the Minnesota Legislature, and they have identified no "hindrance to the [Legislature's] ability to protect [its] own interests." *Hughes v. City of Cedar Rapids*, 840 F.3d 987, 992 (8th

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[7] The Elections and Electors Clauses play functionally identical roles, setting the terms for congressional and presidential elections, respectively. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting) (noting that Electors Clause is "a constitutional provision with considerable similarity to the Elections Clause"); *Foster v. Love*, 522 U.S. 67, 69 (1997) (referring to Electors Clause as Elections Clause's "counterpart for the Executive Branch"); 10/11 Order 3-4. Cases interpreting "the Legislature" in the context of one thus inform application of the other.

Cir. 2016). Appellants therefore "do[] not have third-party standing" to assert the Legislature's claims. *Id*.

Appellants' reliance on *Bond v. United States*, 564 U.S. 211 (2011), is misplaced. *Bond* concerned claims premised on violations of federalism, which ensures that "[t]he allocation of powers in our federal system preserves the integrity, dignity, and *residual* sovereignty of the States," which in turn "secures to citizens the liberties that derive from the diffusion of sovereign power." 564 U.S. at 221 (emphasis added). But Minnesota and its citizens "have no inherent or reserved power" under the Electors Clause "because federal elections did not exist prior to the formation of the federal government." *Gonzalez v. Arizona*, 677 F.3d 383, 392 (9th Cir. 2012) (en banc); *cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995) (state power regarding congressional qualifications derives "not from the reserved powers of state sovereignty, but rather from the delegated powers of national sovereignty"). Because Appellants cannot rely on *Bond* to vindicate a sovereign interest neither they nor the State possess, prudential standing bars Count I.[8]

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[8] Appellants suggest that prudential standing cannot apply to Count I because it "would have barred adjudication . . . [of] *McPherson* and *Palm Beach*." Mot. 16-17. But prudential standing was not addressed by the Supreme Court in these cases, and it is uncertain whether prudential standing is jurisdictional or waivable. *See Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 938-39 (8th Cir. 2013).

D. Count I fails as a matter of law.

Jurisdictional issues aside, Count I fails as a matter of law. The Electors Clause vests authority in "the Legislature" of each state to regulate presidential elections. U.S. Const. art. II, § 1, cl. 2. The Supreme Court has held that legislatures can delegate this authority—including to state officials like the Secretary. *See, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 807 (2015) (noting Elections Clause does not preclude "State's choice to include" state officials in lawmaking functions where it is "in accordance with the method which the State has prescribed for legislative enactments" (quotation omitted)); *see also supra* note 7.[9]

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Accordingly, the Secretary's actions could only violate the Electors Clause if he exceeded the authority granted to him by the Legislature. He did not. Minnesota Statutes section 204B.47 provides that "[w]hen a provision of the Minnesota Election Law cannot be implemented as a result of an order of a state or federal court, the secretary of state shall adopt alternative election procedures to permit the

[9] Appellants suggest that the Electors Clause does not permit legislatures to delegate regulatory authority, but they cite no authority for this position, which conflicts with *Arizona State Legislature* and the analogous treatment of the Electors and Elections Clauses. Appellants also fail to consider the practical upheaval of such an aberrant reading of Article II, which would strip state and local officials of even *legislatively granted* discretion over presidential elections and require dueling regulatory regimes for congressional elections governed by the Elections Clause and presidential elections governed by the Electors Clause.

administration of any election affected by the order." In other words, if a court determines that an election law cannot be implemented, then the Minnesota Legislature does not merely *permit* the Secretary to adopt alternative procedures, it *requires* he do so.

This is precisely what happened here. The state court concluded Intervenors were likely to succeed on the merits and entered the Consent Decree. State Court Order 17-25. The Secretary *had* to "adopt alternative election procedures to permit the administration" of the November election. He did so, issuing guidance and instructions consistent with the Consent Decree. These actions were both contemplated and required by a statute enacted by the Legislature and are thus consistent with the Electors Clause.

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Appellants brazenly mischaracterize the facts, asserting that "the *Secretary* decided that the deadline should not be implemented and asked a state court to rubberstamp that determination." Mot. 7. But the state court did *not* rubberstamp the Consent Decree; it undertook a rigorous analysis, concluding not only that Intervenors were likely to prevail on the merits of their constitutional claims, but that it would also be "empowered to grant the preliminary injunction" or even "*sua sponte* . . . order precisely what the consent decree achieves." State Court Order 23-25. Once the state court entered the Consent Decree, the Secretary could not have applied the receipt deadline without violating its order. *See Am. Broad. Cos. v.*

Ritchie, Civil No. 08-5285 (MJD/AJB), 2011 WL 665858, at *2, *4 (D. Minn. Feb. 14, 2011).[10]

E. Count II fails as a matter of law.

Count II—which alleges that the Consent Decree's postmark deadline and presumption violate federal statutes—also fails as a matter of law. "[A] state's discretion and flexibility in establishing the time, place and manner of" presidential elections has only "one limitation: the state system cannot directly conflict with federal election laws on the subject." *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000). The Elections Clause—and, by extension, the Electors Clause, *see supra* note 7—"is a default provision; it invests the States with responsibility for the mechanics of [federal] elections, *but only so far as Congress declines to preempt state legislative choices*." *Foster v. Love*, 522 U.S. 67, 69 (1997) (emphasis added) (citation omitted).

