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

Appellant's Reply Brief

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INTRODUCTION

Plaintiffs offer no coherent interpretation of 2 U.S.C. § 8(a). They do not defend the reasoning of this Court's stay-stage ruling, which posited that Minnesota's choice to reschedule an election following the death of a "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. Instead, Plaintiffs argue (at 21) that the set of rules governing when an election succeeds and when a "failure to elect" occurs, 2 U.S.C. § 8(a), "is not a 'policy choice' the state gets to make." This would come as a shock to those currently focused on Georgia's upcoming runoff elections for Senate, which were triggered by a "failure to elect" under the policy choice of the Georgia General Assembly.[1] The statutory language self-evidently looks to independent sources of election law, and Plaintiffs' alternative view appears to carve the "failure to elect" language from the statute completely. They acknowledge (at 24) that, under their interpretation, even a natural disaster would not qualify. So what does? The answer is nothing, which confirms that Plaintiffs' reading of the statute is untenable.

The equities present no contest. Rep. Craig testified below that the Secretary's announcement would cause voters not to select a candidate in the Second

[1] Both of Georgia's Senate seats were up for election in November, and the current reported vote counts indicate that neither resulted in a 50% majority for any candidate as required by state law for winner to be declared. Jordain Carney, *McConnell, Graham warn GOP Senate majority on the line in Georgia*, The Hill (Nov. 6, 2020), https://thehill.com/homenews/senate/524834-mcconnell-graham-warn-gop-senate-majority-on-the-line-in-georgia.

Congressional District race, and it is undisputed that voters did just that for weeks. The injunction below works a severe and unequal impingement on the right to vote and should be vacated.

ARGUMENT

I. Plaintiffs Are Not Likely To Succeed on the Merits

Minnesota's choice to conduct a special election following the death of a major-party candidate fits comfortably within Congress's express authorization of special elections, 2 U.S.C. § 8(a), and is not preempted by the statute establishing a default election day, *id.* § 7. Section 8(a) authorizes a special election at a time of Minnesota's choosing if a "vacancy" is "caused by a failure to elect at the time prescribed by law." 2 U.S.C. § 8(a). As Mr. Kistner's opening brief explained, the two elements of this statute—a "vacancy" and "failure to elect"—are met because, by operation of Minnesota Statutes § 204B.13, the November 3 Second Congressional District contest failed to produce a legally conclusive result, and this failure to elect will automatically result in a vacancy as of January 3, 2021. Plaintiffs offer no coherent alternative construction, and their contentions would render Section 8(a) inapplicable in the most obvious cases where a failure to elect occurs, such as widespread election fraud or a natural disaster.[2]

[2] The House of Representatives is incorrect (at 2) that Mr. Kistner's proper recourse is to an election contest before the House. Mr. Kistner's claim is not that "the circumstances of that election were unfair," House Br. 2, but that the district court improperly thwarted the operation of Minnesota law. This Court, not the House, is the proper forum for challenging a district-court injunction. *See* 28 U.S.C. § 1292(a)(1).

A. Plaintiffs Abandon the Reasoning of This Court's Stay-Stage Ruling

Plaintiffs tout this Court's ruling denying Mr. Kistner's motion for a stay pending appeal but promptly abandon that ruling's reasoning and argue against it. This Court's stay-stage ruling assumed "that 2 U.S.C. §§ 7 and 8(a) would allow a State to cancel an election in some scenarios" and that "the death of a Republican or Democratic-Farmer-Labor candidate could qualify," but it found "it unlikely that the rationale would extend to the death of a third-party candidate from a party with the modest electoral strength exhibited to date by the Legal Marijuana Now Party in Minnesota." ADD 34. Plaintiffs, however, have no use for this line-drawing and contend that scheduling a special election is never "a 'policy choice' the state gets to make." Pls' Br. 21. And they apparently agree (at 24 n.5) that a federal court should not "substitute[] its policy judgment for Minnesota's" or "define…major political parties."

Thus, although the Court's stay-stage ruling features prominently in Plaintiffs' brief, they reject its reasoning—and for good reason. As Mr. Kistner's opening brief explained (at 18–22), the types of distinctions drawn by the stay-stage ruling are unworkable and lack any basis in the statutory text. Plaintiffs try to downplay their disagreement with the stay-stage ruling by emphasizing that it merely engaged in assumptions for the sake of argument. Pls' Br. 24 n.5. But this sidesteps the fact that the stay-stage ruling did not endorse Plaintiffs' reading of the statute.

B. Plaintiffs' Defense of the District Court's Reasoning Is Unpersuasive

Plaintiffs, however, offer no competing theory of what the statute means. They assure the Court that it does not apply in *this* case, but fail to explain when it does apply. In place of sound statutory analysis, Plaintiffs offer misdirection and evasion.

