No. 20-3126

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ANGELA CRAIG and JENNY WINSLOW DAVIES,

Plaintiffs-Appellees,

v.

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

Defendant-Appellee,

and

TYLER KISTNER,

Intervenor-Defendant-Appellant

On Appeal from the United States District Court
for the District of Minnesota, No. 0:20-cv-02066-WMW-TNL

AMICUS CURIAE BRIEF OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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INTEREST OF *AMICUS CURIAE*

Amicus curiae, the United States House of Representatives ("House"), respectfully submits this brief because it has a compelling institutional interest in preserving the uniformity and integrity of House elections throughout the Nation.[1] The Constitution empowers Congress to require uniform election timing through its grant of expansive Congressional authority over federal elections. The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations[.]" Art. I, § 4, cl. 1. Pursuant to this authority, Congress has established a uniform federal election day ("Election Day"). *See* 2 U.S.C. § 7. As Congress made clear in enacting Section 7, the mandate to hold federal elections on a single day encourages political participation by voters and prevents gamesmanship by states in the scheduling of

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the House certifies that no counsel for a party authored the brief in whole or in part, and no person or entity other than the House and its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

The Bipartisan Legal Advisory Group ("BLAG") of the House, which "speaks for, and articulates the institutional position of, the House in all litigation matters," has authorized amicus participation in this litigation. Rules of the U.S. House of Representatives (116th Cong.), Rule II.8(b), https://perma.cc/M25F-496H. The BLAG comprises the Honorable Nancy Pelosi, Speaker of the House; the Honorable Steny H. Hoyer, Majority Leader; the Honorable James E. Clyburn, Majority Whip; the Honorable Kevin McCarthy, Republican Leader; and the Honorable Steve Scalise, Republican Whip. Representative McCarthy and Representative Scalise dissented.

federal elections. It also furthers the House's substantial interest in having a full complement of Members seated when each new Congress begins so that the people in each district have a voice through their elected representatives.

Section 7's requirement that federal elections all happen on a single day preempts Minnesota Statute § 204B.13. That state provision would permit an election to occur in February—not on the national Election Day—because of the death of "a major party candidate." The district court correctly enjoined the Minnesota Secretary of State from applying Section 204B.13 to delay a House election until February 2021. Both this Court and the Supreme Court properly declined to stay that injunction. The House has a strong interest in the affirmance of the district court's order.

The House has an additional institutional interest as well: Now that the election has occurred, if Appellant Tyler Kistner believes that the circumstances of that election were unfair, the Constitution itself provides him an avenue for redress—by contesting the result in the House. *See* U.S. Const. art. I, § 5, cl. 1 (granting each house of Congress the power to be the "Judge of the Elections, Returns and Qualifications of its own Members"); 2 U.S.C. §§ 381-396; *cf. Roudebush v. Hartke*, 405 U.S. 15, 25 (1972) (noting the Senate's authority under that clause "to make an independent final judgment" on an election). Holding that Congress's provision for a uniform national Election Day preempts Minnesota's law thus does not deprive Kistner of the opportunity to seek a remedy.

INTRODUCTION

Nearly 150 years ago, Congress set a single national day for the election of Members to the House: "The Tuesday next after the 1st Monday in November, in every even numbered year[.]" 2 U.S.C. § 7. This year, on Tuesday, November 3, in 435 House districts across the nation, including in Minnesota's Second Congressional District (the "Second District"), voters selected the individuals who will represent them in the next Congress.

Kistner was a candidate for the Congressional seat in the Second District. He contends that a Minnesota law that postpones elections upon the death of a candidate should have exempted his race from Section 7's mandate that states must hold elections on a single Election Day.[2] In an attempt to avoid Section 7's preemptive effect on that Minnesota law, Kistner relies on Section 8, which authorizes states to "fill a vacancy . . . caused by a failure to elect at the time prescribed by law[.]" 2 U.S.C. § 8(a). The implication of Kistner's position is that, under Section 8, this Court must now allow the state to disregard the results of the election and hold a new

[2] Defendant-Respondent Steve Simon, Secretary of State of Minnesota, initially supported Kistner's position before the district court, but opposed Kistner's motion for a stay in the court of appeals, expressing concern that such a stay would "wreak havoc on the administration of Minnesota's 2020 general election." Brief of Defendant in Opposition to Appellant's Motion for Stay at 2, No. 20-3126 (8th Cir. Oct. 16, 2020).

election in February, leaving the Second District's residents without House representation when the 117th Congress commences on January 3.

