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, No. 0:20-cv-02066-WMW-TNL
The Honorable Wilhelmina M. Wright

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Appellant's Brief

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SUMMARY AND STATEMENT ON ORAL ARGUMENT

The Appellant, Tyler Kistner, is the Republican candidate for Congress in Minnesota's Second Congressional District. After voting had begun, the candidate of another major political party, as defined by Minnesota law, Adam Weeks, passed away unexpectedly. This triggered Minnesota Statutes § 204B.13, which requires a special election in February if a major-party candidate dies or becomes disqualified on the eve of a November general election. The Minnesota Secretary of State announced that votes in the November 3, 2020, Second Congressional District contest would not be counted and the election would occur in February.

Rep. Angie Craig, the Democratic candidate, sought an injunction to require the Secretary to hold the election as planned in November, claiming that 2 U.S.C. § 7, which sets a nationwide federal election day, preempts Minnesota law and that the death of Mr. Weeks did not create a "failure to elect" authorizing the scheduling of a special election under 2 U.S.C. § 8(a). The district court granted Rep. Craig's motion, even though voters had been casting ballots for weeks on the understanding that votes in this race would not be counted.

The district court's narrow reading of Section 8(a) conflicts with the statute's text and authority interpreting it, and it was in all events too late for federal-court intrusion into the state election process. The equitable factors, too, cut against the injunction and militate reversal. Oral argument of 20 minutes per side would assist the Court in resolving these issues.

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INTRODUCTION

This is an appeal from a preliminary injunction that reinstated the November 3 election for Minnesota's Second Congressional District, even though that election had been cancelled and rescheduled by operation of state law after a major-party candidate died. For nearly three weeks prior to the injunction—as early voting progressed at historically high rates—voters cast their ballots in reliance on the Minnesota Secretary of State's announcement that the November race was off and votes in the race would not be counted. Untold numbers of voters chose not to select a candidate in that race, and the Republican candidate, Appellant Tyler Kistner, his campaign donors, and his independent supporters upended their campaigning—cancelling events, scheduling new events for the February 2021 special election, postponing outreach, etc.—in reliance on Minnesota law and the Secretary's announcement that the November election was off. And then the district court switched the race back on, right in the middle of voting.

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The injunction wrongly "alter[ed] the election rules on the eve of an election," *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020), and violated the equal-protection guarantee of voter equality by subjecting different voters to different election rules based on the arbitrary distinction—indeed, the happenstance—of when they cast their votes. It was too late for the district court to upend the rules of the election.

The district court had no sound legal basis to inflict this tumult. The district court held that Minnesota's vacancy statute is preempted wholesale as

to federal elections, but federal law expressly *authorizes* states to conduct special elections when state law deems an election inconclusive. *See* 2 U.S.C. § 8(a). Minnesota law provides that the death of a major-party candidate shortly before the election compromises the election and necessitates a special election the following February, with all major parties represented. This is no different from any state election law defining when the results of an election are binding and when they are not, and this cause of a "failure to elect" is not materially different from exigencies like a natural disaster or election fraud that a state may lawfully determine require a special election.

Because Plaintiffs are unlikely to succeed on the merits, and because the equities cut decisively against a preliminary injunction, the Court should vacate the injunction to allow a fair contest between all political parties in the February special election, as Section 8(a) authorizes Minnesota to do.

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JURISDICTIONAL STATEMENT

This is an appeal from the district court's grant of a preliminary injunction on October 9, 2020. Plaintiffs timely appealed on October 12. The Court has jurisdiction under 28 U.S.C. § 1292(a)(1). Mr. Kistner intervened as a defendant before the district court, and has standing because he will suffer an "injury in fact" caused by the district court's injunction, and that injury "will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *see* Addendum ("ADD") 4–6 (concluding that Mr. Kistner has Article III standing).

STATEMENT OF THE ISSUES

In the middle of voting, the district court reinstated a November election based on its finding that federal law likely preempts Minnesota Statutes § 204B.13, which provides that the death or disqualification of a major-party candidate within 79 days of an election requires that the election be cancelled and a special election occur the following February. The questions in this appeal are:

1. Whether Rep. Angela Craig and her co-Plaintiff supporter (collectively, "Plaintiffs") are likely to succeed in establishing that Minnesota Statutes § 204B.13 is preempted by federal law despite 2 U.S.C. § 8(a) expressly authorizing Minnesota to schedule special elections.

Public Citizen, Inc. v. Miller, 813 F. Supp. 821 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

2 U.S.C. § 8(a); Minn. Stat. § 204B.13.

2. Whether the district court erred in finding that the equities supported reinstating the November election in the middle of voting.

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018); *Bush v. Gore*, 531 U.S. 98, 105 (2000).

Minn. Stat. § 204B.13.

3. Whether the district court erred in altering state election law weeks before election day, after votes were cast for weeks in reliance on the Secretary's

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representation that no election would occur in the Second Congressional District.

Purcell v. Gonzalez, 549 U.S. 1 (2006); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020).

STATEMENT OF THE CASE

A. An election was scheduled for Minnesota's Second Congressional District for November 3, 2020. Early voting began on September 18. Angela Craig is the District's incumbent and the Democratic Party's candidate. Tyler Kistner is the Republican Party's candidate. Adam Weeks was the candidate representing the Legal Marijuana Now Party ("LMNP").

