No. 20-3126

# In the 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*
*Civil No. 0:20-cv-02066-WMW-TNL*

## BRIEF OF PLAINTIFFS-APPELLEES ANGELA CRAIG AND JENNY WINSLOW DAVIES


Charles N. Nauen (#121216)
David J. Zoll (#0330681)
Rachel A. Kitze Collins (#0396555)
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue S, Suite 2200
Minneapolis, MN 55401
(612) 339-6900
cnnauen@locklaw.com
djzoll@locklaw.com
rakitzecollins@locklaw.com

Marc E. Elias
Joel J. Ramirez
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 800
Washington, DC 20005-3960
(202 ) 654-6200
MElias@perkinscoie.com
JoelRamirez@perkinscoie.com

Kevin J. Hamilton
Holly M. Simpkins
Laura C. Hill
Nitika Arora
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-8000
KHamilton@perkinscoie.com
HSimpkins@perkinscoie.com
LHill@perkinscoie.com
NArora@perkinscoie.com

*Counsel for Plaintiffs-Appellees*

## SUMMARY OF THE CASE

On September 21, the Legal Marijuana Now Party ("LMNP") candidate in the race to represent Minnesota's 2nd Congressional District ("MN-2") passed away. After his death became public on September 24, Secretary of State Steve Simon announced that, pursuant to Minnesota Statute § 204B.13 (the "Minnesota Statute" or "Statute"), the representative for MN-2 would now be selected, not by the voters in the November general election, but in a special election to be held in February 2021. Appellees Angela Craig, who was running for re-election in MN-2, and Jenny Winslow Davies, a voter in MN-2, immediately sought and obtained an injunction from the District Court enjoining the enforcement of the Statute in the race on the grounds that it conflicts with and is preempted by federal law. This Court denied Appellant Tyler Kistner's request for a stay, concluding he was unlikely to succeed on the merits. The Supreme Court then summarily denied Kistner's emergency stay application without even seeking a response.

The election has since occurred, the votes have been counted, and voters have re-elected Representative Craig. The District Court's injunction should not be disturbed, the more than 420,000 votes cast should be given effect, and the residents in MN-2 should be represented when Congress is seated in January.

Appellees do not believe oral argument is necessary given the Court's familiarity with the issues.

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## JURISDICTIONAL STATEMENT

This is an appeal from the District Court's grant of a preliminary injunction on October 9, 2020. The District Court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

## STATEMENT OF THE ISSUES

In enjoining enforcement of Minnesota Statute § 204B.13 (the "Minnesota Statute" or "Statute") and restoring the status quo in the then already ongoing November election, the District Court concluded that the Statute is likely preempted by federal law and that the equities—irreparable harm, balance of harms, and the public interest—all tipped strongly in the Appellees' favor. This Court and the United States Supreme Court declined to stay the District Court's injunction. The questions now presented are:

1. Did the District Court err in concluding that Appellees are likely to succeed on their claim that Minnesota Statute § 204B.13 is preempted by federal law, as applied to the congressional race at issue in this case, because it is contrary to the plain text of 2 U.S.C. § 7 and cannot fit into the two limited exceptions provided by Congress in 2 U.S.C. § 8?

Apposite Authority: *Foster v. Love*, 522 U.S. 67 (1997); *Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016); *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1 (2013); *Public Citizen Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga. 1993), *aff'd*, 992 F.2d 1548 (11th Cir. 1993); 2 U.S.C. § 7; 2 U.S.C. § 8(a); U.S. Const. art. I, § 4, cl. 1.

2. Did the District Court abuse its discretion in determining that the equities tipped in Appellees' favor because, in the absence of injunctive relief, not

one of the more than 420,000 votes cast in the November general election would be counted, Appellee Davies and the citizens of MN-2 would be unrepresented in the U.S. House of Representatives for more than a month, voters would be burdened by having to turn out twice to elect their federal representatives, and Appellee Craig would need to engage in expensive, time-consuming, and resource-intensive campaigning for several additional months?

Apposite Authority: *Reynolds v. Sims*, 377 U.S. 533 (1964); *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

3. Although the District Court did not address Appellees' second claim for relief, that claim presents an additional ground for this Court to affirm the District Court's grant of a preliminary injunction. Does Minnesota Statute § 204B.13, by cancelling every vote cast in the November general election, violate the First and Fourteenth Amendments to the United States Constitution by unconstitutionally burdening the fundamental right to vote?

Apposite Authority: *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964).

## INTRODUCTION

Kistner, the Republican candidate in the race to represent MN-2, asked three separate courts (the United States District Court for the District of Minnesota, this Court, and the United States Supreme Court) to prevent the November election for the House seat in MN-2 from proceeding. He was unsuccessful at every turn. Now that voters in MN-2 have cast their votes and re-elected Appellee Craig, finding in favor of Kistner in this appeal would have the effect of throwing out more than 420,000 votes, requiring those voters to vote again in February 2021 during a pandemic, and leave the residents of MN-2 without representation in Congress for more than a month. Enough is enough. The District Court, this Court, and the U.S. Supreme Court were all correct in allowing the election to proceed—as it has for well over a century—in November in accordance with federal law, and the District Court's order granting the preliminary injunction should be affirmed.



The legal issues are straightforward. For nearly 150 years, federal law has required that every state select their U.S. Representatives in a uniform federal election in November of every even-numbered year. *See* 2 U.S.C. § 7. Congress has provided only two very limited exceptions, neither of which apply here. The Minnesota Statute purports to create a third, requiring that an election be postponed if a "major" political party candidate dies within 79 days before the general election. Minn. Stat. § 204B.13. Under that scenario, instead of proceeding with the general

election for the affected office as scheduled, a special election is held on the second Tuesday in February of the following year. *Id.*

As applied here—to an election for a federal office subject to the federal uniform elections statutes—the Minnesota Statute squarely conflicts with federal law and is thus preempted. It was triggered in this election cycle when the LMNP candidate for MN-2 unexpectedly passed away in September. At the time, early voting was already underway. As soon as news of the candidate's death became public and the Secretary announced his intention to postpone the election, Appellees moved expeditiously for an order allowing the election to proceed as scheduled. All candidates remained on the ballot and, as urged by the Secretary, voters continued to vote. There is no competent evidence in the record to the contrary. The election did not stop and start. Kistner's false narrative should be rejected.



The District Court was correct to conclude that Appellees were likely to succeed on their preemption claim, that absent an injunction they would suffer irreparable harm, and that the equities and public interest tipped in Appellees' favor, thus entitling them to a preliminary injunction enjoining enforcement of the Minnesota Statute as applied to the race for MN-2 in this election. The District Court's order should be affirmed.

## STATEMENT OF THE CASE

It has long been understood that regulations pertaining to federal elections that are "made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Foster v. Love*, 522 U.S. 67, 69 (1997) (quotation marks omitted). Federal law sets a uniform date for the election of U.S. Representatives to be held in November of every even numbered year. 2 U.S.C. § 7. Congress has provided only two very limited exceptions: a state may choose to elect its U.S. Representatives on a different date only where there is a vacancy in office "caused by [1] a failure to elect at the time prescribed by law, or [2] by the death, resignation, or incapacity of a person elected." 2 U.S.C. § 8(a). The parties agree that the second exception regarding death of a person elected is not at issue here.