The House disagrees. We urge this Court to affirm the district court's order, which enjoined the Secretary of State of Minnesota to proceed with the election on November 3—an election that has now taken place. Section 7 preempts Minnesota law, and, contrary to Kistner's contention, Section 8 does not save it. States cannot unilaterally exempt themselves from the uniform Election Day by enacting a law that decrees a "failure to elect" by not holding an election.

But even under Kistner's preferred approach, which would allow at least some state policy judgments to produce a failure to elect before a state holds an election on Election Day, he would not prevail. He failed to persuade this Court to grant a stay even on the assumption that state law could in certain circumstances create an exigency resulting in a failure to elect. His claim fares no better now that the election has been successfully held.

ARGUMENT

FEDERAL LAW PREEMPTS MINNESOTA'S ELECTION POSTPONEMENT LAW

Section 7 establishes a uniform date for House elections. Because Minnesota Statute § 204B.13 provides for an election date three months later, it conflicts with and is preempted by Section 7. Kistner does not attempt to reconcile Minnesota law with Section 7. He instead invokes Section 8—which establishes procedures for

filling vacancies in Congress—and maintains that Minnesota law validly creates a vacancy resulting from a "failure to elect." That reading of the statute is flawed. Minnesota cannot, by its own law, create a "failure to elect" that would exempt it from the statutory requirement to hold an election on the federal uniform Election Day. Even if a state policy *could* have that effect, which it cannot, this Court in its stay ruling correctly rejected *this* state policy on the facts of this case.

A. Section 7 Establishes a Single, Nationwide Election Day That Preempts Minnesota Law's Selection of a Different Date

1. In 1872, Congress prescribed a uniform national date for House elections. 17 Stat. 28; *see also* 18 Stat. 400. Section 7 of Title 2 of the United States Code provides that:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

2 U.S.C. § 7. This year, that date was November 3. Congress's intent to concentrate the attention of the citizenry on a single federal Election Day is additionally clear from the requirement that elections for the U.S. Senate and for the electors of President and Vice President be held on this date. *See* 2 U.S.C. § 1 (providing that Senate elections shall occur "at which election a Representative to Congress is regularly by law to be chosen"); 3 U.S.C. § 1 (providing that the electors of President and Vice

President shall be appointed "on the Tuesday next after the first Monday in November").

Congress has long recognized that standardizing the federal election schedule protects our democratic system from "more than one evil arising from the election of members of congress occurring at different times in the different states[.]" *Ex parte Yarbrough*, 110 U.S. 651, 661 (1884). By requiring that House elections be conducted simultaneously around the nation, Section 7 minimizes voter confusion and mitigates the burdens of having to vote on multiple days for different elections. *See* Cong. Globe, 42d Cong., 2d Sess. 141 (1871) (comments of Rep. Butler) ("[I]t is a wrong also to the people of those States, that once in four years they shall be put to the trouble of having a double election. On every election day the poor laboring man who goes to the polls to vote loses his day's work . . . ."). A uniform date also prevents states from completing their elections early and, in doing so, unfairly influencing voters in other states. *Id.*; *see Foster v. Love*, 522 U.S. 67, 72 (1997) (invalidating state law that provided for concluding an election before Election Day).

A standardized Election Day additionally protects Congress's substantial institutional interests in having a full slate of Representatives and Senators whose terms start concurrently at the beginning of January. *See* U.S. Const. amend. XX, § 1. The uniform date requires that all states hold their elections with sufficient time so that a Representative can be seated at the beginning of the Congress—not after. Indeed, Minnesota is the only state that permits a general election to be delayed

beyond the start of the next Congress because of the death of a candidate.[3] Congress has determined that the prescription of a federal uniform Election Day enhances voter participation, electoral integrity, and representative government.