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Congress has not legislated how to determine either the timeliness of mail ballots or the postmark date when a ballot lacks the requisite marking. And because Congress has not codified a deadline or postmark presumption that competes with the Secretary's, "compliance with both [the Consent Decree] and the federal election

[10] If this Court doubts that section 204B.47 mandated the Secretary's actions pursuant to the Consent Decree, then certification of the question to the Minnesota Supreme Court is advisable. *See, e.g.*, *Kaiser v. Mem'l Blood Ctr. of Minneapolis, Inc.*, 938 F.2d 90, 93 (8th Cir. 1991).

day statutes does not present a physical impossibility," so no preemption has occurred. *Millsaps v. Thompson*, 259 F.3d 535, 549 (6th Cir. 2001) (citation and quotation omitted).

This case is thus readily distinguishable from *Foster*, since the Consent Decree does *not* set a competing date on which "a contested selection of candidates for a [federal] office [] is concluded as a matter of law." 522 U.S. at 72. To the contrary, it mandates that ballots be "postmarked *on or before Election Day*," Consent Decree 10 (emphasis added), and its postmark presumption effectuates this requirement. *Foster* did not reach any broader conclusions. *See* 522 U.S. at 72 (declining to "isolate[e] precisely what acts a State must cause to be done on federal election day (and not before it) in order to satisfy the statute"). It certainly did not rule on what must or can be accomplished *after* Election Day; indeed, "official action to confirm or verify the results of the election extends well beyond federal election day," and such actions violate neither *Foster* nor the federal statutes. *Millsaps*, 259 F.3d at 545-46 & n.5. Courts have consistently held that such procedures and standards—which, like the postmark deadline and presumption, *facilitate* the federal election date—do not alter the date prescribed by Congress. *See, e.g.*, *id.* at 549.[11]

As one post-*Foster* decision concluded, "we cannot conceive that Congress

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[11] Moreover, none of Congress's objectives in enacting these statutes, *see Millsaps*, 259 F.3d at 541, is hindered by the postmark deadline.

intended the federal election day statutes to have the effect of impeding citizens in exercising their right to vote." *Bomer*, 199 F.3d at 777; *accord Millsaps*, 259 F.3d at 545. The Consent Decree "further[s] the important federal objective of reducing the burden on citizens to exercise their right to vote . . . without thwarting other federal concerns," *Bomer*, 199 F.3d at 777, by ensuring that voters who cast ballots on or before Election Day are not disenfranchised because the postal system, through no fault of the voter, fails to affix a legible postmark or deliver the ballot in a timely manner.

This Court should reject Appellants' invitation to be the first to conclude that these laws, which are similar to those used by other states for decades governing tens of millions of voters, are invalid.[12]

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II. Appellants will suffer no injury absent an injunction.

Appellants have failed to demonstrate any harm that "is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa*

[12] *See Donald J. Trump for President, Inc. v. Way*, Civil Action No. 20-10753 (MAS) (ZNQ), 2020 WL 5912561, at *10-12 (D.N.J. Oct. 6, 2020) (finding New Jersey's postmark law not preempted); *cf. Gallagher v. New York State Board of Elections*, No. 20 Civ. 5504 (AT), 2020 WL 4496849, at *22 & n.5 (S.D.N.Y. Aug. 3, 2020) (applying presumption "that absentee ballots received [within days of primary election] were [] timely cast despite the absence of a postmark"); *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *31 (Pa. Sept. 17, 2020) (adopting postmark deadline and presumption similar to Consent Decree's), *stay denied sub nom. Republican Party of Pa. v. Boockvar*, No. 20A54, 2020 WL 6128193 (U.S. Oct. 19, 2020).

Utils. Bd. v. FCC, 109 F.3d 418, 425 (8th Cir. 1996).

First, Appellants repeat the same unsustainable vote-dilution theory discussed above. Mot. 17-18. For the reasons already mentioned, these allegations are speculative. Moreover, Intervenors' unrebutted expert evidence demonstrates that the likelihood that ballots cast after Election Day will be counted is infinitesimal: mail ballots are postmarked and, if not, there are other means of determining when they were posted to USPS. ECF 39, Exs. 19-20; *see also* Consent Decree 10 ("[P]ostmark . . . include[es] bar codes, circular stamps, or other tracking marks.").

Second, Appellants suggest that "the legal infirmity of the Secretary's actions has created significant uncertainty about the rules governing the November election." Mot. 18. This is simply a rehash of Appellants' merits argument. And, as the district court found, injunctive relief would *cause* uncertainty and confusion, not cure it. *See* 10/11 Order 24-27.

Third, Appellants suggest that the Consent Decree "risk[s] placing the resolution of the contest past dates Congress set for the safe harbor and the actual vote of the Electoral College." Mot. 18. But county canvassing boards have until *ten days* after Election Day to publicly canvass votes, Minn. Stat. § 204C.33 subd. 1, and the State's canvassing board meets *three weeks* after Election Day to canvass the county boards' reports, declaring the results three days later: November 27. *Id.* § 204C.33 subd. 3. The Consent Decree's seven-day extension of the receipt

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deadline will not place the December 8 safe-harbor deadline at risk.[13] Moreover, as discussed in Part I.C.1.c *supra*, Appellants have provided no explanation, let alone evidence, that Congress would disenfranchise Minnesotans under the safe harbor.