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LMNP is a "major political party" under Minnesota Statutes § 200.02, subd. 7. That statute deems a party "major" only if it establishes a broad base of public support across the state under one of three standards:

> (a) it presented a candidate for a major statewide office (e.g., governor, attorney general, president, U.S. senator), who received votes in every Minnesota county and received not less than five percent of the total vote, *id.* § 200.02, subd. 7(a);
>
> (b) it presented, in the most recent election, at least 45 candidates for the State House, 23 for the State Senate, four for Congress, and one for each major statewide executive office, governor and lieutenant governor, attorney general, secretary of state, and state auditor; *id.* § 200.02, subd. 7(b);
>
> (c) it filed with the Secretary of State a petition to participate in the state's partisan primary election with signatures, dated less than a year before the petition's filing, of a number of registered voters amounting to at least five percent of the total number of individuals who voted in the preceding state general election, *id.* § 200.02, subd. 7(c).

A party that fails to maintain a continuous base of support across the state loses its major-party status within two state general elections. *Id.* § 200.02, subds. 7(d) & (e). Minnesota utilizes the major-party definition for numerous election-administration purposes. *See, e.g.*, *id.* § 204B.03 (affording major-political party candidates the right to apply for a place on the ballot and conduct partisan primaries); *id.* § 201.091 subd. 4a (giving the chairs of each major political party a list of voters who voted in each political party's primary). Minnesota has a long history of third-party electoral success that includes the Minnesota Farm-Labor Party—which elected three governors, four U.S. senators, and eight U.S. representatives before merging with the Democratic Party[1]—and the Reform Party, which won the governorship in 1998.[2]

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LMNP qualified as a major party in 2018 under the first definition above, *see id.* § 200.02, subd. 7(a), when its candidate for state auditor received nearly 134,000 votes statewide. In in 2014, an LMNP candidate for attorney general received more than 57,000 votes statewide, more than any other third-party candidate. In recent congressional elections in Minnesota's Fourth and Fifth Districts, LMNP candidates have won over seven percent of the vote. And in 2018's special election for Senate, LMNP's candidate earned nearly 100,000 votes. In the 2018 general election, an LMNP candidate for state office received more than 17,000 votes of the approximately 330,000 cast in the Second

[1] Minnesota DFL, *Our History*, https://www.dfl.org/about/dfl-history/.
[2] Cody Nelson, *In his own words: The night 'The Body' became the governor*, MPRNews, Jan. 19, 2017 https://www.mprnews.org/story/2017/01/19/history-jesse-ventura-gary-eichten-election-victory-interview.

Congressional District, and LMNP anticipated that Mr. Weeks would exceed that mark in November 2020. ADD 46–47; *see generally* Minnesota Secretary of State, *2018 General Election Results*.[3]

B. On September 21, Mr. Weeks unexpectedly died. That triggered a Minnesota statute that sets an automatic special election "when a major political party candidate" dies, succumbs to a "catastrophic illness," or is deemed ineligible less than 79 days before the general election. Minn. Stat. § 204B.13, subds. 1 & 2(c). Under Section 204B.13, the party that loses its candidate can nominate a replacement, the other nominees remain the candidates of their respective parties, the votes cast in the previously scheduled race are not counted, and the contest is rescheduled for the second Tuesday in February of the following year. *Id.* § 204B.13, subds. 2(c) & 7. Notices of these changes are required to be posted in polling places, and county auditors must mail all persons who requested a ballot in the general election a new ballot for the special election. *Id.* § 204B.13, subds. 2(c) & 8.[4]

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The Secretary promptly issued an official announcement that the November 3 election was cancelled. After expressing condolences, the announcement stated that "[t]he law is clear on what happens next" and announced a special election for February 9, 2021. D.Ct.Dkt. 19, Nauen Decl. Ex. 2. It represented that, while "[b]allots will not be changed" to reflect the

[3] https://www.sos.state.mn.us/elections-voting/2018-general-election-results.
[4] The impetus for this statute was the tragic case of Sen. Paul Wellstone, who died in a plane crash shortly before the 2002 election. His competitor prevailed in the contest, which went forward as scheduled.

cancellation, "the votes in [the Second Congressional District] race will not be counted." *Id.* The announcement was widely covered in the media.[5] Mr. Kistner's campaign cancelled events and advertising and began to plan for a February 2021 contest. ADD 49–50. Some voters who cast ballots did not vote for a candidate in the Second Congressional District race. ADD 50.

C. On September 28, Rep. Craig and one of her supporters ("Plaintiffs") filed this action asserting that Minnesota's vacancy statute is "unconstitutional as applied to elections for U.S. Congress and preempted by federal law." Appellant's Appendix ("APP") 11. Plaintiffs alleged that 2 U.S.C. § 7 sets the Tuesday after the first Monday in November as the date of congressional elections and preempts Minnesota's vacancy statute, APP 23–25, and that the special election unduly burdens the right to vote, APP 24–26.

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On September 29, eight days after Mr. Weeks passed away, Plaintiffs moved for a preliminary injunction. Rep. Craig testified that the Secretary's announcement of a special election will "threaten to cause voters to forego their right to cast their ballots for the 2nd Congressional District." D.Ct.Dkt. No. 17, Craig Decl. ¶ 11. By that time, voters had already been selecting that course of action for several days. But Plaintiffs did not move for a temporary restraining

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[5] *See, e.g.*, Jessie Van Berkel, *Second Congressional District race delayed after death of Legal Marijuana Now candidate*, Star Trib., Sep. 24, 2020, https://www.startribune.com/minnesota-congressional-race-delayed-after-candidate-s-death/572523221/(last visited Oct. 30, 2020); David H. Montgomery, *2nd District candidate Adam Weeks dies; special election needed*, MPRNews, Sep. 24, 2020, available at https://www.mprnews.org/story/2020/09/24/congressional-candidate-dies-special-election-needed (last visited Oct. 30, 2020).

order. Mr. Kistner moved to intervene as a defendant and filed an opposition to Plaintiffs' injunction motion, arguing that Congress expressly authorized states to conduct special elections in circumstances like those here. *See* 2 U.S.C. § 8(a).