Accordingly, the District Court and a panel of this Court, in denying Kistner's motion for stay, focused on whether the circumstances at issue in this case create a legitimate "failure to elect at the time prescribed by law" under § 8(a) that allows Minnesota to decline to count the votes cast in the November election and move the election for MN-2 to February 2021. Both the District Court and this Court concluded that the Minnesota Statute likely conflicts with federal law. Nothing in Kistner's brief, which rehashes arguments that this Court previously rejected, provides reason to come to a different conclusion.

Appellees are U.S. Representative Angela Craig, who was running for reelection in MN-2, and Jenny Winslow Davies, a voter in the District. On September 21, 2020, the LMNP candidate for MN-2, Adam Weeks, unexpectedly passed away. News of his death did not become public until three days later on Thursday, September 24. In an announcement that day, the Secretary stated that, in accordance with the Minnesota Statute, a special election would be held for the MN-2 seat in February 2021. In that same announcement, however, the Secretary was clear that the race would remain on the November ballot and that "[e]ligible voters in the Second Congressional district *should continue to vote*."[1]



Appellees filed suit two business days later and the next morning sought a preliminary injunction prohibiting the Secretary from enforcing the Minnesota Statute, as applied to this federal congressional race in this election, on the grounds that doing so would violate federal law establishing a uniform time for federal elections. *See* 2 U.S.C. § 7; 2 U.S.C. § 8. Kistner sought and was granted leave to intervene in the case. Appellant's Add. at 8.

Both Kistner and the Secretary filed responses to Appellees' motion for a preliminary injunction, and the District Court heard argument on October 7. Two days later, on October 9, the District Court issued a 24-page order, in which it

[1] *See* Press Release, Office of the Minnesota Secretary of State (Sept. 24, 2020), available at https://www.sos.state.mn.us/about-the-office/news-room/secretary-simon-releases-statement-on-death-of-cd2-candidate/ (emphasis added).

carefully considered the arguments raised by the parties and concluded that an injunction was warranted. Appellant's Add. at 8–24.

The District Court determined that every factor for injunctive relief weighed in Appellees' favor. Specifically, the court concluded that because the Minnesota Statute plainly conflicted with the text of 2 U.S.C. § 7 and did not fit within the exceptions set forth in 2 U.S.C. § 8 (neither the plain text nor the case law interpreting it), it was preempted. *See id.* at 8–15. The District Court also determined that the equities tipped strongly in Appellees' favor because in the absence of an injunction, "*not a single vote* cast in the November general election" for that race would be counted; the citizens of MN-2, including Appellee Davies, would be unrepresented in the U.S. House of Representatives for more than a month; and Appellee Craig would need to engage in expensive, time-consuming, and resource-intensive campaigning for several additional months. *See id.* at 16–21 (emphasis in original). Thus, because the Minnesota Statute was plainly preempted by federal law, and "[g]iven the overwhelming importance for Minnesota's Second Congressional District voters to be able to vote in the November general election and to have uninterrupted representation in the United States Congress," the District Court granted Appellees' request for injunctive relief. *Id.* at 21.

Later that day, the Secretary announced that a court had determined the Minnesota Statute was preempted by federal law as applied to the MN-2 race in the

November 2020 election. The Secretary was clear: "Voters should continue to vote this race on their ballots, and pursuant to the district court ruling, those votes will be counted."[2]

After entry of the injunction, Kistner—but not the state—filed a notice of appeal and sought a stay of the injunction pending appeal. Appellant's Add. at 8. After the District Court denied that motion, *id.* at 9, Kistner sought a stay in this Court. *Id.* at 25–35. On appeal, the Secretary opposed Kistner's stay motion on the grounds that, if a stay were granted, it would "threaten[] to wreak havoc on the administration of Minnesota's 2020 general election." Secretary's Opp. to 8th Cir. Mot. Stay at 2. The U.S. House of Representatives also filed an amicus brief in opposition to Kistner's motion, explaining how the federal statutes at issue protect Congress's "substantial institutional interests in having a full slate of Representatives and Senators when their terms start at the beginning of January." Amicus Br. at 6.



[2] *See* Press Release, Office of the Minnesota Secretary of State (Oct. 9, 2020), available at https://www.sos.state.mn.us/about-the-office/news-room/secretary-simon-statement-on-ruling-in-second-congressional-district-case/ (hereinafter, "Oct. 9 Press Release"). There is no competent evidence in the record that any voter disregarded the Secretary's direction on September 24 to continue voting in the MN-2 race (nor is there any dispute that the race remained on the ticket throughout the election). And as this Court noted when it denied Kistner's motion to stay the preliminary injunction order, to the extent there were any voters who undervoted due to confusion about whether their votes would count, voters retained the right under Minnesota law through October 20 to cancel their ballots and request a new absentee ballot or vote in person. *See* Appellant's Add. at 35.

In a detailed order issued on October 23, this Court unanimously denied Kistner's motion for a stay. Appellant's Add. at 35. In so ruling, the panel affirmatively determined that Kistner was not likely to succeed on the merits of his appeal. It concluded, "[i]f federal law permits a State to cancel an election for Representative based on events beyond the State's control, then we believe the reasons for cancellation would have to be compelling or akin to 'exigent circumstances,'" as the caselaw previously applying the federal elections statutes suggests. *Id.* at 33. Those circumstances were not met here. *Id*. at 33–35. The Court further held that Kistner could not show irreparable harm absent a stay because, due to Appellees' quickly filed lawsuit, "an informed candidate or voter would have been aware then that the status of the election was not resolved." *Id.* at 35. The Court noted that the same day the District Court entered the injunction, the Secretary encouraged voters to continue to vote in the MN-2 race. *Id.* And it found significant the fact that for any voter who forewent a vote due to the Secretary's initial announcement, Minnesota law allowed that voter to cancel his or her ballot until October 20 and request a new absentee ballot or vote in person. *Id.*; *see also supra* at n.2.

Kistner then filed an emergency application for a stay with the United States Supreme Court. The application was docketed on October 26. The following day,

without calling for a response, Justice Gorsuch denied it. *See Kistner v. Craig*, No. 20A73 (U.S. Oct. 27, 2020).

On October 26, this Court set an expedited briefing schedule on the merits of Kistner's appeal of the District Court's injunction. Pursuant to that order, Kistner submitted his opening brief on November 2, and Appellees now submit their response.

## SUMMARY OF ARGUMENT

The District Court's preliminary injunction order should be affirmed. All of the relevant factors favored entering relief. As this Court, too, found, Appellees are likely to succeed on the merits of their claim that the Minnesota Statute is preempted as applied in the circumstances of this case. If an injunction was not issued (or if it were overturned now) Appellees would suffer severe, irreparable harm. Finally, the equities and public interest both strongly favor the issuance of the injunction. The District Court's entry of the order was not an abuse of discretion.