2. The Constitutional provision that authorizes Congress to prescribe a uniform Election Day establishes that federal law overrides any contrary state law. The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations*[.]" Art. I, § 4, cl. 1 (emphasis added). "Because any state authority to regulate election to [federal] offices could not precede the [States'] very creation by the Constitution, such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (internal quotation marks omitted). The Elections Clause provides that delegation while making clear that Congress retains the paramount power to modify, override, or prevent such state regulation. The Supreme Court has thus described this clause as a "default provision . . . [that] invests the States with responsibility for the mechanics of congressional elections, but only so far as

[3] Only two other states have statutes that permit a general election to be delayed due to the death of a candidate, and neither permits a delay beyond the uniform swearing-in date in early January. *See* Iowa Code § 49.58(1); S.C. Code Ann. § 7-11-55.

Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. at 69 (internal citations omitted).

"[T]he power the Elections Clause confers is none other than the power to pre-empt[.]" *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 14 (2013). Because the Elections Clause expressly displaces state law when Congress acts, "the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent." *Id.*; *see also Ex parte Siebold*, 100 U.S. 371, 384 (1879) (noting that "the power of Congress over [federal elections] is paramount" and that "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them"). Accordingly, unlike analysis under the Supremacy Clause, in which courts routinely invoke a presumption against preemption, *see, e.g.*, *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996), no such presumption applies when courts conduct a preemption analysis under the Elections Clause, *see Inter Tribal*, 570 U.S. at 13-15.

3. Kistner cites only one case in which a court exempted a state from holding an election on the date mandated by Section 7, Appellant's Br. at 17, but in that case, the state could not proceed with the election without otherwise violating federal law—a situation not present here. In *Busbee v. Smith*, a three-judge court considered whether Section 7 precluded it from scheduling a Congressional election for a date other than Election Day in order to remedy the discriminatory effects of an election procedure that violated Section 5 of the Voting Rights Act. 549 F. Supp. 494, 526

(D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983). The court had ordered Georgia to develop a new reapportionment plan to comply with the one-person, one-vote standard. *Id.* at 520. The court then concluded that Georgia's proposed expedited election schedule, which called for a general election on November 2 (the date of the national election), would have a discriminatory effect in violation of the Voting Rights Act. *Id.* at 521-23. Thus, an election that complied with federal law was impossible on Election Day. *Id.*

Georgia nevertheless objected that Section 7 "absolutely requires that the general election be held on [the national uniform date]." *Id.* at 522. But that objection, the court explained, "is valid only if 2 U.S.C. section 7 limits the duration of [the Voting Rights Act] section 5's automatic injunction." *Id.* at 523. The court held that it would be "untenable" to read Section 7 as restricting the Voting Rights Act's authority to enjoin an election, especially because the Voting Rights Act was enacted long after Section 7. *Id.* at 523-24.

That analysis does not help Kistner, who does not contend that the Voting Rights Act, or any other source of federal law external to Congress's election scheme in Title 2 of the United States Code, displaces Section 7. On its face, therefore, Section 7's requirement that the election be held on November 3, 2020—as it was—preempts Minnesota's conflicting statute.

In the other decision Kistner relies upon, *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga. 1993), *aff'd*, 992 F.2d 1154 (11th Cir. 1993), the state proceeded

with an election on the day prescribed by Section 7, and only determined that a run-off election was needed after the election had taken place. That ruling does not support Kistner's claim here because the state in that case *complied* with Section 7 and held a run-off election only in response to the inconclusive outcome on Election Day. Minnesota's law, by contrast, would forgo an election on Election Day altogether. *See* Section B.2, *infra*.