The district court issued an order on October 9 granting Mr. Kistner intervenor status, granting Plaintiffs' preliminary-injunction motion, enjoining the operation of Minnesota's vacancy statute, and commanding the Secretary to permit ballots to be counted in the Second Congressional District race. ADD 1, 23–24. Mr. Kistner moved that day for a stay pending appeal in the district court. The district court denied that motion on October 13, and, on the same day, Mr. Kistner filed a motion for stay pending appeal in this Court. The Court denied the motion in a published opinion issued on October 23, 2020,[6] reasoning that Minnesota's statute was likely preempted at least as to candidates of third parties like the LMNP, a rationale that Plaintiffs had never advanced. ADD 25. The Court granted Mr. Kistner's motion to expedite consideration of this appeal. On October 26, Mr. Kistner moved to amend that order to allow for further expedition of briefing and resolution, and the Court granted that motion on the same day.[7]

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[6] Mr. Kistner filed an application for a stay pending appeal with Justice Neil Gorsuch, circuit justice for the Eighth Circuit on the same day. Justice Gorsuch denied the application on October 27.

[7] The Court's provisional ruling on Mr. Kistner's stay motion has no binding force as law of the case or otherwise, because it is not a final judgment. *See* *Cottrell v. Duke*, 737 F.3d 1238, 1241 (8th Cir. 2013). Importantly, at that stage, Mr. Kistner bore the burden of establishing the stay elements. *See* ADD 35. In moving for a preliminary injunction, by contrast, Plaintiffs bore the burden.

SUMMARY OF ARGUMENT

The district court abused its discretion in provisionally enjoining the Secretary from cancelling the November 3 election and conducting a February 2021 special election.

I. Plaintiffs are not likely to succeed on the merits. Minnesota's choice to conduct a special election because of the death of a major-party candidate is expressly authorized by Congress, 2 U.S.C. § 8(a), and therefore is not preempted by the statute establishing nationwide default election day, *id.* § 7. Section 8(a) authorizes states to conduct congressional special elections in the event that (1) a "failure to elect in the time prescribed by law" (2) results in a "vacancy" in a congressional seat. These elements are satisfied.

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A. Minnesota's vacancy provision, Section 204B.13, requires the Secretary to cancel an election and schedule a special election in the event that a major-party candidate dies or becomes disqualified shortly before election day. That qualifies as a "failure to elect" under Section 8(a), which does not define the phrase but instead looks to state election laws to ascertain when an election succeeds and when it fails. And there is a resulting vacancy because, by operation of that law, the Second Congressional District seat will become vacant on January 3, 2021. The district court's contrary conclusions conflict with the text of Section 8(a) and the two leading decisions interpreting it—one summarily affirmed by the Supreme Court and therefore binding here.

B. This Court's provisional ruling denying Mr. Kistner's stay motion did not adopt or endorse the district court's reasoning that the Minnesota statute is

wholly preempted from application to congressional elections. Instead, that ruling assumed that states may lawfully schedule a special election due to "exigent circumstances," as other courts have held. But it proceeded to override Minnesota law's policy judgment defining those circumstances, holding that Minnesota's choice to schedule a special election following the death of any "major" party candidate is preempted absent some showing of a "history of electoral strength" of the candidate's party beyond that required by Minnesota's neutral and generally applicable definition of "major" political party. That holding removes any discernable standard from Section 8(a)'s special-election authorization and arrogates the policy question of how major parties should be defined from the state's proper policymakers to federal judges, who lack policymaking authority or competence. The stay-stage ruling's reasoning, which has no binding force, should not be followed.

II. The equitable factors cut against a preliminary injunction. The injunction imposes severe harms on Mr. Kistner, supporters of the LMNP party, and the voting public. Voters were told for weeks that votes would not be counted, and it is undisputed that some relied on that representation by not casting votes in the Second Congressional District contest. By changing the rules in the middle of the election, and thereby subjecting voters to different rules on the basis of when they cast their ballots, the injunction violates basic equal-protection principles and severely injures the affected voters and the public interest. Meanwhile, Mr. Kistner reasonably relied on Minnesota law and the Secretary's announcement that the race was rescheduled, cancelling campaign events and

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fundraisers and preparing for a 2021 election. Meanwhile, Rep. Craig will not suffer irreparable harm without an injunction, as she is able to campaign and run for office in the same way in February as she is in November, and Plaintiffs' opportunity to vote in February is not a harm, irreparable or otherwise. The district court abused its discretion in determining that the benefits of an injunction, which are virtually non-existent, outweigh the harms, which are legion.

STANDARD OF REVIEW

The Court reviews the district court's grant of a preliminary injunction "for abuse of discretion," but it "review[s] de novo" its "legal conclusions." *Grand River Enters. Six Nations, Ltd. v. Beebe*, 467 F.3d 698, 701 (8th Cir. 2006); *see also Dixon v. City of St. Louis*, 950 F.3d 1052, 1055 (8th Cir. 2020) ("We will find abuse of discretion when the district court relies on…an error of law."). A preliminary injunction is an "extraordinary remedy," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), and the moving party bears the burden to establish that exceptional circumstances justify it, *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003).

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ARGUMENT

I. Plaintiffs Are Unlikely To Succeed on the Merits

A. Federal Law Authorizes Minnesota's Choice To Conduct a Special Election

Federal law does not preempt Minnesota Statutes § 204B.13. Although 2 U.S.C. § 7 establishes a congressional-election default date of the Tuesday after the first Monday in November, the very next provision, Section 8(a), authorizes states to hold a special election at other times:

> [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(a). By its plain terms, the statute is triggered on the occurrence of two elements: (1) a "failure to elect" and (2) a "vacancy." Minnesota law, as applied to the circumstances of this case, satisfies both.