First, Appellees are likely to succeed on the merits because federal law plainly preempts the Minnesota Statute. Minnesota may not manufacture a failure to elect, and a vacancy in *nomination* does not permit Minnesota to move the date for a federal election. Alternatively, Appellees are likely to succeed on their claim that the Minnesota Statute unconstitutionally burdens the fundamental right to vote under the circumstances at issue here because, if enforced, every single one of the more

than 420,000 votes cast in the MN-2 race in the November election would be nullified.

Second, the District Court did not abuse its discretion when it found that the equities tipped in Appellees' favor. Kistner fails to show that the District Court abused its discretion in its analysis of the equitable factors. To the contrary, the District Court reviewed the evidence presented, accounted for all relevant factors, and properly found that the equities favored Appellees. The District Court's decision was more than just "within the range of choice available to the district court"—it was correct. *Jet Midwest Int'l Co., Ltd v. Jet Midwest Grp., LLC*, 953 F.3d 1041, 1044 (8th Cir. 2020). This Court, however, need only determine that the District Court's analysis did "not constitute a clear error of judgment" to affirm. *Id.* It should do so.



## STANDARD OF REVIEW

In reviewing the grant of a preliminary injunction, this Court reviews the district court's fact findings for clear error, its legal conclusions de novo, and its ultimate decision to grant the injunction for abuse of discretion. *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750, 754 (8th Cir. 2018) (quotation omitted). The scope of this review is "very limited." *Am. Home Inv. Co. v. Bedel*, 525 F.2d 1022, 1023 (8th Cir. 1975); *Rittmiller v. Blex Oil, Inc.*, 624 F.2d 857, 859 (8th Cir. 1980). "It has been repeatedly ruled that [an order

granting a preliminary injunction] may be reversed only if the trial court abused its discretion or based its decision on an erroneous legal premise." *Rittmiller*, 624 F.2d at 859 (citation omitted).

In reviewing for abuse of discretion, this Court "accord[s] deference" to the district court "because of its greater familiarity with the facts and the parties. [The Court] generally will not disturb the district court's decision if it remains within the range of choice available to the district court, accounts for all relevant factors, does not rely on any irrelevant factors, and does not constitute a clear error of judgment." *Jet Midwest Int'l Co.*, 953 F.3d at 1044 (quotation omitted). Accordingly, "[a] reversal is only warranted where the moving party has met the heavy burden resting upon him to show an abuse of discretion." *Am. Home Inv. Co.*, 525 F.2d at 1023. Kistner has failed to do so.



## ARGUMENT

### I. The District Court was correct in concluding that Appellees are likely to succeed on the merits.

#### A. Federal law preempts the Minnesota Statute.

Federal law establishes a uniform time at which all states must hold elections for the U.S. House of Representatives. These elections are held uniformly across the country as part of the November general election in every even numbered year. 2 U.S.C. § 7. Section 7 was passed pursuant to Congress's power under the Elections Clause and thus preempts conflicting state laws that would establish a different time

for electing U.S. Representatives. *See Foster*, 522 U.S. at 69 (citing U.S. Const. art. I, § 4, cl. 1); *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 14 (2013) ("[T]he power the Elections Clause confers [to Congress] is none other than the power to pre-empt."). It is well settled that when a state law conflicts with § 7, it is preempted. *See Foster*, 522 U.S. at 69.

The Minnesota Statute clearly conflicts with § 7's mandate by requiring that (1) the election in MN-2 not be held in November as required, but instead be moved to February of the following year; (2) Minnesota discard all votes cast for candidates in the November general election in that race; and (3) voters who want to have a say in selecting all of their federal representatives vote twice, in November and again in February. In the words of the Secretary, the effect of the Minnesota Statute on the MN-2 race would be that "there is no election on election day." Appellees' Add. at 5.



Kistner does not contest that state statutes that conflict with the federal uniform elections statutes are preempted. Nor does he contest that the Minnesota Statute violates the plain text of § 7. Rather, he admits as much by arguing that the Minnesota Statute fits within an *exception* to that language within the scope of 2 U.S.C. § 8(a). But the plain text of § 8, too, forecloses Kistner's argument.

Section 8(a) permits states to set a date outside the time mandated by § 7 to fill vacancies in only two circumstances: when a vacancy is "caused by [1] a failure

to elect at the time prescribed by law, or [2] by the death, resignation, or incapacity of a person elected." 2 U.S.C. § 8. As both the District Court recognized and Kistner concedes, only the first exception is relevant here. Appellant's Add. at 10–12; Appellant Br. at 12; Appellees' Add. at 1:4–13. MN-2 is currently represented by Appellee Craig; thus, there is no vacancy caused by "the death, resignation, or incapacity of a person elected."

Accordingly, the only question before the District Court was whether there was a vacancy "caused by a failure to elect at the time prescribed by law," within the meaning of § 8(a). Kistner asserts that there has been a "failure to elect" by operation of the Minnesota Statute because of the death of a major party candidate in the MN-2 race. *See* Appellant Br. at 12. Notably missing from the statutory text of § 8, however, is any mention of the death of a "nominee," or "candidate." Kistner strains mightily to read these terms into the statute, arguing they fit within the statutory text because the statute merely creates a "causation" requirement that the Minnesota Statute satisfies by making "a vacancy as of January 3, 2021 [] a certainty." Appellant Br. at 16.[3]



[3] Kistner criticizes the District Court, baselessly, for failing to "analyze the meaning of the term 'vacancy' in any depth." Appellant Br. at 17. He completely ignores the District Court's detailed textual analysis of § 8 and its dissection of the cases on which Kistner relied (and on which he continues to rely). *See* Appellant's Add. at 10–15.

As an initial matter, January 3, 2021, is not the relevant date to determine whether a vacancy arises. The statute applies to a failure to elect "at the time prescribed by law," which is November 3, 2020. The District Court and this Court have recognized November 3 is the correct date, and Kistner conceded this point at argument on the motion. *See* Appellant's Add. at 10; *id.* at 26; Appellees' Add. at 2:15–20.

More importantly, courts have consistently rejected creative interpretations like Kistner's and required that state and federal elections laws be read plainly. *See Foster*, 522 U.S. at 72–73 (rejecting Louisiana's interpretation of law contrary to 2 U.S.C. § 7 as "merely wordplay" and requiring it to be read "straightforwardly"); *Fish v. Kobach*, 840 F.3d 710, 728 (10th Cir. 2016) ("*Foster* establishes that the reading to be applied to the federal and state statutes at issue is a plain one."); *Gonzalez v. Arizona*, 677 F.3d 383, 398 (9th Cir. 2012), *aff'd sub nom. Inter Tribal Council of Ariz.*, 570 U.S. 1 (2013) (rejecting Arizona's "creative interpretation" of state elections statute and concluding the court would "not strain to reconcile a state's federal election regulations with those of Congress, but" instead would "consider whether the state and federal procedures operate harmoniously when read together naturally").

Plainly read, § 8 sets forth two limited circumstances in which a state may alter the time of a federal election to fill a vacancy. A vacancy *in nomination* is not

one of them. If anything, the language of the statute suggests the opposite: it directly addresses the death "of a person *elected*." 2 U.S.C. § 8(a) (emphasis added). Had Congress intended to authorize states to delay congressional elections upon the death of a *candidate*, "it would have so indicated." *Fish*, 840 F.3d at 729.