1. Vacancy

As explained, Section 8(a) authorizes states to set the time of special elections "to fill a vacancy." 2 U.S.C. § 8(a). This vacancy element is satisfied because Minnesota's ordinary and generally applicable election law will result in a vacancy in the Second Congressional District as of January 3, 2021. Plaintiffs concede that, without an injunction, this vacancy is a certainty. Pls' Br. 32 (highlighting "the lack of representation in Congress for more than a month").

Plaintiffs insist (at 16), however, that "January 3, 2021, is not the relevant date to determine whether a vacancy arises," since the "statute applies to a failure to elect 'at the time prescribed by law,' which is November 3, 2020." This is the first of Plaintiffs' many conflations of the "vacancy" and the "failure to elect" elements. The statute provides that a state may "fill a vacancy" if "such vacancy is caused by a failure to elect at the time prescribed by law." 2 U.S.C. § 8(a) (underlining added). The adjectival phrase "at the time prescribed by law" modifies the phrase "a failure to elect," not the noun "vacancy." Plaintiffs' interpretation "disregards—indeed, is precisely contrary to—the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase…should ordinarily be read as modifying only the noun or phrase that it immediately

follows…." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). The phrase "at the time prescribed by law" requires only that the "failure to elect," not the "vacancy," occur at the time prescribed by law. As Mr. Kistner's opening brief explained (at 16), the statutory language "caused by" confirms this, because cause precedes effect. The timing requirement is satisfied here, because (without the injunction) the failure to elect occurred as of November 3, 2020.[3]

Plaintiffs' discussion of this element attempts to tiptoe past *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983), which 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." *Id.* at 525. *Busbee* explained that "[a] simple reading of the statute, which 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, is enough to refute this contention." *Id.* Plaintiffs have no response.

Rather than engage *Busbee* on this point, Plaintiffs engage in misdirection over *Busbee*'s status as controlling authority. They insist that "*Busbee*'s passing 'natural disaster' reference is not binding on this Court," because the Supreme Court' summary affirmance of *Busbee* only reaches "matters 'essential to sustain that judgment.'" Pls' Br. 24 (quoting Kistner Br. 17). But, as Mr. Kistner noted

[3] The House contends (at 11) that a failure to elect "cannot be declared by state law before the uniform Election Day." The House does not explain why that would be, nor must a *declaration* coincide with when the failure *occurs*. The Secretary's declaration that the result would prove inconclusive is no different from knowing days in advance that a hurricane will strike on the scheduled election day and rescheduling on that basis.

(at 17), *Busbee*'s discussion of the timing of the relevant vacancy—i.e., that a January vacancy qualifies—is binding, because *Busbee*'s holding on the timing of the relevant vacancy was essential to its judgment. *See* 549 F. Supp. at 524–26. And whatever the binding force of *Busbee*'s observation 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, it is plainly correct, as recognized in *Pub. Citizen, Inc. v. Miller*, 813 F. Supp. 821, 830 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993). Yet Plaintiffs contend (at 24) that a natural disaster could never qualify as the cause of a prospective vacancy—in their view, nothing could. That reading is inconsistent with *Busbee* and unserious.

2. Failure To Elect

The failure-to-elect element is also satisfied. Minnesota's ordinary and generally applicable election statutes render the November 3 election a failure and its result inconclusive.

a. Plaintiffs respond again with misdirection, claiming that Mr. Kistner "argues that the Court should look to Minnesota law—and particularly the Minnesota Statute—to define the term 'vacancy.'" Pls' Br. 19; *see also id.* at 17 ("It is not appropriate to look to state law to define when a vacancy arises."). Mr. Kistner did not argue that, nor did he need to when, as explained, the meaning of "vacancy" is clear and clearly satisfied. Mr. Kistner argued—in a section with a bold heading "**Failure to Elect**"—that the term "'failure to elect' is not a defined term in the U.S. Code and itself references independent principles of

election law, including state law." Kistner Br. 12. Plaintiffs are mixing and matching arguments, this time lodging arguments on the vacancy element in response to Mr. Kistner's argument on the failure-to-elect element.

b. The House (but not Plaintiffs) relies on a presumption that federal statutes are not "dependent on state law," House Br. 12 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989)), but this "does not mean that [a federal statute's] content is not to be determined by state, rather than federal law," *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956). A plain indication that Congress intends to refer a statutory term to a state-law meaning need not be express; it can be inferred "the general scheme of the statute." *Id.* For example, because "there is no federal law of domestic relations," *id.*, and no comprehensive federal law of real property, *Reconstruction Fin. Corp. v. Beaver Cty., Pa.*, 328 U.S. 204, 208–09 (1946), the Supreme Court has looked to state law to afford meaning to federal-law references to terms related to these fields. *De Sylva*, 351 U.S. at 581; *Reconstruction*, 328 U.S. at 208–09.