1. Failure To Elect

By operation of Section 204B.13, the November 3 Second Congressional District contest has resulted in a "failure to elect" because a major-party candidate unexpectedly died within 79 days of the election. Minn. Stat. § 204B.13, subds. 1 & 2(c). This qualifies as a failure to elect for the same reason any contest proving inconclusive by operation of a state's election law would. A "failure to elect" is not a defined term in the U.S. Code and itself references independent principles of election law, including state law. Because Section

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204B.13 defines the terms under which all Minnesota elections succeed and fail, it qualifies under Section 8(a) as establishing "a failure to elect."

The Eleventh Circuit held as much with respect to Georgia law when it affirmed and adopted the district court's opinion in *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993). *Public Citizen* held that Georgia could legitimately find a "failure to elect" where no candidate crossed the 50-percent mark in the total vote, even though the state could have handed the race to the plurality vote-winner, as other states do. *Id.* at 830. It was sufficient that "the *statute* deems an election resulting in a mere plurality not to be a completed election." *Id.* (emphasis added). The failure to reach the 50-percent mark, the court reasoned, "is similar to an election postponed due to natural disaster or voided due to fraud," and "[t]his is not changed by the fact that a plurality outcome results in a failure to elect only because the state so declares." *Id.*

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Minnesota's policy choice is no different than Georgia's. Just as the Georgia General Assembly determined that an election without a majority-vote winner is not sufficiently conclusive to bind Georgia, the Minnesota Legislature determined that an election compromised by the untimely and unforeseen death of a major-party candidate—as defined by the state's neutral and generally applicable election laws—is not sufficiently indicative of popular will to bind Minnesota. In this respect, Section 204B.13 is no different from any other state law defining when an election is valid and when it is not.

The district court adopted Plaintiffs' contrary view that Minnesota's statute was preempted as to federal elections because "Minnesota cannot *invent* a failure to elect or *create* an exigent circumstance." ADD 14. But Section 204B.13 does not "invent" a failure to elect any more than a majority-vote-winner requirement does. The terms "failure" and "elect" do not require that it be physically impossible to conduct an election, but merely that the election *fail* under the state's ordinary election mechanisms—which is the literal meaning of "failure to elect." For example, a three-judge court in *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983), considered an election that was barred by the preclearance requirement of Section 5 of the Voting Rights Act—a law—and, although it was certainly possible for an election to be conducted and the votes counted, the three-judge panel determined that the operation of Section 5 created a failure to elect. *Id.* at 526. In other words, because a generally applicable election law declared the election a "failure," there was a "failure to elect" under Section 8(a).

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The district court reasoned that the phrase "failure to elect" distinguishes between state law and "*federal or constitutional law*" and distinguished *Busbee* (but not *Public Citizen*) on that basis. ADD 13 (emphasis added). But nothing in the statutory language draws any distinction between state and federal law. Quite the opposite, because most election law is state law, it is the natural place to look to identify when an election fails and when it succeeds. Federal law does not contain a comprehensive elections code, it does not define when the outcome is legally valid, and only in exceptional circumstances does it define an outcome

as *not* valid. *See North Carolina v. Covington*, 137 S. Ct. 1624, 1625–26 (2017) (per curiam); *Sw. Voter Reg. Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) ("[T]he Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation."). Indeed, *Busbee* took state law's ability to declare a failure to elect as a given and reasoned from that premise that federal law may as well. *See* 549 F. Supp. at 526; *see also PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) ("'[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" (quoting *Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998))); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (same). Numerous states have enacted statutes authorizing the rescheduling of elections in certain defined circumstances,[8] and all of them would be invalid under the district court's pinched interpretation of Section 8(a)'s "failure to elect" language.

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The district court distinguished *Public Citizen* on the ground that "the State of Georgia actually held a general election on the congressionally mandated date in November," ADD 13–14, but *Public Citizen* itself recognized that an election could as easily be "postponed" for many reasons, such as a "natural disaster," 813 F. Supp. at 830—a point *Busbee* considered beyond reasonable dispute, 549 F. Supp. at 526 ("[N]o one would seriously contend that section 7 would prevent a state from rescheduling its congressional elections under such

[8] *See* National Conference of State Legislatures, Election Emergencies, Sept. 1, 2020, https://www.ncsl.org/research/elections-and-campaigns/election-emergencies.aspx.

circumstances.”). The fact that the election was not postponed in *Public Citizen* is therefore immaterial. Nor would that distinction, which would render Section 8(a) inapplicable in the case of a natural disaster, make sense.

2. Vacancy

There is also a cognizable “vacancy.” 2 U.S.C. § 8(a). By operation of Section 204B.13, the Second Congressional District seat will become open as of January 3, 2021. It does not matter that Rep. Craig currently represents the Second Congressional District because there is a certainty of a vacancy “caused by” the failure to elect come January. 2 U.S.C. § 8(a). The causation requirement being met, there is no basis to read a requirement into the statute that the vacancy coincide temporally with the failure to elect. It is typical that one event caused by another will occur temporally *after* that first event. It is therefore entirely atextual to impose a *current* vacancy requirement where the statute imposes only a causation requirement. Causation and contemporaneity are neither identical nor even compatible. In a case like this the causation requirement is easily satisfied: by operation of Minnesota Statutes § 204B.13, a vacancy as of January 3, 2021 is a certainty. Hence, there is a cognizable vacancy.