### B. Minnesota may not manufacture a failure to elect.

As this Court has recognized, "[t]here are strong federal policy reasons for" the uniformity of federal elections, including the need "to ensure that some States who vote earlier cannot influence voters in other States, and to avoid a burden on citizens who would be forced to turn out on two different election days." Appellant's Add. at 32–33 (citing *Foster*, 522 U.S. at 73–74). Because Congress has defined the limited circumstances in which states may deviate from this uniformity, it has necessarily preempted "state legislative choices," like Minnesota's, to the contrary. *Foster*, 522 U.S. at 69; *Inter Tribal Council of Ariz.*, 570 U.S. at 14 ("Elections Clause legislation, 'so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.'" (quoting *Ex parte Siebold*, 100 U.S. 371, 384 (1880))).



#### 1. It is not appropriate to look to state law to define when a vacancy arises.

Kistner repeatedly asserts that state law dictates whether a vacancy has arisen, *see* Appellant Br. at 12, 14, 22, but notably cites no authority for this novel proposition. And for good reason. Courts routinely reject creative interpretations

pushed by litigants attempting to avoid the conclusion that a state law that conflicts with federal elections law is unenforceable. They do so in accordance with the Supreme Court's decision in *Foster*, where it was clear, as it is here, that "the fact that the federal and state [elections] regulations both spoke to the same issue and differed in their requirements was sufficient to preempt the state regulation." *Fish*, 840 F.3d at 728–29 (discussing *Foster*, 522 U.S. at 69–73); *see Foster*, 522 U.S. at 73 (concluding Louisiana law "straightforwardly" "allow[ed] for the election of a candidate" on a date different from the federally prescribed date and was thus preempted).[4] These cases caution that courts should decline to "finely pars[e]" federal elections statutes "for gaps or silences into which state regulation might fit." *Fish*, 840 F.3d at 729. To do otherwise would allow states to fundamentally alter or modify the structure and effect of federal elections statutes, even where there is no indication whatsoever that Congress intended they be able to do so. *Id.*; *see also*



[4] In *Foster*, the Court addressed a state law that purported to change the date for certain federal elections. Under then-existing Louisiana law, in October of a federal election year, the State would hold an "open primary" for congressional offices. *Id.* at 70. If no candidate received a majority of the votes, the State would hold "a run-off (dubbed a 'general election') between the top two vote-getters the following month on federal election day." *Id.* (citation omitted). However, if a candidate received a majority of the votes in their race, that candidate was "elected," and no further action took place. *Id.* Louisiana argued that its "open primary system concern[ed] only the 'manner' of electing federal officials, not the 'time' at which the elections w[ould] take place." *Id.* at 72–73. A unanimous Supreme Court rejected this "imaginative" interpretation as "merely wordplay." *Id.* Because the Louisiana law "allow[ed] for the election of a candidate" on a date different from the federal election day, it conflicted with § 7 and was preempted. *Id.* at 73–74.

*Gonzalez*, 677 F.3d at 398 (rejecting Arizona's "creative interpretation of the state and federal statutes in an effort to avoid a direct conflict").

Yet this is precisely what Kistner urges this Court to do. He argues that the Court should look to Minnesota law—and particularly the Minnesota Statute—to define the term "vacancy." But doing so would create a brand-new, state-created exception to the uniform federal elections statutes, where the time of federal elections may be altered in the event of a vacancy *in nomination*. And it would ensure that Minnesota citizens of MN-2 would be unrepresented in Congress until a special election is held in February. This is the very danger contemplated by the Elections Clause of the Constitution, Art. I, § 4, cl. 1. Writing for the Court in *Arizona v. Inter Tribal Council of Arizona*, Justice Scalia observed that the "grant of congressional power" to preempt contrary state elections laws "was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." 570 U.S. at 8. Thus, Minnesota's choice not to permit the election of a representative to a U.S. Congressional seat at the time prescribed by federal law is precisely the sort of "state legislative choice[]" that must yield to the requirements of § 7. *Foster*, 522 U.S. at 69–70.

### 2. *Public Citizen* is distinguishable because an election occurred on election day in that case and the votes cast in that election were in fact counted and given effect.

Kistner relies heavily on *Public Citizen Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga. 1993), *aff'd*, 992 F.2d 1548 (11th Cir. 1993), a case involving Georgia's run-off law, but that case is not only distinguishable as this Court and the District Court recognized, it supports Appellees (not Kistner). In *Public Citizen*, the court concluded that a state cannot manufacture a "failure to elect" by enacting state laws creating additional exceptions to § 7 not provided for in § 8. *See id.* at 830. "Congress," the court noted, "could not have intended such emasculation of section 7 at a state's whim." *Id.*

Kistner fails to acknowledge this crucial observation. Instead, he argues that the Minnesota Statute is no different than the Georgia run-off statute because both reflect a state "policy choice" about when the results of an election are inconclusive. Appellant Br. at 13. But the critical distinction is that Georgia, in effectuating its policy choice, did not change the date of congressional elections. It held an election on election day—counting votes cast and giving them full effect. *See Pub. Citizen*, 813 F. Supp. at 830. Those ballots were what Georgia used to determine whether a candidate obtained a majority of the votes in order to avoid a run-off election. *Id.* In contrast, Minnesota not only changes the date of the election every time a "major political party" candidate dies within 79 days of the general election, it also refuses

to give effect to the votes cast for the impacted race in the November general election.

As the Eighth Circuit recognized, *Public Citizen* "did not specifically characterize the run-off election as one to 'fill a vacancy' within the meaning of § 8(a), but approved Georgia's definition of the time for holding the election as 'continuing' through the run-off election in late November." Appellant's Add. at 31 (quoting *Pub. Citizen*, 813 F. Supp. at 830). As the *Public Citizen* court observed, "[a]lthough the [Georgia] run-off takes place on a separate day, it does not negate section 7's effect. *The run-off does not reschedule the earlier general election, nor does it negate that election's outcome*." *Id.* (emphasis added). In short, the Georgia statute did not raise a preemption problem because it did not conflict with § 7.



In sharp contrast, the Minnesota Statute ensures that no election occurs on election day. Minnesota is not, however, empowered to make a "policy choice" to cancel the November election. *See Inter Tribal Council of Ariz.*, 570 U.S. at 8; *Foster*, 522 U.S. at 69. This "policy choice" results in significant consequences—discarding votes cast in the MN-2 race, stripping citizens in that District of representation in the U.S. House of Representatives until February 2021, and making voters vote in an additional election. *Cf. Foster*, 522 U.S. at 73–74 (citing Cong. Globe, 42d Cong., 2d Sess., 141 (1871) (remarks of Rep. Butler)); *see also* Appellant's Add. at 32–33. That, too, is not a "policy choice" the state gets to make.

In fact, these consequences encompass the very dangers that Congress adopted § 7 to avoid. *See id.* Such "state legislative choices" must yield to the requirements of § 7 setting a uniform date for federal elections. *Foster*, 522 U.S. at 69–70. Accordingly, the Minnesota Statute is preempted.

### C. The November election proceeded as scheduled, and nothing precluded Minnesota from holding an election on November 3.