Lastly, Appellants' delay in filing suit further militates against finding irreparable harm. *See GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir. 1984) ("By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action." (quotation omitted)). The state court entered the Consent Decree on August 3. Despite the substantial injuries Appellants claim they will suffer without injunctive relief, they waited *nearly two months* before filing suit, during which time the Secretary implemented plans and issued guidance consistent with the Consent Decree. Changing course now, after this inexplicable delay, would only harm Minnesota voters. *See Memphis A. Philip Randolph Inst.*, slip op. at 3 (denying stay where "[p]artly from [movants'] own doing, the electoral calendar works against their request" and "injury to potential voters . . . is great").

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III. The balance of harms weighs against injunctive relief.

An injunction reinstating the Election Day receipt deadline would disenfranchise Minnesota voters, as the state court concluded when entering the

[13] Indeed, "other states' statutorily-enacted ballot-receipt deadlines match or exceed the provisions of the Consent Decree, and nothing . . . indicates those states have had difficulty meeting the safe harbor deadline in past elections." 10/11 Order 28.

Consent Decree. State Court Order 5-7, 25. This conclusion was supported by ample evidence establishing the difficulties voters would experience under the receipt deadline. *See* ECF 39, Exs. 2-9; *id.*, Ex. 10 (noting 3,517 late ballots were rejected in 2018 and predicting 16,800 ballots could be rejected in November election due to receipt deadline); *see also id.*, Exs. 17-18 (describing hardships if receipt deadline were reinstated). The risk of disenfranchisement is especially grave given that a late-hour change and consequent "conflicting orders" would lead to confusion and uncertainty and harm voters relying on the postmark deadline. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). The harm of depriving the franchise is not only significant—"[t]o disenfranchise a single voter is a matter for grave concern," *Serv. Emps. Int'l Union, Local 1 v. Husted*, 906 F.Supp.2d 745, 750 (S.D. Ohio 2012)—but irreparable as well. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress.").

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IV. The public interest would not be served by an injunction.

"By definition, [t]he public interest . . . favors permitting as many qualified voters to vote as possible." *League of Women Voters*, 769 F.3d at 247 (alterations in original) (quotation omitted). This includes not only Intervenors, but *all* eligible Minnesotans who would risk disenfranchisement if Appellants receive their requested injunctive relief. *See, e.g.*, ECF 39, Exs. 2-10, 17-18.

CONCLUSION

For these reasons, Intervenors request that the Court deny Appellants' emergency motion.

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Dated: October 20, 2020

s/ Sybil L. Dunlop

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with Fed. R. App. P. 27(d), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,198 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016, in Constantia 14-point font.

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Dated: October 20, 2020

s/ Sybil L. Dunlop
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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Sybil L. Dunlop
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EXHIBIT

(6th Circuit Order noted in Footnote 3)

INTERVENORS-DEFENDANTS-APPELLEES' RESPONSE TO PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0334p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MEMPHIS A. PHILIP RANDOLPH INSTITUTE; THE EQUITY ALLIANCE; FREE HEARTS; MEMPHIS AND WEST TENNESSEE AFL-CIO CENTRAL LABOR COUNCIL; THE TENNESSEE STATE CONFERENCE OF THE NAACP; SEKOU FRANKLIN,

Plaintiffs-Appellees,

v.

TRE HARGETT, in his official capacity as Secretary of State of the State of Tennessee; MARK GOINS, in his official capacity as Coordinator of Elections for the State of Tennessee; AMY P. WEIRICH, in her official capacity as District Attorney General for Shelby County, Tennessee,

Defendants-Appellants.

No. 20-6141

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Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:20-cv-00374—Eli J. Richardson, District Judge.

Decided and Filed: October 19, 2020

Before: MOORE, GIBBONS, and READLER, Circuit Judges.

COUNSEL

ON MOTION AND REPLY: Matthew D. Cloutier, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellants. **ON RESPONSE:** Ezra D. Rosenberg, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, Washington, D.C., Molly Danahy, Jonathan Diaz, Ravi Doshi, Caleb Jackson, CAMPAIGN LEGAL CENTER, Washington, D.C., for Appellees.

GIBBONS, J., delivered the order of the court in which READLER, J., joined, and MOORE, J., joined in the result. MOORE, J. (pp. 5–16), delivered a separate opinion concurring in the denial of a stay pending appeal.

ORDER

JULIA SMITH GIBBONS, Circuit Judge. We have before us defendants' motion to stay the district court's preliminary injunction barring enforcement of a statutory requirement that voters who registered online or by mail vote in person in the first election in which they vote after registration. For the following reasons, defendants' motion is denied.