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The Supreme Court has endorsed that reading of Section 8(a). The three-judge court in *Busbee* rejected the argument “that section 8 is inapplicable because no vacancy will arise until the terms of the current representatives expire on January 3, 1983.” 549 F. Supp. at 525. It found that 2 U.S.C. § 8(a) “clearly indicates that a failure to elect gives rise to a vacancy and in no way suggests

that a state cannot choose representatives until January after failing to elect them in November." *Id.* The January 3, 2021 vacancy here is no more or less current than was the January 3, 1983 vacancy addressed in *Busbee*.

Yet the district court sided with Plaintiffs' contrary argument and adopted the very reasoning *Busbee* rejected, concluding that there is no "vacancy" as required under 2 U.S.C. § 8(a) "because Minnesota's Second Congressional District currently is represented in the United States House of Representatives by Representative Craig." ADD 12. This not only contravenes the statutory text, but also an element of the *Busbee* decision that is binding because it was summarily affirmed by the Supreme Court. *Busbee v. Smith*, 459 U.S. 1166 (1983). Summary affirmances are binding precedent as to matters that were "essential to sustain that judgment." *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). *Busbee*'s holding on the timing of the relevant "vacancy" was essential to its judgment. An alternative resolution of that issue along the lines the district court adopted would have rendered 2 U.S.C. § 8(a) inapplicable and changed the outcome. *See Busbee*, 549 F. Supp. at 525.

And *Busbee* is far more persuasive than the district court's reasoning, which did not analyze the meaning of the term "vacancy" in any depth.[9] As

[9] The district court's treatment of *Busbee*, ADD 12–13, does not grapple with its holding about the timing of a cognizable vacancy and skips to an analysis of the meaning of a "failure to elect." This misses the point that, under *Busbee*, the statute reaches a future vacancy due to a failure to elect. And, although this Court's stay-stage ruling suggested that the "primacy of the Voting Rights Act" may explain *Busbee*, ADD 32, it does not address *Busbee*'s specific holding on the *timing* of a cognizable vacancy.

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Busbee reasoned, nothing in Section 8(a) requires a current vacancy or disqualifies a vacancy that is sure to occur in the near future. *Busbee* observed that, because congressional "terms did not expire until March 4 when section 8's predecessor was enacted," it "seems inescapable" that "a vacancy [arises] upon a failure to elect and not on the expiration of the terms of the incumbent representatives." 549 F. Supp. at 525. *Busbee* also reasoned that "no one would seriously contend that section 7 would prevent a state from rescheduling its congressional elections" in the event of "a natural disaster," *id.* at 526, but the district court's conclusion that the vacancy must be a present one would lead to that absurd result. A congressional district could be hit by a devastating earthquake the week before election day, and under the district court's interpretation of Section 8(a), the state would be preempted from rescheduling the election because the incumbent's term would continue for several more weeks.

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B. This Court's Non-Binding Stay-Stage Ruling Is Incorrect and Should Not Be Followed

This Court's ruling denying Mr. Kistner's stay motion did not endorse the district court's reasoning that states are powerless to define a race compromised by the death of a major-party candidate as a "failure to elect." Instead, it posited that, for a candidate's death to qualify, "the candidate must represent a political party with a greater history of electoral strength than the Legal Marijuana Now Party in Minnesota." ADD 33. That position was not pressed by Plaintiffs below, finds no support in the evidentiary record before the district court, and is

unpersuasive. This Court cited no statutory text supporting this proposition and relied instead on "strong federal policy reasons for…uniformity." ADD 32.

But Section 8(a) must be read "according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). As explained, the text of Section 8(a), in its plainest sense, reaches this case. The phrase "failure to elect" does not authorize the federal judiciary to define states' major political parties for them any more than it authorizes the federal judiciary to define the voting thresholds that candidates must achieve to prevail. *See Public Citizen*, 813 F. Supp. at 830. What matters is not whether the Court agrees or disagrees with Minnesota's definition of major-party status (or its choice of victory thresholds, standards for identifying a weather emergency, etc.), but whether the law essentially creates a pretext to "invent[] a 'failure to elect.'" *Id.* at 830.

Minnesota law does nothing like that. It consistently utilizes the same definition of a "major party" for all election purposes. It empowers parties with that status to place candidates on the ballot, conduct primaries, and receive information about the electorate. *See* Minn. Stat. § 204B.03, *id.* § 201.091 subd. 4a. And, by utilizing the same definition in its vacancy provision, the state adheres to neutral, preexisting, and generally applicable bright-line principles in assessing when a special election is required. The stay-stage ruling highlighted this point in observing that, "[i]f a candidate of the Green Party, the Independence Party, or the Libertarian Party were to die, then the election would proceed." ADD 33. That these other parties have not made the requisite showing of substantial and broad public support under Minnesota law illustrates

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that its standards are stiff and that Minnesota has capably drawn neutral lines to exclude a finding of electoral "failure" where it is not warranted.[10]

Further, neither the state nor its officials may produce a vacancy at will. A major-party candidate's death is like a natural disaster or voting fraud in the relevant sense "that each is contemplated, yet beyond the state's ability to produce." *Pub. Citizen*, 813 F. Supp. at 830. The district court recognized this, finding that "the Minnesota Nominee Vacancy Statute was [not] drafted or enacted in bad faith," ADD 14, and this Court's stay-stage ruling did not disagree. Nor is there cause for concern that its application will result in frequent special elections. Section 204B.13 took effect seven years ago, and this appears to be the first congressional election that triggered it.

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This stay-stage ruling's policy-based approach mistakenly transforms the meaning of "failure to elect" into one tethered to *post hoc* determination on a case-by-case basis by unelected adjudicators—who are ill-equipped to set state policy—whereas the proper reading of Section 8(a) provides clarity based on states' ordinary election mechanics and their bright lines. Under the reasoning of the stay-stage ruling, it is unknowable in advance whether a given exigency may permit a state to reschedule an election.