Finally, Kistner attempts to save the Minnesota Statute from preemption by relying on a decision from the District Court for the District of Columbia in *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983), for the proposition that a vacancy in nomination permits Minnesota to move the federal election date for MN-2. Kistner's reliance on *Busbee* is misplaced.



First and foremost, *Busbee* involved the interplay of two federal statutes, not whether a state law is preempted by a federal statute. And, it addresses the scope of authority of a federal district court to postpone a federal election due to violations of a federal statute, not the scope of *state authority* to do so. In *Busbee*, the district court invalidated two Georgia congressional districts under § 5 of the Voting Rights Act of 1965 ("VRA"). 549 F. Supp. at 517–18. With the election nearing, the court postponed the general election to later in November for those districts. *Id.* at 522. Among its reasons was that § 5 of the VRA was a more recent Act of Congress than 2 U.S.C. § 7, and Congress, of course, has the authority to modify its own laws. *Id.* at 523–25. The court also addressed whether it had the power to schedule a

congressional election for a date other than the first Tuesday after the first Monday in November to remedy the discriminatory electoral procedures held unlawful under the VRA. *See id.* at 519–20. It concluded it did. The court did *not*, however, address the scope of Georgia's authority to move the date of a congressional election. Indeed, the State of Georgia argued that "Section 7 . . . absolutely requires that the general election be held on November 2"—the federally prescribed election date in that election cycle. *Id.* at 522. *Busbee* is the *only* case in which a congressional general election has been postponed. And it is plainly distinguishable on its facts alone.

Undeterred, Kistner relies on *Busbee*'s single reference to a "natural disaster" to argue that a *future failure to elect* is sufficient to create a vacancy. *See* Appellant Br. at 18. *Busbee* construed 2 U.S.C. § 8 "to mean that where exigent circumstances arising prior to or on the date established by section 7 *preclude* holding an election on that date, a state may postpone the election until the earliest practicable date." 549 F. Supp. at 525 (emphasis added). A natural disaster, as understood by *Busbee*, must therefore preclude the state from holding an election on the federally prescribed date. *See id.* at 526. Kistner does not argue, however, that a vacancy in nomination for federal office precludes Minnesota from holding a general election. Indeed, the

election in MN-2 proceeded, as scheduled, quite unlike a "natural disaster" scenario.[5]

In any event, *Busbee*'s passing "natural disaster" reference is not binding on this Court. The district court's decision in *Busbee* was summarily affirmed, and as Kistner recognizes, summary affirmances constitute binding precedent only on matters "essential to sustain that judgment." Appellant Br. at 17 (citing *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979); *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1800 (2015)). As explained, the basis for *Busbee*'s holding was the primacy of the VRA. *See* 549 F. Supp. at 524 ("We hold, in short, that a court's duty under section 5 of the Voting Rights Act to disapprove changes in voting procedures that discriminate in purpose or effect is unaltered by any supposed conflict with 2 U.S.C. § 7."). *Busbee*'s single reference to a natural disaster was not essential to its judgment. *See id.* at 526. Moreover, it is



[5] Contrary to Kistner's assertion, by comparing a vacancy in nomination to a snowstorm, this Court did not "define [Minnesota's] major political parties for [it]" or "set state policy." Appellant Br. at 19–20. Rather, the Court merely applied *Busbee*'s natural-disaster analogy—upon which Kistner continues to heavily rely—to the circumstances of this case. *See* Appellant's Add. at 33 ("[W]e do not think Kistner is likely to succeed on the merits of his contention that § 204B.13, as applied to the current situation, may coexist with the federal election laws. . . . By analogy *to the natural disaster hypothetical favored by Kistner*, perhaps a major earthquake or hurricane in the congressional district on election day could justify a cancellation, but a snowstorm could not.") (emphasis added). Kistner's argument is a thinly veiled attempt to insinuate that the Court substituted its policy judgment for Minnesota's. The Court did no such thing.

dicta. *See Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").[6]

If anything, because the *Busbee* court was careful to note that § 8 "creates an exception to section 7's absolute rule in a limited class of cases," *id.* at 526, it undermines Kistner's argument because the death of one candidate assuredly did not preclude Minnesota from holding an election for MN-2 on November 3, or otherwise create a circumstance where the state was *unable* to elect at the time prescribed by law. Kistner resists this conclusion by mischaracterizing *Busbee* as announcing a highly generalized rule that a "future" vacancy, standing alone, fits within the bounds of § 8. Appellant Br. at 16–18. It did not. Rather, as the District Court



[6] To the extent Kistner takes issue with ambiguity in what constitutes "exigent circumstances" or a "natural disaster," Appellant Br. at 20, 22, his issue is not with the panel's decision but with the fact that neither "exigent circumstances" nor "natural disaster" are defined—or even *mentioned*—in the text of § 8. This ambiguity is yet another reason (1) the Court should reject Kistner's invitation to create extra-textual exceptions to § 7, and (2) it is not bound by *Busbee*'s passing reference to a natural disaster. It also reveals the hollowness of Kistner's assertion that the Court should look to state law to discern whether an "exigent circumstance" has arisen or whether a weather event, like a derecho, is an exigent circumstance. *Id.* at 22. He fails to identify *any* such state law. And it requires little effort to imagine a patchwork of various state laws that would undermine § 7's uniformity requirement. *See Fish*, 840 F.3d at 729 (concluding courts should "not finely parse the federal statute for gaps or silences into which state regulation might fit . . . because were states able to build on or fill gaps or silences in federal election statutes[,] . . . they could fundamentally alter the structure and effect of those statutes").

correctly observed, "*Busbee* involved a vacancy caused by an anticipated *and inevitable* 'failure to elect' a representative—a circumstance in which [§ 8] expressly applies." Appellant's Add. at 13 (quoting *Busbee*, 549 F. Supp. at 524–25) (emphasis added); *see Busbee*, 549 F. Supp. at 525 ("We construe [§ 8] to mean that where exigent circumstances arising prior to or on the date established by section 7 *preclude* holding an election on that date, a state may postpone the election until the earliest practicable date." (emphasis added)). Far from being inevitable, a vacancy caused by a "failure to elect" would only occur in this case if the LMNP candidate posthumously received a majority of the votes cast in the election, as the District Court recognized, and which did not happen. Appellant's Add. at 13, n.4.

For these reasons, the District Court correctly concluded that Appellees are likely to succeed on their claim that the Minnesota Statute is preempted by federal law.



### D. The Minnesota Statute is unconstitutional because it deprives voters of their right to vote.

Given the District Court's determination that Appellees were likely to succeed on their preemption claim, it declined to address their constitutional claim. Appellant's Add. at 15. For the reasons discussed above, this Court should affirm the District Court's injunction on the preemption claim and need not reach the constitutional claim. *See O'Brien v. U.S. Dep't of Health & Human Servs.*, 766 F.3d 862, 863 (8th Cir. 2014). But in the event the Court were to reach that claim,

Appellees are likely to succeed on the merits that the Minnesota Statute, as applied under the circumstances at issue here, impermissibly impinges on the right to vote.