Plaintiffs are organizations involved in voter outreach in Tennessee and one individual Tennessee voter. Defendants are Tennessee government officials involved in election enforcement, each sued in their official capacity. Plaintiffs brought this suit on May 1, 2020, challenging the Tennessee statutory scheme that governs absentee voting. Given the expected increase in absentee voting in the November 2020 election due to the COVID-19 pandemic, there has been increased interest in the state's absentee-voting procedures. This appeal involves only one of plaintiffs' claims, which challenges a restriction on first-time voters' ability to vote absentee. On June 12, 2020, plaintiffs filed a motion for a preliminary injunction seeking to enjoin the enforcement of Tenn. Code Ann. § 2-2-115(b)(7), which prevents individuals who registered to vote by submitting a registration form online or by mail from voting absentee during the first election after they had registered. On September 9, 2020, the district court granted the preliminary injunction, finding that the restriction on first-time voters violated their constitutional rights. Defendants appealed and filed this motion to stay the preliminary injunction pending the appeal.

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A stay pending appeal is a matter of judicial discretion, "not a matter of right." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). Four factors guide our exercise of that discretion:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Defendants, as the movants, bear the burden of showing that a stay is warranted under the circumstances. *See Nken*, 556 U.S. at 433–34.

Here, the strength of the final three factors of the stay analysis outweigh any probability of defendants' success on the merits. Partly from defendants' own doing, the electoral calendar works against their request for a stay of the district court's preliminary injunction. The district court issued its preliminary injunction on September 9, 2020. While that timing may have been out of defendants' control, defendants did not file their appeal of the preliminary injunction until October 5, 2020, nearly one month after the injunction sprang into effect. And they did not seek a stay of the district court's order until October 9, 2020. Plaintiffs' response to the stay motion was filed October 15, 2020.

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During the period between September 9, the day of issuance of the preliminary injunction, and October 15, the day plaintiffs' response was filed, both absentee voting and early in-person voting had begun in Tennessee. Plaintiffs have been working in their communities to inform their members and the general public about the district court's preliminary injunction; collectively, they have spoken to over 1,500 voters at union meetings, virtual town halls, and voter-registration events. On Tennessee's official government webpage about absentee voting, the defendants themselves prominently state that "[p]ursuant to the September 9, 2020 Order of the U.S. District Court, first-time voters are not required to vote in-person if they meet a legal reason to vote by-mail." *Absentee Voting*, Tenn. Sec'y of State, https://sos.tn.gov/products/elections/absentee-voting (last accessed Oct. 17, 2020).

Given this situation, the injury to potential voters, who have relied on communications from defendants and local election officials, is great. Moreover, disrupting the new rules at this point poses significant risk of harm to the public interest in orderly elections. In this instance, there is no substantial harm to defendants in continuing to comply with rules they are currently following.

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It is well-established that "lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006)); *see also Democratic Nat'l Comm. v. Bostelmann*, --- F.3d ---, 2020 WL 5951359, at *1 (7th Cir. Oct. 8, 2020) (per curiam); *New Ga. Project v. Raffensperger*, --- F.3d ---, 2020 WL 5877588, at *3 (11th Cir. Oct. 2, 2020). Consistency in the weeks ahead of an election is important to avoid voter confusion. *See A. Philip Randolph Inst. of Ohio v. LaRose*, --- F. App'x ---, 2020 WL 6013117, at *3 (6th Cir. Oct. 9, 2020) ("The public interest would be best served by consistent rules regarding how to vote during the pendency of this lawsuit."). Considering that both plaintiffs and defendants have widely publicized the district court's order in this case and that voting is well underway in Tennessee, a stay of the district court's preliminary injunction at this point would substantially injure the plaintiffs and is not in the public's best interest.

Defendants' motion for stay is denied. Their appeal will be considered under the agreed-upon timeline submitted by the parties and previously ordered by the Court.

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CONCURRENCE

KAREN NELSON MOORE, Circuit Judge, concurring in the denial of a stay. Legal challenges to state election laws implicate unique equitable considerations where granting relief immediately before an election might risk confusing voters or disincentivizing voter turnout. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). Often—*too* often, some say—the federal courts of review have concluded that these considerations favor staying district court orders that have preliminarily enjoined state election laws ahead of an election, even if those laws are likely to be deemed unconstitutional after adversarial proceedings have run their course. Our ruling today, however, demonstrates that the equities do not always require that result. At least where disturbing a lower court order that has been in place for a substantial period of time in the lead up to an election could result in voter confusion and the state has not offered sound reasons to justify that risk, the equities do not support staying the order pending appeal, even with an election looming.

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On September 9, 2020, the district court issued an order preliminarily enjoining Tennessee from enforcing a law requiring certain voters who submitted their voter registration online or by mail to "appear in person to vote in the first election the person votes in after such registration becomes effective" even if they otherwise qualify to vote by mail. Tenn. Code § 2-2-115(b)(7)(A). Defendants—Tennessee's Secretary of State and the Coordinator of Elections for the Division of Elections for the Tennessee Department of State (the "Coordinator of Elections")—did not seek a stay of the district court's order in this court until October 9, 2020, when they filed the instant "emergency" motion for a stay pending appeal.

While Defendants waited, absentee voting has been well underway in Tennessee. First-time Tennessee voters who would have had to vote in person have cast their ballots by mail instead in reliance on the district court's order. The state, the media, and voter outreach organizations have informed first-time voters that they are no longer required to vote in person the first time that they vote in an election. Granting a stay now, with the November 3, 2020 General Election less than a month away, risks introducing confusion into Tennessee's electoral

process. Defendants have not convinced us that there is any sound reason to do so. Put simply, Defendants' motion for a stay pending appeal is too little, too late.