Even in this case, the stay-stage ruling's standard presents an evidentiary quagmire. That ruling did not opine on what levels of support would be necessary for a finding of "exigent circumstances" to be justified, ADD 34, and

[10] The state-stage ruling's approach creates a substantial danger of preferential treatment of the Democratic and Republican Parties, whereas Minnesota's principles are neutral and blind to partisan identity.

it departed from the evidentiary record to recite vote totals in several elections (e.g., the 2016 presidential contest and the 2018 senatorial contest). But this evidence was not presented to the court below—whose discretion is under review here—and the stay-stage ruling identified no methodology behind the selection of the particular elections it cited, as opposed to others. The decision did not discuss the 57,000 statewide votes LMNP's attorney-general candidate received in 2014, or the more than seven and eight percent respectively of the total vote cast in recent congressional elections in Minnesota's Fourth and Fifth Congressional Districts. And it is unknown and unknowable whether these results would make a difference under the stay-stage ruling's standard.

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At a minimum, application of that standard would seem to require vacatur of the injunction and remand for factfinding—and likely presentation of expert analysis at an evidentiary hearing—on the potentially numerous fact questions that it implicates. After all, because no party pressed this theory below, Mr. Kistner was denied the opportunity to rebut it by presenting evidence on the LMNP's "history of electoral strength," public support, and so forth. And, for the same reason, the district court made no findings under that standard. *See, e.g.*, *Blue Moon Entm't, LLC v. City of Bates City, Mo.*, 441 F.3d 561, 566 (8th Cir. 2006) (remanding for district-court consideration "in the first instance" of matters not addressed in its preliminary-injunction ruling); *Able v. United State*s, 44 F.3d 128, 132 (2d Cir. 1995) (similar); *Basel v. Knebel*, 551 F.2d 395, 398 & n.3 (D.C. Cir. 1977) (similar); *see also Fergin v. Westrock Co.*, 955 F.3d 725, 730 n.3 (8th Cir. 2020) ("When a district court fails to address a matter properly

presented to it, we ordinarily remand to give the court an opportunity to rule in the first instance.").

Beyond its questionable application in this case, the stay-stage ruling's standard is plainly unworkable. In 1998, for instance, Minnesota elected a third-party governor, Jessie Ventura, who appointed a third-party senator to represent the state in Congress. Would the death of a candidate from that party qualify under the reasoning of the stay-stage opinion? Likewise, the provisional ruling opined that "a major earthquake or hurricane in the congressional district on election day could justify a cancellation, but a snowstorm could not," ADD 33, but what about a tropical storm or a derecho? What about a snowstorm in Florida or Arkansas, as opposed to Colorado or Minnesota? What about an ice storm that results in postponement of every major athletic event and concert in town? The substitution of a free-floating policy inquiry in place of the statutory text would (if it stands) require case-specific adjudication, with full-blown trials, in practically every instance, throwing elections into doubt *as voting progresses*.

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The place to look for answers to these kinds of questions is not vague considerations of "policy," but the body of the state law that Section 8(a) necessarily relies upon by its terms. Minnesota's policymakers have already identified a bright-line standard appropriate for Minnesota's political environment and its unique election needs. There is no reason to adopt a shadow set of *ad hoc* policy prescriptions identifying a new set of major-party standards and parallel principles identifying when Minnesota's elections succeed and when a "failure to elect" occurs.

II. The District Court Abused Its Discretion in Determining That the Equities of This Case Justify the Extraordinary Remedy of Preliminary Injunction

"An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32. Plaintiffs were required to establish "the threat of irreparable harm to the movant…the state of balance between the harm to the movant and…the injury that granting an injunction will inflict on other parties to the litigation and the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). These factors cut *against* an injunction here.

A. Unrebutted Evidence Demonstrates That the Injunction Works Enormous Irreparable Harm on Voters and Mr. Kistner

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The district court abused its discretion in finding that, on balance, the supposed harm to Plaintiffs without an injunction exceeds the harm to other parties with an injunction. Importantly, the court conceded that the injunction *will* harm other parties. ADD 19–20. But the court "significantly understated the burden the preliminary injunction would impose on" them, which far exceeds any burdens that *might* befall Plaintiffs without an injunction. *Winter*, 555 U.S. at 24.

1. The injunction severely frustrates the right of innumerable voters in the Second Congressional District to vote in the congressional contest. Beginning on September 24, these voters were informed that the election was cancelled, that votes would not be counted, and that a special election would be held in February 2021. As Rep. Craig herself testified, this disincentivized voters who cast ballots after September 24 from making any choice in the Second

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Congressional District race, D.Ct.Dkt. 17, Craig Decl. ¶ 11, and voters did in fact follow that course, ADD 50. That fact is uncontroverted. Now that the district court has ordered the contest to proceed, a second group of voters will vote with the understanding that the November election is occurring.

This differential treatment inflicts a constitutional harm through the "arbitrary and disparate treatment of the members of [the] electorate." *Bush v. Gore*, 531 U.S. 98, 105 (2000). Election rules must "satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right" to vote. *Id.* The "uneven treatment" of voters violates the Equal Protection Clause. *Id.* at 531. The injunction inflicts uneven treatment of voters on the arbitrary basis of when they cast their votes. "[E]ach qualified voter must be given an equal opportunity to participate in [the] election," *Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 56 (1970), but the injunction here denies equal treatment and results in disenfranchisement on an uneven basis—a paradigmatic irreparable harm. *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, No. 81-03876, 2016 WL 6584915, at *17 (D.N.J. Nov. 5, 2016) (collecting cases).