The right to vote is guaranteed by the First and Fourteenth Amendments to the United States Constitution. *See Burdick v. Takushi*, 504 U.S. 428, 430 (1992). It is a "fundamental" constitutional right, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966), and "[o]ther rights, even the basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The right to vote includes the right to have one's vote counted. *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted.") (citation omitted).



To determine whether a state's elections practice imposes an undue burden on the right to vote, federal courts apply the *Anderson-Burdick* balancing test. If the burden is severe, the policy imposing that severe burden "must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). Even if the burden is less than severe, the court asks whether a state interest justifies the burden imposed, by "weigh[ing] 'the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the

extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id*. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

More than 420,000 Minnesotans voted in the MN-2 race in the November election (during a pandemic, no less). Because the Minnesota Statute requires the Secretary to nullify *every single one* of those votes, it inflicts a severe burden on the right to vote. *See Reynolds*, 377 U.S. at 554. Kistner offers no state interest that could come close to justifying this burden. Indeed, his assertion that the death of Adam Weeks renders the MN-2 race insufficiently indicative of the popular will, *see* Appellant Br. at 13, is belied by the fact that a large number of Minnesota voters (more than 420,000) cast ballots in that race, including more than 24,000 votes for Weeks.



Accordingly, Appellees are likely to succeed on the merits of their claim that the Minnesota Statute violates the First and Fourteenth Amendments by inflicting a severe, unjustifiable burden on the right to vote. This violation of the Constitution supplies an alternative, independent ground for affirming the District Court's grant of preliminary injunctive relief.

## II. The District Court did not abuse its discretion when it determined that the equities tipped in favor of Appellees.

The District Court reviewed the evidence presented, accounted for all relevant factors, and properly found that the equities favored Appellees. Appellant's Add. at 16–21. Though the court considered Kistner's arguments, it ultimately did not find

them convincing. *See id.* Its decision was certainly well "within the range of choice available to the district court" and did "not constitute a clear error of judgment." *Jet Midwest Int'l Co.*, 953 F.3d at 1044.

### A. The District Court properly determined that Appellees would suffer irreparable harm absent a preliminary injunction.

The first equitable factor requires a district court to evaluate whether the moving party would be irreparably injured absent a preliminary injunction. *Id.* "Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Rogers Grp., Inc. v. City of Fayetteville, Ark.*, 629 F.3d 784, 789 (8th Cir. 2010) (quoting *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009)). Notably, Secretary Simon—the original defendant in the case—conceded that Appellees would suffer irreparable harm if no injunction issued. Appellant's Add. at 17. Kistner's arguments to the contrary were, and are, unpersuasive.



#### 1. Irreparable Harm to Appellee Craig

The District Court found that, absent an injunction, Appellee Craig would "be forced to conserve campaign resources in anticipation of a potential special election in February, which will require candidates to campaign—and expend campaign resources—for several additional months." Appellant's Add. at 17. It determined "that campaigning is an expensive, time-consuming and resource-intensive endeavor," creating burdens that "are enhanced by the ongoing COVID-19

pandemic," and concluded that the harms Appellee Craig would suffer "cannot be remedied by an award of damages in the future" and are thus irreparable. *Id.*; *see also Rogers Grp.*, 629 F.3d at 789.

Kistner quibbles with the facts found by the District Court but fails to show or even suggest that the District Court abused its discretion. *Cf. Jet Midwest Int'l Co.*, 953 F.3d at 1044. First, Kistner argues that Appellee Craig will not be irreparably injured because money is "fungible" and she can spend it at any time, regardless of when the election occurs. Appellant Br. at 29. But he ignores the District Court's finding that an unjustified delay in the election would force Appellee Craig to spend three additional months campaigning, which is a significant burden, particularly during the COVID-19 pandemic. Appellant's Add. at 17.[7] He further ignores that, absent an injunction, all lawful, eligible voters who cast ballots in the November election will have those ballots summarily rejected, and all MN-2 residents, including Representative Craig, would be unrepresented for nearly six weeks in the new Congress. These harms are plainly irreparable and severe.[8]



[7] Kistner appears to concede that Appellee Craig *will* be injured absent an injunction, but then argues that her injuries will be "comparatively insubstantial." Appellant Br. at 30. If Kistner is weighing harms, he is doing so in the wrong part of the analysis. It is in the second equitable factor—not the first—where courts balance harms. *Jet Midwest Int'l Co.*, 953 F.3d at 1044.

[8] Perhaps recognizing as much, Kistner attempts to misconstrue Appellee Craig's interest in this litigation, insinuating that her "true (unstated) concern" is a preference in running without a LMNP candidate on the ballot. Appellant Br. at 30.

### 2. Irreparable Harm to Appellee Davies

As to Appellee Davies, the District Court found that, without an injunction, she would "suffer irreparable harm by not having her vote count such that she is required to vote twice, and by the absence of uninterrupted congressional representation in the United States House of Representatives." Appellant's Add. at 17. The District Court explained that "restrictions on voting rights constitute irreparable injury" and that the right to vote, "secured by the Constitution, [includes] the right of qualified voters within a state to cast their ballots *and have them counted*." *Id.* at 17–18 (citing *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (collecting cases), and quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).



Kistner's arguments here too are unconvincing. He first claims that the District Court abused its discretion by finding that Appellee Davies would be harmed if she had to vote twice, arguing that "the opportunity to vote is neither a severe nor an irreparable burden on the right to vote." Appellant Br. at 30. But Kistner offers no support for this statement, which, if carried to its logical conclusion, would mean that Minnesota could repeatedly invalidate Appellee Davies' vote so long as it gave

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This is an absurd allegation, not supported by the record or even plausible speculation. Appellees' concern is, and has always been, ensuring that voters' ballots cast in the November election are appropriately counted and given their required legal effect and that residents in MN-2 have consistent representation in Congress.

her a second, third, or even fourth opportunity to cast her ballot. That is not the law, for good reason. The District Court properly rejected this argument. Appellant's Add. at 19 ("Defendants discredit the burden of voting twice. But the burden of voting twice is significant. And the practical reality of voting during a global pandemic compounds the burden for voters who wish to vote in person and must leave their homes in the winter to vote in a crowded polling location."); *see also* Appellant's Add. at 32–33.

Kistner also argues that no harm flows from the lack of representation in Congress for more than a month. That claim is baffling, given that legislation is *constantly* being negotiated and passed in Congress; that the first months of a new Congress are often the most productive of the term; and that it is important for Appellee Davies (and all residents of MN-2) to have federal representation starting on January 3, 2021. The District Court properly exercised its discretion to reject this argument as well. *See id.*



### B. The District Court properly exercised its discretion in determining that the balance of harms favored Appellees.

The second equitable factor requires a district court to balance the threat of irreparable harm to the moving party with "the injury that granting the injunction will inflict on other parties litigant." *Jet Midwest Int'l Co.*, 953 F.3d at 1044 (quoting *Dataphase Sys., Inc. v. C L Sys., Inc*, 640 F.2d 109, 114 (8th Cir. 1981)). Here the District Court did just that in carefully considering the parties' arguments and

evidence as it balanced the harms. *See* Appellant's Add. at 18–20. It concluded that "the balance of harms weighs strongly in favor of granting a preliminary injunction," reasoning that, without a preliminary injunction, "*not a single vote* cast in the November general election for Minnesota's Second Congressional District will count. By granting the preliminary injunction, this Court ensures that all properly cast votes in the November general election, including the votes cast for Weeks, will be counted." *Id.* at 19 (emphasis in original).