I. BACKGROUND

Tennessee grants voters that fall within enumerated categories the right to "vote absentee by mail." Tenn. Code § 2-6-201. For example, Tennesseans may vote absentee by mail if they will be outside the county where they are registered during the voting period, *id.* § 2-6-201(1)–(2), if they will be observing a religious holiday, *id.* § 2-6-201(8), if they will be serving as a juror, *id.* § 2-6-201(4), if they are over sixty years of age, *id.* § 2-6-201(5)(A), or if they are persons who are hospitalized or ill, persons with physical disabilities, or caretakers for such persons, *id.* § 2-6-201(5)(C)–(D). Tennessee has recently interpreted the latter criteria to encompass "persons who have underlying medical or health conditions which render them more susceptible to contracting COVID-19 or [are] at greater risk should they contract it . . . , as well as those who are caretakers for persons with special vulnerability to COVID-19." *See Fisher v. Hargett*, 604 S.W.3d 381, 385 (Tenn. 2020). In short, Tennessee authorizes voters to vote absentee by mail where voting in person would result in hardship, if not be entirely out of the question.

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For some first-time voters, Tennessee places a further limitation on the right to vote absentee by mail. Specifically, Tennesseans who register to vote by submitting a registration form by mail or online must "appear in person to vote in the first election the person votes in after such registration becomes effective" and present "satisfactory proof of identity." Tenn. Code §§ 2-2-115(b)(7)(A), 2-2-112.[1] With limited exceptions, this "first-time voter requirement" applies even if the first-time voter would otherwise qualify to vote absentee by mail. *See id.* § 2-2-115(b)(7).

Plaintiffs are a registered Tennessee voter and five organizations engaged in voter outreach in Tennessee with members who wish to vote absentee by mail. They initiated this suit on May 1, 2020, filing a complaint challenging various aspects of Tennessee's absentee voting

[1]The first-time voter requirement does not apply to voters who register to vote in person at a county election commission office. *See id.* §§ 2-2-109, 2-2-115(b)(7)(A).

laws. R. 1 (Compl.) (Page ID #1–33). On June 12, 2020, Plaintiffs amended their complaint to add a claim that the first-time voter requirement violates the fundamental right to vote protected by the First and Fourteenth Amendments. R. 39 (Am. Compl. at ¶¶ 92–96) (Page ID #155). That same day, Plaintiffs moved the district court for a preliminary injunction prohibiting Defendants from enforcing the first-time voter requirement. R. 40-1 (Proposed Order at 2) (Page ID #164).[2]

On September 9, 2020, the district court granted Plaintiffs' motion and issued a preliminary injunction order providing that:

> Defendants and their officers, agents, employees, servants, attorneys, and all persons in active concert or participation with them are hereby enjoined and restrained, pending further order of the Court, from enforcing the first-time voter restriction, meaning, primarily and among other things, that with respect to first-time voters who registered to vote in Tennessee by mail or online, the eligibility to vote by mail shall be made without reference to the requirement set forth in Tenn. Code Ann. § 2-2-115(b)(7).

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R. 80 (Order) (Page ID #2637–38) (footnote omitted). The district court further ordered Defendants to "publicize the relief granted by this Order by all reasonable means, including a notice prominently place [sic] on Defendant Hargett's website." *Id.* (Page ID #2638).

Defendants waited almost a month to appeal the district court's September 9, 2020 order, filing their notice of appeal on October 5, 2020. R. 108 (Notice of Appeal) (Page ID #2791). Then, on October 9, 2020, Defendants filed the instant motion for an emergency stay pending appeal, arguing that a stay is warranted because they are likely to succeed on appeal and the equities favor staying the district court's preliminary injunction until after the General Election. App. R. 4 (Emergency Mot. to Stay).[3] In support of their emergency stay motion, Defendants

[2]Plaintiffs also sought to enjoin "(1) Tennessee's enforcement of the Eligibility Criteria for mail-in voting, Tenn. Code § 2-6-201, (2) Tennessee's enforcement of a statute criminalizing the unsolicited distribution of requests for an application to vote by mail, *see* Tenn. Code § 2-6-202(c)(4), [and] (3) Tennessee's existing signature verification procedures for mail-in voting . . . ." The district court denied Plaintiffs' motion as it related to these other aspects of Tennessee's absentee voting laws. *See* R. 66 (Mem. Op. & Order); R. 77 (Mem. Op. & Order). This court, in a 2-1 decision, recently upheld that denial as to Tennessee's signature verification process for absentee ballots. *Memphis A. Philip Randolph Inst. v. Hargett*, --- F.3d ----, 2020 WL 6074331 (6th Cir. 2020).

[3]Defendants filed a simultaneous motion for expedited briefing, which called for (1) Defendants to file their opening brief on October 16, 2020; (2) Plaintiffs to file their response on October 23, 2020; and (3) Defendants

filed a declaration by the Coordinator of Elections, which provided that (1) since the district court's injunction went into effect, the state "has received absentee ballots from first-time, mail-registered voters who would previously have been unable to vote by mail" and (2) "the State will attempt to minimize any further confusion that a stay of the injunction might cause by counting valid absentee ballots that first-time voters have already returned while the injunction has been in effect." App. R. 4-2 (Goins Decl. at ¶¶ 3–4).