The district court conceded "that conflicting announcements from Minnesota's Secretary of State as to the status of votes cast in the November general election might cause some confusion," yet it appeared to shift the burden to the *defense* to establish the absence of harm. *See* ADD 20 ("[T]hese countervailing potential harms do not tip the balance in favor of the Defendants."). This is not the law. *See Winter*, 557 U.S. at 32–33. And the

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balancing is, regardless, clearly erroneous: as this Court's stay-stage ruling recognized, allowing the Minnesota's vacancy statute "to take effect, and permit the election for Representative to occur in February 2021 rather than November 2020" would render "any current confusion…largely immaterial." ADD 27. Even if voters are *now* confused, the operation of Minnesota law allows the state time to provide clarity to voters well in advance of February's special election.

But the converse is not true. Those who did not select a candidate in this race, in reasonable reliance on the Secretary's announcement, may never learn that the race was revived *after* they voted,[11] and those who do learn this face the onerous process of affirmatively cancelling their ballots, requesting new ballots, and voting again—all before an October 20 statutory deadline that has already passed. *See* ADD 35. The balance of burdens is clear-cut. Those voters who voted in this contest can do so again without much ado in February. Many who did not will not learn that the race was revived, many will not learn this in time, and those who do are not likely to take the steps to undo what they already did and redo it.

2. The injunction especially burdens the supporters of LMNP and Mr. Weeks, who now have no candidate representing their major party in the

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[11] This Court's stay-stage ruling charged voters who do not learn of Plaintiffs' lawsuit with not being "informed." ADD 35. But that is no basis for distinguishing between and among voters. Just as "[a] citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm," *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), a voter is no more or less qualified by virtue of watching the District of Minnesota's docket or happening upon a story about the lawsuit and guessing at the outcome.

November election. Under Minnesota law, these voters may nominate (and have nominated) a candidate to represent their views and to compete in the race.

The district court responded that it "cannot enjoin harm caused by Weeks's death," ADD 21, but this is not relevant: Minnesota law *addressed* that harm, so the weighing of equities required the Court to weigh in the balance the effect of enjoining that law on those who benefited from it. The court's contrary conclusion assumed that only "state action" is relevant in the balance of equities, *id.*, but that is legally erroneous. *See, e.g.*, 11A Charles A. Wright et al., Federal Practice & Procedure Civ. § 2948.2 (3d ed.) (citing "likely insolvency of a defendant if a preliminary injunction is issued," which is not state action, as a circumstance where the balance of equities cuts against an injunction); *see also Energy Servs. v. W. River Pumps, Inc.*, 567 F.3d 398, 403–04 (8th Cir. 2009) (similar); *Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 277 (7th Cir. 1992) (similar); *KMW Int'l v. Chase Manhattan Bank, N.A.*, 606 F.2d 10, 17 (2d Cir. 1979) (similar). In weighing competing harms, a district court should consider the effect enjoining a statute will impose on the beneficiaries of that statute.

This Court's provisional ruling, meanwhile, diminished the harms the injunction imposes on LMNP supporters on the view that they "may still cast a vote for the decedent." ADD 34. Needless to say, there is a material difference between rallying around a living candidate in a competitive election and casting a symbolic vote for a dead candidate. Pursuant to Minnesota law, LMNP nominated a new candidate to carry the banner for its cause, and the district

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court's injunction irreparably harms LMNP and its supporters by denying them the opportunity to run that candidate in February.

3. The injunction also inflicts severe and irreparable harm on Mr. Kistner. Mr. Kistner's campaign acted in reasonable reliance on the Secretary's announcement, rescheduling campaign and fundraising events and strategic meetings. ADD 49. Other campaigns and supporters of Mr. Kistner stopped disseminating Kistner campaign materials. ADD 49. The campaign cancelled advertising and declined to purchase advertising time that it would have otherwise purchased. ADD 49–50. Donors otherwise inclined to give to the campaign chose to fund other causes and candidates, and donations plummeted after it was announced that the election would not occur in November. ADD 50. Independent expenditures related to the contest also appear to have ceased. ADD 50. Meanwhile, the campaign made plans for the February election. ADD 50. Finally, voters inclined to cast ballots for Mr. Kistner chose not to vote in reliance on the Secretary's announcement, ADD 50, and this harm accrues directly Mr. Kistner. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992) ("[T]he rights of voters and the rights of candidates do not lend themselves to neat separation" (citations omitted)); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (same).

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All of these choices were eminently reasonable: it would have made no sense for the Kistner campaign to run a full-court-press campaign in September and October for a contest that would not occur until February. ADD 50. Under longstanding Minnesota law, the *status quo* is a February 2021 election, not a

November 2020 election. Votes have been cast, money has been spent, choices have been made, and the wheels on the election were spinning at full speed *before* the injunction—indeed before Plaintiffs an injunction at all. All of these harms are uniquely *irreparable* because no court can turn back the clock to September 24 and start the election again. In this respect, the harms to Mr. Kistner are not like any harms that *might* accrue to Rep. Craig, since those harms can be repaired by the ordinary operation of Minnesota law: holding a February election on equal terms.