Kistner raises several arguments regarding the District Court's analysis, none of which are proper bases for reversal. In each argument, Kistner asks this Court to re-weigh the evidence. But on appeal, Kistner is not entitled to *de novo* review. Instead, he must show that the District Court abused its discretion by acting "[outside] the range of choice available to [it]," by not "account[ing] for all relevant factors," by "rel[ying] on any irrelevant factors," or by making a "clear error of judgment." *Jet Midwest Int'l Co.*, 953 F.3d at 1044. (quoting *PCTV Gold*, 508 F.3d at 1142). Kistner has not and cannot make this showing. And, the District Court's findings are "accord[ed] deference" because of its "greater familiarity with the facts and the parties." *Id.* (quotation omitted).



**1. Kistner waived his "equal protection" argument, which in any event is unavailing.**

Kistner asserts that the District Court abused its discretion because the injunction treats voters differently based on when they cast their ballots. Appellant

Br. at 24 (citing *Bush v. Gore*, 531 U.S. 98, 105 (2000)). But Kistner did not raise an Equal Protection Clause argument in his opposition to the motion for preliminary injunction; rather, he first raised it in his motion to stay *after* the District Court entered its preliminary injunction. *See generally* Dist. Ct. Dkt. 41; Dist. Ct. Dkt. 52 at 11–12. Only the District Court's grant of a preliminary injunction is before this Court. Accordingly, Kistner has waived reliance on the equal protection argument he now seeks to make.

Further, even if this Court considers that argument, it is not convincing. The District Court's injunction does not "inflict[] a constitutional harm," either "through the 'arbitrary and disparate treatment of the members of [the] electorate'" or by denying voters "an equal opportunity to participate in [the] election." Appellant Br. at 24 (quoting *Bush*, 531 U.S. at 105 (first quotation), and *Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 56 (1970) (second quotation)). Neither of the two cases Kistner cites suggest otherwise. In *Bush v. Gore*, the Supreme Court held that a state "may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. at 104–05. And in *Hadley*, an apportionment case, the Court held that "[i]f one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired." 397 U.S. at 55. Here, the District Court's injunction *ensures* that all lawful voters will have their ballots counted and be given full legal effect (not discarded under state law).

Conversely, absent an injunction, hundreds of thousands of votes will be discarded. In other words, the preliminary injunction ensures that every vote will be given equal value and equal weight, addressing the concerns raised in *Bush* and *Hadley*.

Kistner also glosses over the fact that every voter in MN-2 had an equal opportunity to correct his or her ballot. The District Court issued the preliminary injunction on October 9, 2020. As this Court recognized in denying Kistner's stay motion, under Minnesota law, any absentee voter who cast a ballot but did not vote in the MN-2 election between September 24 and October 9 had until October 20 to cancel his or her ballot and request a new absentee ballot or vote in person. Minn. Stat. § 203B.121 subdivs. 2–4; Minn. R. 8210.2600(1); 2020 Minn. Sess. Laws, ch. 77, § 1, subdiv. 3; Appellant's Add. at 11. Thus, there are not two classes of voters voting under different rules.



Kistner speculates that there might be some voters who (1) chose not to vote in the MN-2 race in reliance on the Secretary's September 24 announcement and (2) did not learn about the preliminary injunction or were otherwise unable to cancel their ballot in time to send in a new absentee ballot or vote in person. *See* Appellant Br. at 25. But Kistner fails to offer any competent evidence in support of this claim.[9]

[9] Kistner suggests there were "thousands of voters who have not voted in this race because they relied on the law and the Secretary's statements." Appellant Br. at 32. It is entirely unclear where Kistner came up with the idea that "thousands of voters" failed to vote in the election, but it is certainly not supported by any information

First, it is entirely unclear how a voter would have been aware of the Secretary's first announcement (but not of the portion explicitly encouraging voters to continue to vote), but entirely unaware of the lawsuit or the Secretary's second announcement that votes would be counted.[10] Moreover, no voter submitted a declaration on Kistner's behalf at any point in these proceedings attesting to these facts. As this Court determined when denying Kistner's motion to stay, "an informed . . . voter would have been aware [] that the status of the election was not resolved" well before the October 20 deadline to change their vote. Appellant's Add. at 11. Kistner's speculation does not create a basis for reversal.

Finally, Kistner is wrong to suggest that the District Court "shift[ed] the burden to the *defense* to establish the absence of harm." Appellant Br. at 24. Instead, the District Court did exactly what it was supposed to do: it carefully considered each party's harms and balanced them. The District Court reached a decision that Kistner does not like, but that does not mean it abused its discretion.



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presented to the District Court on the motion for preliminary injunction or that otherwise exists in the record—a point made clear by the lack of any citation to record evidence for this proposition.

[10] *See, e.g.*, Oct. 9 Press Release, *supra* n.2; Torey Van Oot & Patrick Condon, *Judge blocks delay of Minnesota congressional race*, Star Tribune (Oct. 10, 2020), https://www.startribune.com/federal-judge-minn-congressional-race-is-back-on-for-november/ 572693992/.

### 2. The District Court properly weighed harm to the LMNP and its supporters.

Kistner next argues that the District Court erred because it failed to "consider the effect enjoining [the] statute will impose on the [supporters of the LMNP and Mr. Weeks]." Appellant Br. at 26. This assertion is plainly incorrect. The District Court appropriately considered potential harm to LMNP supporters in both the public interest analysis *and* the balance of harms analysis. *See* Appellant's Add. at 21, n.7; *see also id.* at 21 (acknowledging the Secretary's argument that an injunction would cause irreparable harm to the LMNP party). It also noted that the injunction would allow Mr. Weeks's name to remain on the general election ballot, as required by Minnesota law. *See* Minn. Stat. § 204B.13(2)(c); Appellant's Add. at 21, n.7 (citing *Monaghen v. Simon*, 888 N.W.2d 324, 331 (Minn. 2016) (explaining that one purpose of the Minnesota Statute is to preserve the voters' choice of eligible candidates for an election). Thus, LMNP supporters could still cast a ballot for that party.[11] And to the extent LMNP supporters would be harmed by having a deceased candidate on the ballot, the District Court reasonably concluded that this harm was



[11] Kistner argues that the District Court "assumed that only 'state action' is relevant in the balance of equities," but he appears to misunderstand the District Court's order. Appellant Br. at 26. The District Court did not say or even suggest that "only 'state action' is relevant." Instead, by distinguishing between "harm caused by Weeks's death" and "harm caused by likely unenforceable state action," the District Court was making the uncontroversial point that it cannot enter an injunction to undo a death. Appellant's Add. at 21, n.7.

grossly outweighed by the harms that would accrue to *all* voters in MN-2—including LMNP supporters—if their ballots were cancelled and they were denied representation in Congress. *See* Appellant's Add. at 21 (recognizing that "[the] right to vote is 'of the most fundamental significance under our constitutional structure." (quoting *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)).[12]

### 3. Kistner waived arguments about his alleged harm.

Kistner's third argument relates to harm that his campaign, donors, and supporters would allegedly suffer if an injunction issued. Appellant's Br. at 27. But Kistner did not raise these arguments in his opposition to the motion for preliminary injunction. *See* Dist. Ct. Dkt. 41 at 17–18. Accordingly, Kistner has waived these arguments on appeal.[13]



[12] Without citing any authority, Kistner claims that "there is a material difference between rallying around a living candidate in a competitive election and casting a symbolic vote for a dead candidate." Appellant Br. at 26. But votes for deceased candidates are, in many cases, not symbolic at all. *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/. Indeed, earlier this week, a candidate for the North Dakota state legislature posthumously won his race. *See* Teo Armus, *A North Dakota Republican died of covid-19 in October. He still won his election*, Wash. Post (Nov. 4, 2020), https://www.washingtonpost.com/nation/2020/11/04/covid-candidate-north-dakota-election/.