B. Section 8 Does Not Save Minnesota's Law From Preemption

Because Minnesota Statute § 204B.13 cannot be reconciled with Section 7, Kistner invokes Section 8, 2 U.S.C. § 8, to justify the state's election-postponement law. He contends that Section 204B.13 will result in a "vacancy" caused by a "failure to elect" within the meaning of Section 8(a) "because a major-party candidate unexpectedly died within 79 days of the election." Appellant's Br. at 12 (citing Minn. Stat. § 204B.13, subds. 1 & 2(c)). In Kistner's view, a "failure to elect" can result from "independent principles of . . . state law," as when "the election fail[s] under the state's ordinary election mechanisms." *Id.* 12, 14 (emphasis omitted). He contends that is what happened here. That argument cannot be reconciled with the text, history, or structure of Section 8 and would defeat the operation of a uniform Election Day under Section 7.

1. Section 8 authorizes states to provide for elections on a day other than the Election Day established in Section 7 in order to fill a vacancy:

> [T]he time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

2 U.S.C. § 8. By its explicit language, Section 8 thus allows states to set a different election date only to fill a vacancy caused by either (1) the death (or other prescribed unavailability) of a person elected, or (2) a "failure to elect at the time prescribed by law." Kistner contends that there has been a "failure to elect" here, but the Minnesota law at issue does not satisfy that condition.

The text of Section 8 defeats Kistner's position. Section 8(a) states that a "failure to elect" for purposes of the statute is one "caused" by events occurring "at the time prescribed [for an election] by law." Given this language, a statutory "failure to elect" cannot be declared by state law before the uniform Election Day; it can only exist when it has been caused on that day. The language of the statute thus establishes that a state cannot enact a law authorizing itself in advance not to *hold* a federal election for policy reasons, and thereby produce a "failure to elect."

Section 8's origins confirm that "failure to elect" is a term of art with a far narrower scope. As Senator Allen Thurman explained in 1872, "[i]t is very seldom that there is an election to fill a vacancy, and *still more seldom that there is a failure to elect.*" Cong. Globe, 42nd Cong., 2d Sess. 677 (1872) (emphasis added). In what the Supreme Court has recognized is "the only explanation of this provision," *Foster v. Love*, 522 U.S. at 71 n.3, Senator Thurman identified only two situations when a

"failure to elect" might occur. First, "[i]n all those States in which a plurality [of the voters] elects, no such thing as a failure to elect can occur unless there should be a tie." Cong. Globe, 42nd Cong. at 677. Second, "in those States in which a majority of all the votes is necessary to elect a member," a "failure to elect" would occur only if no one secured a majority (*i.e.,* a run-off was needed). *Id.*

In both scenarios Senator Thurman described, an election is held on the date mandated by Section 7, and the "failure to elect" arises on Election Day itself, when the voters fail to definitively choose a candidate by the requisite number of votes. The entire phrase—"failure to elect at the time prescribed by law"—thus refers to Election-Day failures. Nothing in those words confers an open-ended license for a state to create a vacancy by choosing not to hold an election at all.

Kistner erroneously asserts that the meaning of the term "failure to elect" in Section 8 should be governed by *state law* because states have comprehensive election codes and federal law does not. Appellant's Br. at 14. But nothing in Section 8 references state law, nor does the term "failure to elect" have a common-law pedigree or state-law meaning that Congress could have intended to import. To the contrary, the Supreme Court has instructed that statutory interpretation begins "with the general assumption that 'in the absence of a plain indication to the contrary, … Congress when it enacts a statute is not making the application of the federal act dependent on state law.'" *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30,

43-44 (1989) (quoting *Jerome v. United States*, 318 U.S. 101, 104 (1943)). That is because "federal statutes are generally intended to have uniform nationwide application." *Id.*

Here, Congress drew on its constitutional authority, granted by the Elections Clause, to displace state authority to specify the federal Election Day. *Inter Tribal*, 570 U.S. at 14-15 ("[T]he States' role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that *it terminates according to federal law*." (internal quotation marks omitted) (emphasis added)). And where Congress has acted pursuant to the Elections Clause, courts "do not finely parse the federal statute for gaps or silences into which state regulation might fit." *Fish v. Kobach*, 840 F.3d 710, 729 (10th Cir. 2016).