Plaintiffs responded on October 15, 2020. They argued that a stay was inappropriate because Defendants are unlikely to succeed on the merits of their appeal and that the equities do not favor the issuance of a stay. In particular, Plaintiffs point out that since the district court issued its preliminary injunction, there have been significant efforts to inform voters that the first-time voter requirement is no longer in effect for the General Election and that reinstating the requirement could lead to confusion among voters and the public more generally.[4] Defendants filed a reply on October 19, 2020.

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II. STANDARD OF REVIEW

A stay pending appeal "'is not a matter of right.'" *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). Rather, it is "'an exercise of judicial discretion.'" *Id.* (quoting *Virginian Ry. Co.*, 272 U.S. at 672). Four factors guide our exercise of that discretion:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150,

to file their reply on October 26, 2020. App. R. 5 (Mot. Expedite at 3). We granted this motion and scheduled briefing in accordance with Defendants' proposal. App. R. 8 (Order).

[4]*Absentee Voting*, Tenn. Sec'y of State, https://sos.tn.gov/products/elections/absentee-voting (last accessed Oct. 19, 2020); R. 112-1 (Lichtenstein Decl. at ¶¶ 2–5) (Page ID #2824–25); R. 112-2 (Sweet-Love Decl. at ¶¶ 3–7) (Page ID #2828).

153 (6th Cir. 1991). Defendants, as the movants, bear the burden of showing that a stay is warranted under the circumstances. *See Nken*, 556 U.S. at 433–34. They have failed to carry that burden here.

III. DISCUSSION

Typically, the first two stay factors are the "most critical." *Id.* at 434. However, election cases implicate unique equitable considerations more relevant to the latter two factors. In this case, it is appropriate to address the considerations unique to election cases first, before addressing Defendants' contentions that they will be irreparably harmed absent a stay and that they are likely to succeed on appeal.

A. Equitable Considerations

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So far as election cases go, this is an uncommon one. Typically, where a lower court enjoins a state election law in the lead up to an election, the appeals court is immediately confronted with the state's appeal and its customary request for a stay pending that appeal. In the context of these immediate applications for relief, the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (citing *Purcell*, 549 U.S. 1). That is not to say that the Court has outright *forbidden* lower courts from issuing orders that enjoin the enforcement of state election laws immediately before an election. *See id.* But the Court has directed the lower courts to carefully consider whether issuing such an order risks voter confusion or disincentivizing voter turnout before they do so. *See Purcell*, 549 U.S. at 4–5. Rightly or wrongly, this "*Purcell* doctrine" has inspired a string of cases where the federal courts of review have stayed lower court orders enjoining state election laws with an election imminently approaching. *See, e.g.*, *Democratic Nat'l Comm. v. Bostelmann*, --- F.3d ----, 2020 WL 5951359 (7th Cir. 2020) (per curiam); *New Ga. Project v. Raffensperger*, --- F.3d ---, 2020 WL 5877588 (11th Cir. 2020).

Here, the district court's order altered Tennessee's election laws just under two months before the November 3, 2020 General Election. Rather than seeking immediate relief in this court, Defendants continued to litigate the issue in the district court. It was not until thirty days

had passed from the date the district court issued its preliminary injunction that Defendants filed their emergency motion for a stay pending appeal in this court. As things now stand, the *Purcell* doctrine does not counsel in favor of a stay, even assuming it ever did.

Because of Defendants' delay in seeking relief in this court, the district court's order has effectively displaced Tennessee's first-time voter requirement as the status quo for the November 3, 2020 General Election. *See Ohio State Conf. of N.A.A.C.P. v. Husted*, 769 F.3d 385, 389 (6th Cir. 2014) (denying a stay in an election case and remarking that "informally the status quo has already changed"). For those who qualify to vote absentee by mail, the election is already under way—they have been able to request and cast their absentee ballots since ninety days before election day. Tenn. Code § 2-6-202(a)(1), (g). Indeed, since the district court issued its preliminary injunction, first-time voters who would have had to vote in person under the first-time voter requirement have submitted their absentee ballots by mail to be counted. App. R. 4-2 (Goins Decl. at ¶¶ 3–4).[5] By committing to count those votes, Defendants tacitly acknowledge that reinstating the first-time voter requirement could lead to confusion for those voters, who would be left uncertain as to whether their already-cast absentee ballots would be counted. *See id.* This contradicts Defendants' argument that a stay is warranted because it would prevent voter confusion. Indeed, Defendants point to no evidence suggesting that voters have been confused by the district court's order, despite the fact that it has been more than a month since that order issued. More broadly, staying the district court's order and reinstating the first-time voter requirement could lead to confusion for first-time voters who planned to, but have not yet submitted their absentee ballots. Given that there are approximately 128,000 first-time voters in Tennessee to whom the first-time voter requirement would apply, R. 79 (Mem. Op. & Order at 57 n.39) (Page ID #2634), the confusion caused by a stay of the district court's order at this juncture could be relatively widespread. This confusion could lead to frustration and, conceivably, to voters' decisions not to partake in an ever-changing process. *See Purcell*, 549 U.S. at 4. Thus, *Purcell* does not counsel in favor of a stay.