4. The injunction also impairs the state's interest in administrating an election that effectively administers and guarantees the right to vote. "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). That risk is now a certainty, since tens of thousands of votes have been cast. It is for precisely these reasons that the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). The injunction below contravenes this principle and must be reversed on this basis alone.[12]

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[12] The Minnesota Secretary of State urged this position before the district court, but at the stay stage in this Court changed course, contending that the potential for voter confusion cut against intervention by this Court in the election. The stay-stage ruling rejected this position as illogical, correctly concluding that allowing "the state statute to take effect, and permit the election for Representative to occur in February 2021 rather than November 2020" would

5. Reversal is required here because Plaintiffs are, at least in part, the cause of the widespread disenfranchisement the injunction below will cause. Mr. Weeks passed away on September 21, but Plaintiffs waited a full eight days to move for an injunction and, even then, did not seek a temporary restraining order. The state and thousands of voters thus spent weeks taking action in reliance on the state's (lawful) determination and the Secretary's widely-publicized announcement that no November 3 election could occur for the Second Congressional District seat. Plaintiffs' delay, and the contribution of that delay to widespread and severe irreparable harm, is yet another reason an injunction should never have issued. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("A party requesting a preliminary injunction must generally show reasonable diligence."); *see also Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers). The district court's assertion that "all properly cast votes" will be counted, ADD 19, ignores the voters who were told there was no vote to cast, and now are left without a voice in this election.

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B. Plaintiffs Will Not Suffer Irreparable Harm

Plaintiffs failed to prove that they will suffer irreparable harm without an injunction. The harms alleged to accrue against Rep. Craig as a candidate are not severe, and certainly not irreparable, because she can run in February 2021, just as in November 2020, and can spend the same fungible money at either time. The district court's finding that Rep. Craig "will be forced to conserve

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render "any current confusion among voters about the effect of a vote for Representative in November 2020" to "be largely immaterial." ADD 27.

campaign resources in anticipation of a potential special election in February," ADD 17, describes a comparatively insubstantial burden, one that applies to all candidates evenly (including Mr. Kistner); can be overcome with appropriate budgeting and prudent campaign management; and, besides, appears to be *exacerbated* by the injunction, since Rep. Craig was compelled to assume for a time that no November election would occur and adopt appropriate contingency measures. Meanwhile, if Rep. Craig's true (unstated) concern is that she would prefer to run without a living LMNP candidate on the ballot, that is ordinary election competition, not irreparable harm.

The harm the district court identified to co-Plaintiff Davies is that "she is required to vote twice," ADD 17, but the opportunity to vote is neither a severe nor an irreparable burden on the right to vote. Indeed, the opportunity to vote in the same election in February proves that the alleged harm is, and will be, repaired. Since Ms. Davies had already voted on September 29th, D.Ct.Dkt. 18 Davies Dec. ¶ 3, she must have done so by absentee ballot and therefore will automatically receive a ballot for the February special election. Minn. Stat. § 204B.13 subd. 8. Any burden of filling out a second ballot selecting Rep. Craig is *de minimis*. Meanwhile, "the absence of uninterrupted congressional representation in the United States House of Representatives," ADD 17, is for little more than a month, and there is no evidence that Ms. Davies will be injured by that hiatus.[13]

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[13] To the extent it is contended that Rep. Craig will be harmed by not sitting in Congress, this also is speculative. Rep. Craig has not proven that she will win, nor does Rep. Craig have a legally cognizable interest in sitting in Congress.

C. Plaintiffs Did Not Establish That the Public Interest Favors an Injunction

For the same reasons, the public interest weighs decidedly against an injunction. The harms plainly outweigh any benefits. Elections cannot be stopped and restarted on a dime, especially *after voting begins*. The district court was incorrect that its injunction "*restores* and *maintains* the *status quo*." ADD 23. The *status quo* is that the November 3 election is off, and voters and Mr. Kistner's campaign took action in reasonable reliance on that *status quo*.

On the one side of the balance are tens of thousands of votes that will be cast on fundamentally unfair terms, as some voters believed they were voting in the Second Congressional contest and many others believed they were not. The burden the injunction imposes on fundamental rights is severe to the utmost degree, and practically no interest could outweigh it.

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"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (quotation marks omitted); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (same); *Def. Distributed v. U. S. Dep't of State*, 838 F.3d 451, 458 (5th Cir. 2016) (same); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (same); *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 884 (3d Cir. 1997) (same); *cf. United States v. Raines*, 362 U.S. 17, 27 (1960) ("[T]here is the highest public interest in the due observance of all the constitutional guarantees."). The injunction is presently violating the rights of Mr. Kistner and voters in this District. Although the opinion below posits that the right to vote can be vindicated by a November election, it is impossible to administer that

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election on an even playing field and in a fair way. *See Bush*, 531 U.S. at 110 (calling ballot counting to a close where it "will be unconstitutional" in application). Indeed, the burdens imposed on the right to vote apply to Rep. Craig's own supporters, who (like everyone else) were instructed that no election would occur on November 3. It is perplexing that Rep. Craig has sought to disenfranchise persons who might have otherwise voted for her.

On the other side of the scale are the slight burdens of campaign management issues Rep. Craig has had to navigate in any event, the opportunity to vote in February, and a short hiatus in representation. These minor burdens—if they can be called that—are handily justified by the vindication of rights of untold numbers of voters who deserve a fair election, knowing exactly what races are occurring when they cast their ballots. The District Court understood that the "right to vote is of the most fundamental significance under our constitutional structure," ADD 21, but instead of recognizing that a February special election allows *all* voters to exercise that right, it abused its discretion when it limited the scope of that right to "vot[ing] in the November general election," ADD 21. The court ignored the thousands of voters who have not voted in this race because they relied on the law and the Secretary's statements. The disenfranchisement caused by the injunction cannot be in the public interest.

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CONCLUSION

The Court should vacate the district court's injunction.

Dated: October 30, 2020

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I hereby certify that the foregoing complies with the following requirements:

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I hereby certify that on October 30, 2020, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and will be served via electronic filing upon all counsel of record who have appeared or will appear in this case.

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