[13] Kistner raised these arguments in his motion for stay pending appeal, filed *after* the District Court entered its preliminary injunction. But Kistner is appealing from the order granting the preliminary injunction, not the order denying a stay.

Even if the Court is inclined to consider them, these purported harms would not have altered the District Court's balance-of-harms analysis. Kistner alleges that his campaign, donors, and supporters relied on the Secretary's announcement that the election would be postponed, for example by "rescheduling campaign and fundraising events and strategic meetings," by canceling advertising buys, and by shifting donations to other candidates. But Appellees filed their lawsuit on Monday, September 28—within two business days of the Secretary's announcement that the election would be postponed—and immediately sought expedited injunctive relief. Under these circumstances, it was hardly reasonable for Kistner to have ceased campaigning or for his supporters or donors to radically change course. As this Court recognized, "an informed candidate . . . would have been aware [on September 28] that the status of the election was not resolved." Appellant's Add. at 35.[14]



[14] Not only would such an approach be unreasonable, Kistner's claims are belied by publicly available evidence that he did in fact continue his campaign activities—participating in fundraising events, meet-and-greets, and debates—and repeatedly continued to tell supporters to vote for him in the November election. *See, e.g.*, Appellees' Opp. to Stay at 16 n.1–2; https://twitter.com/KistnerCongress/status/1321224591180783623 (On October 27, writing: "As we have said before, we continue to urge Minnesotans to vote in the November 3rd election."); https://twitter.com/KistnerCongress/status/ 1319679723958652931 (On October 23, writing: "I urge all voters to participate in this election on November 3rd[.]"). Because Kistner did not raise these arguments below, this evidence is not in the record. This only provides further reason to reject Kistner's attempt to raise these arguments for the first time on appeal.

Kistner's argument that "voters inclined to cast ballots for Mr. Kistner chose not to vote in reliance on the Secretary's announcement" also finds no support in the record. And, again, Kistner fails to credit the fact that absentee voters who undervoted between September 24 and October 9 had the right to cancel their ballots and request a new absentee ballot or vote in person until October 20.

**4. Kistner's remaining arguments lack merit.**

Kistner's additional arguments also lack merit. First, Kistner presses the argument, purportedly on behalf of the State, that the District Court injunction "impairs the state's interest in administering [the] election." Appellant Br. at 28. He cites *Purcell v. Gonzalez*, 549 U.S. 1 (2006), as support. But *Purcell* is irrelevant because the election has already occurred, and there is no need to guard against "voter confusion or consequent incentive to remain away from the polls." *Cf. id.* In any event, the Secretary represents Minnesota in this case, and he expressly disclaimed Kistner's argument "because it threaten[ed] to wreak havoc on the administration of Minnesota's 2020 general election." Simon Opp. to Stay Mot. at 1.

Second, Appellees did not delay in seeking injunctive relief, much less "cause" any "disenfranchisement," by filing their complaint within two business

days of the Secretary's announcement that the election would be postponed. *Cf.* Appellant Br. at 29. By any measure, they moved expeditiously.[15]

### C. The District Court properly exercised its discretion to find that the public interest favors a preliminary injunction.

The District Court properly found that the public interest favored an injunction, concluding that two harmful "public-interest consequences" would occur absent an injunction: "all votes cast for Minnesota's Second Congressional District in November will be discarded," and "every constituent in [that] District will have no representation in the United States House of Representatives for more than a month." *Id.* Those interests are even stronger now given that the election has occurred, more than 420,000 voters have voted, and Appellee Craig has been reelected. It would be a severe burden on voters to discard each and every one of those votes, ask those voters to vote again in the middle of a pandemic, and leave them without representation when the new Congress is seated on January 3.



Kistner does not dispute that the severe public interest consequences identified by the District Court would occur absent an injunction. Instead, he

[15] Kistner cites *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018), as support. But in *Benisek*, the appellants waited "*six years*, and *three general elections*, after the [districting map] was adopted, and *over three years* after the plaintiffs' first complaint was filed," to move for a preliminary injunction. *Id*. (emphases added). Here, Appellees moved for a preliminary injunction the morning after they filed their complaint, a mere two business days after the Secretary announced the postponement. *Benisek* simply confirms Appellees' diligence.

rehashes the same unavailing arguments addressed above. His also asserts that "[e]lections cannot be stopped and restarted on a dime, especially *after voting begins.*" Appellant Br. at 31. Appellees agree. But the election never stopped. Instead, the *status quo* was and remains a November 3 election, which is the date mandated by federal law and the date on which the election in all other House races proceeded. *See* 2 U.S.C. § 7.

## CONCLUSION

For the reasons above, Appellees respectfully ask the Court to affirm the District Court's order entering a preliminary injunction.



Dated: November 6, 2020

**LOCKRIDGE GRINDAL NAUEN P.L.L.P.**

*s/Charles N. Nauen*

Charles N. Nauen (#121216)
David J. Zoll (#0330681)
Rachel A. Kitze Collins (#0396555)
100 Washington Avenue S, Suite 2200
Minneapolis, MN 55401
(612) 339-6900
cnnauen@locklaw.com
djzoll@locklaw.com
rakitzecollins@locklaw.com

**PERKINS COIE LLP**
Marc E. Elias
Joel J. Ramirez
700 Thirteenth Street NW, Suite 800
Washington, DC 20005-3960
(202) 654-6200
MElias@perkinscoie.com
JoelRamirez@perkinscoie.com

Kevin J. Hamilton
Holly M. Simpkins
Laura C. Hill
Nitika Arora
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-8000
KHamilton@perkinscoie.com
HSimpkins@perkinscoie.com
LHill@perkinscoie.com
NArora@perkinscoie.com

*Attorneys for Appellees*

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certifies that this document complies with the type-volume requirements of Fed. R. App. P. 32(a)(7). This memorandum was prepared using Microsoft Word 2016, which reports that the motion contains 10,052 words, excluding items listed in Fed. R. App. P. 32(f). This document also complies with the typeface and the type-style requirements of Fed. R. App. P. 32(a), because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

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s/Charles N. Nauen
Charles N. Nauen

## CERTIFICATE OF SERVICE

I hereby certify that on November 6, 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.

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Charles N. Nauen