Congress enacted the precursors to Sections 7 and 8 at the same time, establishing a coherent statutory scheme to govern the timing of House elections. *See* Act Feb. 2, 1872, c. 11, §§ 3-4, 17 Stat. 28. That federal scheme would unravel if states could seize on the "failure to elect" provision in Section 8 to set their election days based on state-law policies. A statutory exemption from Section 7 should not be interpreted "in a manner that could swallow the . . . rule." *Bloate v. United States*, 559 U.S. 196, 210 (2010); *see Senne v. Village of Palatine*, 685 F.3d 597, 606 (7th Cir. 2012) ("[E]xceptions should not be read to eviscerate the rule they modify[.]").

2. Kistner seeks support from *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga. 1993), *aff'd*, 992 F.2d 1154 (11th Cir. 1993), but that case does not assist him. *Miller* held that a "failure to elect" can result from a state law requiring a

majority vote to prevail; in that circumstance, the court held, a state can hold a run-off election after the federal Election Day. Kistner argues that Minnesota law similarly reflects a policy that "an election compromised by the untimely and unforeseen death of a major party candidate . . . is not sufficiently indicative of popular will to bind Minnesota." Appellant's Br. at 13. That argument fails for at least two reasons.

First, *Miller* involved a statutory scheme in which the election was actually held on the date set by Section 7, but because the state required a majority vote to elect a candidate and no candidate achieved that mark, a run-off election ensued. That was the precise circumstance contemplated as a "failure to elect" when Congress enacted the predecessor to Section 8. *See Foster v. Love*, 522 U.S. at 71 n.3 (citing *Miller*). *Miller* makes clear that Section 8 cannot be read to permit a state to "premeditate a complete avoidance of section 7's dictates merely by passing a law pursuant to which a general election must be held on a different day, thus resulting in a 'failure to elect' on the federally-mandated day." *Id.* at 830. Yet Kistner asks this Court to hold just that: that Minnesota's statute can, by postponing the federally set election, create the very failure to elect that then justifies its postponement.

Second, Kistner errs in equating the policy interest reflected in a state run-off provision with the policy interest reflected in Minnesota law. As noted, Congress deliberately accommodated state run-off laws when it enacted Section 8. *See* Section B.1, *supra*. But Section 8 by its terms refutes the idea that a state could rely on contestant's death to deviate from the federal Election Day.

That Section authorizes a state to hold an election to fill a vacancy caused by the "death . . . of a person elected." 2 U.S.C. § 8(a). Congress could have provided the same latitude to states for a vacancy caused by the death of a *candidate*. But it chose not to do so. The fact that Congress explicitly gave the states authority to provide for a new election in the event of an elected person's death, but did not make the same judgment about a candidate's death, precludes Minnesota from deciding to suspend a federal election upon a candidate's death.

"A standard axiom of statutory interpretation is *expressio unius est exclusio alterius*, or the expression of one thing excludes others not expressed." *Watt v. GMAC Mortgage Corp.*, 457 F.3d 781, 783 (8th Cir. 2006). Here, Kistner's argument that "failure to elect" should encompass the pre-election death of a candidate is irreconcilable with "the general principle that Congress' use of explicit language in one provision cautions against inferring the same limitation in another provision." *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 442 (2016)) (internal quotation marks omitted).

3. Kistner's reliance on *Busbee*, Appellant's Br. at 17-18, is similarly unavailing. In addition to its principal holding, discussed above, that the Voting Rights Act took precedence over the earlier-enacted Section 7, 549 F. Supp. at 523-24, *Busbee* suggested that Section 7 could be aligned with Section 8 "where exigent circumstances arising prior to or on the date established by section 7 preclude holding an election on that date." *Id.* at 525; *see also id.* at 526 ("Congress did not expressly anticipate that a

natural disaster might necessitate a postponement, yet no one would seriously contend that section 7 would prevent a state from rescheduling its congressional elections under such circumstances.").