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[5]Defendants' suggestion that these votes are the result of confusion stemming from the district court's order is not well taken. The district court order allowed first-time voters who otherwise qualified to vote absentee by mail in Tennessee to do so. By voting absentee by mail, those voters were acting in accord with the district court's injunction—there is no confusion to point to.

In sum, at least this long after the district court enjoined Tennessee's first-time voter requirement, the equities do not favor a stay.[6] Thus, Defendants have failed to carry their burden to show the equities favor staying the district court's order.

B. Irreparable Injury

Defendants dedicate all of a single, seven-line paragraph to their argument that they will be irreparably harmed in the absence of a stay. Their argument rests solely on the grounds that "the State's sovereignty is irreparably harmed anytime action taken by its democratically elected leaders is enjoined." R. 4 (Emergency Mot. to Stay at 18) (citing *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers)). But if that alone were sufficient to warrant a stay, the rest of the stay factors would be meaningless, and a state would be entitled to a stay pending appeal any time a lower court enjoined its statutes. That plainly not being the case, it is clear here that Defendants have not made a particularly persuasive showing of irreparable harm. Indeed, they have not presented any actual evidence of other harms commonly argued in election cases, such as an increased risk of voter fraud,[7] voter confusion, or a disruption to the orderly processing of an election. *See, e.g.*, *Ohio State Conf. of N.A.A.C.P.*, 769 F.3d at 389. Given that Defendants had thirty days to marshal such evidence before they filed the instant motion and failed to do so, and that Defendants waited that long to file their motion in the first place, any harm Defendants may suffer in the absence of a stay will be relatively insubstantial.

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C. Likelihood of Success on Appeal

The final factor is Defendants' likelihood of success on appeal. Given that the equities do not support a stay and any harm suffered by Defendants without one would be minimal, this factor must be weighed accordingly. But it does not follow from Defendants' poor showing on

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[6]This is not to suggest that the equities would have favored a stay had Defendants immediately sought relief in this court.

[7]It is worth mentioning that Defendants likely would be unable to show a significant risk of voter fraud resulting from leaving the preliminary injunction in place. In purporting to comply with the district court's order, Defendants have implemented a requirement by which many first-time mail-registered voters who vote absentee by mail must submit a copy of their identification when they submit their ballot in order to have it counted.

the other factors that we need not consider the merits at all. Just as the merits are one among the factors a district court must consider in deciding whether to issue a preliminary injunction, so are they a factor we must consider in determining whether to issue a stay. *See Griepentrog*, 945 F.2d at 153 (the stay "factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together"); *Nken*, 556 U.S. at 434 ("There is substantial overlap between these and the factors governing preliminary injunctions . . . ."). Even a strong showing on the equitable considerations—including those that sometimes counsel against court interference with election rules on the eve of an election—is not a per se bar to relief where the merits weigh in favor of it. Here, however, Defendants have not carried their burden to make a "strong showing" that they are likely to succeed on appeal, or at least a strong *enough* showing to outweigh the equitable considerations that suggest that a stay is inappropriate.

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Defendants present three arguments for why they are likely to succeed on appeal. Each involves the assertion of a legal error committed by the district court in determining that Plaintiffs are likely to succeed on the merits of their claim that the first-time voter requirement unconstitutionally burdens the right to vote protected by the First and Fourteenth Amendments. We would analyze these arguments under a de novo standard of review on direct appeal. *See City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc).

First, Defendants argue that they are likely to succeed on appeal because the district court erred in concluding that Plaintiffs had demonstrated a likelihood of establishing standing. *See Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 256 n.4 (6th Cir. 2018) (likelihood of success on the merits "'necessarily includes a likelihood of the court's *reaching* the merits, which in turn depends on a likelihood that plaintiff has standing'") (quoting *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 328 (D.C. Cir. 1987) (Williams, J., concurring in part) (original emphasis)). The district court concluded that at least the Tennessee NAACP—as a representative of its members—had standing to pursue Plaintiffs' constitutional challenge to the first-time voter requirement. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 623 (6th Cir. 2016) ("When one party has standing to bring a claim, the identical claims brought by other parties to the same lawsuit are justiciable."). The district court based its conclusion on a finding that Corey Sweet, an apparent Tennessee NAACP member, would have standing to

challenge the first-time voter requirement in his own right because the law applied to him and would have prevented him from voting absentee by mail in either the August 2020 primary or November 2020 General Election. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) ("An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.").

The trouble with Defendants' standing argument—at least as presented to us in their emergency motion to stay—is that it ignores the rule that standing is determined "at the time that its complaint was filed." *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 525 (6th Cir. 2001). Plaintiffs filed their constitutional claim challenging the first-time voter requirement on June 12, 2020. R. 39 (Am. Compl. at ¶¶ 92–96) (Page ID #155). Thus, standing is to be determined as of that date. *Cleveland Branch, N.A.A.C.P.*, 263 F.3d at 525. Yet, in their emergency motion for a stay pending appeal, Defendants' standing arguments largely focus on changes to Sweet's circumstances after June 12, 2020, and call into question whether he is *currently* qualified to vote absentee by mail, such that the first-time voter requirement has any effect on him. Defendants' arguments thus miss the mark when it comes to standing, because changes in circumstances that occur after a claim is filed are irrelevant to the standing inquiry. *See id.* Whatever the merits of a better developed and properly focused standing argument might be after a full round of appellate briefing, Defendants have not made a persuasive showing at this juncture that their standing argument is likely to succeed on appeal.