The exigency contemplated in *Busbee* is far afield from Minnesota's candidate-death law. In contrast to providing a remedy in the event that a natural disaster *prevents* an election, Minnesota enacted a law that seeks to *cancel* an election, usurping Congress's Election Day mandate.

Nothing made it impossible to hold the election for the Second District House seat on Election Day. The fact that it was held reveals the opposite. The death of the Legal Marijuana Now Party ("LMNP") candidate, unlike a natural disaster, did not "preclude" Minnesota from holding an election on November 3. *Id.* at 525. If Minnesota were to determine that a deceased candidate received the most votes, *then* Minnesota could have prescribed a remedial procedure pursuant to Section 8. In fact, in other states this has occurred several times in recent decades, which demonstrates that states can and do adhere to the national Election Day despite a candidate's death.[4] And other states have created detailed schemes for dealing with candidate

[4] *See* Philip Bump, *Five people have won election to Congress, despite being dead*, Wash. Post (Oct. 1, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/10/01/five-people-have-won-election-to-congress-despite-being-dead/.

deaths that do not involve postponing the election.[5] Minnesota cannot claim to have faced the type of exigency discussed in *Busbee*.

In sum, Minnesota Statute § 204B.13 is preempted by federal law, and its application must be enjoined. To hold otherwise would contravene Congress's provision for a uniform Election Day throughout the nation.

C. The Court Previously Rejected The Claim That An Exigency Justifying Postponement Of An Election Occurred Here.

At the stay stage, this Court rejected Kistner's invitation to look solely to state law to create an "exigency" that can produce a "failure to elect," and his claim fares no better now.

In rejecting Kistner's request for a stay, this Court did not decide whether an election could be postponed based exclusively on a state policy choice. But it noted that if a state could do so, it would only be where the "reasons for cancellation . . . [were] compelling or akin to 'exigent circumstances.'" Opinion at 9, No. 20-3126 (8th Cir. Oct. 23, 2020). On the facts of this case, this Court found that such reasons were lacking. *Id.*

To arrive at this conclusion, this Court reviewed, in close detail, the electoral history of the LMNP—the party that had nominated the deceased candidate—and found that it had a limited record of electoral success in Minnesota politics and

[5] *See, e.g.*, Mo. Rev. Stat. § 115.379; N.Y. Election Law § 6-150; Tex. Elec. Code Ann. §§ 145.005, 145.039; Wisc. Stat. § 8.35(e)(3).

reasoned that the death of a candidate for a party with such a record would not constitute the sort of exigency that would justify postponing the election. *Id.* at 9-10 ("If the death of a candidate ever would justify cancellation of an election and declaration of a 'failure to elect' under §8(a), then we think it likely that the candidate must represent a party with a greater history of electoral strength than the [LMNP] in Minnesota."). It then held that whatever latitude a state might have to depart from Congress's uniform Election Day because of unanticipated events, that latitude could not allow a state to define a "failure to elect" under the circumstances presented here.

This Court should hold that the federal mandate in Section 7, which requires every state to hold elections for the House on the same day, preempts Minnesota Statute § 204B.13. If any further analysis of state law were necessary—and it is not—this Court's observation about the weak state interests supporting the application of Minnesota law on the facts here reinforces the conclusion that Kistner's claim fails.

CONCLUSION

For the foregoing reasons, the district court's order should be affirmed.

Dated: November 6, 2020

Respectfully submitted,

/s/ Douglas N. Letter

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5). This brief contains 4714 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2009 in 14-point Garamond font.

Dated: November 6, 2020

/s/ Douglas N. Letter
Counsel for Amicus Curiae

CIRCUIT RULE 28A(H) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 28A(h), a version of the brief in non-scanned PDF format. I hereby certify that the file has been scanned for viruses and that it is virus-free.

Dated: November 6, 2020

/s/ Douglas N. Letter
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 6, 2020, an electronic copy of the *Amicus Curiae* Brief of the United States House of Representatives was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: November 6, 2020

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