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Second, Defendants argue that even if Plaintiffs once had standing, their claims are now moot. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). "The heavy burden of demonstrating mootness rests on the party claiming mootness." *Cleveland Branch, N.A.A.C.P.*, 263 F.3d at 531. Defendants did not directly raise this question below.

The problem with Defendants' mootness argument as presented to us here is that it boils down to an assertion that *Plaintiffs* lack a "legally cognizable interest" because *Sweet* is no

longer qualified to vote absentee by mail such that he has an interest in the outcome of the case. Sweet, however, is not a party, and mootness turns on whether the parties have a legally cognizable interest in the outcome of the case. *Powell*, 395 U.S. at 496. Fair enough, it was Sweet's interest that the district court found sufficient to demonstrate a likelihood of establishing standing, but our cases suggest that even if Sweet in fact no longer has an interest in the case—which we need not comment on here—that would not render Plaintiffs' claims moot. *See Cleveland Branch, N.A.A.C.P.*, 263 F.3d at 257; *Waskul*, 900 F.3d at 257 (reading *Cleveland Branch, N.A.A.C.P.* as "appearing to hold that even if a named member's claims had become moot, the association retained standing because the named member had standing at the outset of the litigation"). Defendants do not meaningfully engage with this authority. Even if they had, mootness does not prevent a case from proceeding where the relevant "injury is capable of repetition, while evading review." *A.C.L.U. of Ohio, Inc. v. Taft*, 385 F.3d 641, 646 (6th Cir. 2004). And Defendants have not explained why that principle would not apply here, which is particularly problematic given that injuries to voting rights are particularly "capable of repetition, yet evading review." *See id.* at 646–47. At this stage, it was Defendants' burden to make a "strong showing" that they are likely to succeed on appeal. *Nken*, 556 U.S. at 433–34. By failing to address key questions on their mootness argument, Defendants have failed to carry that burden.

Third, Defendants argue that they are likely to succeed on appeal because they contend that the district court misapplied the standard for determining whether a state voting regulation impermissibly burdens the fundamental right to vote. To determine Plaintiffs' likelihood of success on their constitutional challenge to the first-time voter requirement, the district court applied the balancing test set forth by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Under the *Anderson-Burdick* standard, "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434. The district court first concluded that the first-time voter requirement placed a "moderate" burden on the right to vote, such that an intermediate level of constitutional scrutiny applied. It then concluded that the first-time voter requirement did not survive the level

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of scrutiny called for under *Anderson-Burdick*. Defendants now argue that the district court erred at both steps.

Defendants first argue that the first-time voter restriction places only a minimal burden on the right to vote, such that the district court should have applied the forgiving rational basis standard to Plaintiffs' constitutional challenge. Again, however, Defendants' argument is not well-developed enough to demonstrate a likelihood of success on appeal. On this point, Defendants rely solely on the assertion that there is no constitutional right to vote absentee as their basis for asserting (without further analysis) that the first-time voter requirement places a minimal burden on the constitutional right to vote. In the face of a lengthy rejection of this very argument by the district court, Defendants have not made a "strong showing" that they are likely to succeed on their appeal.

Next, Defendants argue that even if the first-time voter restriction does moderately burden the right to vote, the district court ignored their argument that the state's interest in protecting against voter fraud justifies that burden. Again, Defendants fail to grapple with the issues raised by the district court. It is true that the district court found that Defendants had not attempted to justify the first-time voter restriction as a means of preventing voter fraud. R. 79 (Mem. Op. & Order at 51–52) (Page ID #2628–29). However, the district court did note that even if Defendants had raised the issue, "they would have encountered difficulties at [the next step] of the *Anderson-Burdick* analysis, because they have not explained how requiring first-time, mail-registered voters to submit the required identification in person when voting helps prevent fraudulent voting to any greater extent than requiring the submission of such identification with mailed-in ballots." *Id.* at 52 n.37 (Page ID #2629). At the very least, this point should have been addressed by Defendants in their motion for a stay given that, in implementing the district court's injunction, Defendants have implemented a requirement that at least some first-time absentee voters mail in proof of identification along with their ballots.[8] In failing to do so, Defendants once again failed to meet their burden for a stay.

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[8] *Information for First-Time Voters Who Registered by Mail*, Tenn. Sec'y of State, https://sos.tn.gov/products/elections/information-first-time-voters-who-registered-mail (last accessed Oct. 19, 2020).

IV. CONCLUSION

In sum, Defendants have failed to satisfy their burden to show that a stay of the district court's order preliminarily enjoining the first-time voter requirement is warranted. The equities do not support the issuance of a stay, any harm that Defendants may suffer is minimal, and Defendants have not made a "strong showing" that they are likely to succeed on appeal.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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