This case neatly fits within the classes of cases where state law is, in large part, "controlling." *De Sylva*, 351 U.S. at 581. Just as Congress has not established comprehensive federal codes of real property or of family-relations law, it has not established a comprehensive federal election code dictating when a "failure to elect" occurs. The House contends (at 12) that the term "failure to elect" does not have a "state-law meaning that Congress could have intended to import," but a "failure to elect" is a legal concept that must draw its meaning from *some* law. It is law that defines who may vote, what a vote is worth, the vote

totals necessary to win, the qualifications of those entitled to hold office, and the manner in which the election must occur. For there to be a "failure to elect," there must be a source of law to define it. State law is the natural source of that law.

The House also cites Congress's authority under the Elections Clause to regulate congressional elections, but Congress's authority is not exclusive, was not intended to be plenary, and has not been exercised in a plenary way. The same Elections Clause gives state legislatures the *lead* role in promulgating election laws. *See* U.S. Const. art. I, § 4, cl. 1; 2 J. Story, Commentaries on the Constitution of the United States § 813, p. 280 (1833) (opining that Congress would not exercise its Elections Clause power "unless from an extreme necessity, or a very urgent exigency"). Although federal law may independently create a failure to elect, it does not follow that state law may not. There is no reason to conclude that the phrase "failure to elect" incorporates the less voluminous, but not the more voluminous, source of election law.

c. Were the House's interpretation correct, Georgia would have no leeway to conduct runoff elections for its Senate seats, as it is poised to do. But the Eleventh Circuit's affirmance and adoption of the *Public Citizen* decision approving Georgia's runoff-election policy choice endorses Mr. Kistner's reading of Section 8, so Plaintiffs are wrong (at 17) that Mr. Kistner "cites no authority for" it. *Public Citizen* concluded that a Georgia law "construe[ing] a mere plurality vote as an inconclusive vote" satisfies Section 8's failure-to-elect standard, and that "[t]his is not changed by the fact that a plurality outcome results in a failure

to elect only because the state so declares." 813 F. Supp. at 803. Georgia could have chosen a different threshold, yet *Public Citizen* read Section 8 as deferring to state law.

Plaintiffs (at 17–19) ignore *Public Citizen* in addressing Mr. Kistner's argument about states' role in defining a failure to elect, a proposition central to that decision. Instead, Plaintiffs (at 20–21) attempt to differentiate *Public Citizen* on the ground that Georgia "held an election on election day," and the run-off occurred later. They contend (at 21) "the Georgia statute did not raise a preemption problem because it did not conflict with § 7." But the decision held that "Georgia's 'failure to elect' falls within the scope of such failures [to elect] covered by section 8." 813 F. Supp. at 830. It is true that an earlier portion of the decision reasoned that the "majority vote statute…does not prescribe a bald departure from section 7's instructions," and, in reaching that conclusion, *Public Citizen* observed that "[t]he run-off does not reschedule the earlier general election, nor does it negate that election's outcome." 813 F. Supp. at 830. But Georgia raised arguments under both Sections 7 and 8, *see id.* at 828–29, and the court addressed both, *see id.* at 829–31.

In addressing the phrase "failure to elect" under Section 8, *Public Citizen*'s principal rationale was that a "plurality outcome in the general election is similar to an election postponed due to natural disaster or voided due to fraud in that each is contemplated, yet beyond the state's ability to produce." *Id.* at 830. If states were required to conduct the election on election day to satisfy the failure-to-elect element, Section 8 also would not reach the case of a natural disaster,

which might result in "rescheduling" an election. *See id.* at 830; *Busbee*, 549 F. Supp. at 526 ("Congress did not expressly anticipate that a natural disaster might necessitate a postponement, yet no one would seriously contend that section 7 would prevent a state from rescheduling its congressional elections under such circumstances." (underlining added)).

Yet Plaintiffs do not discuss *Public Citizen* in addressing the natural-disaster scenario. They opportunistically shift (at 23) to *Busbee* and claim that "[a] natural disaster, as understood by *Busbee*, must…preclude the state from holding an election on the federally prescribed date." If so, then *Public Citizen* was wrongly decided: the failure to elect resulted from a Georgia statute, and the state was not prevented from adhering to the result of the general election. The same is true in *Busbee*. Kistner Br. 14. In fact, the exact same thing happened twice in Georgia this year, and no one has challenged Georgia's decision to schedule two Senate special elections.[4]

d. Plaintiffs (at 15) also point to language in Section 8(a) authorizing a special election in the event of "the death, resignation, or incapacity of a person elected" and contend that *this* element of the statute is not met. But Mr. Kistner does not, and need not, rely on this element. This element and the failure-to-elect elements are alternative bases for the statute's application. *See, e.g.*, *In re Pac.-Atl. Trading Co.*, 64 F.3d 1292, 1302 (9th Cir. 1995). A showing of the "death, resignation, or incapacity of a person elected," is not required to show a

[4] Minnesota's Secretary of State, represented by its Attorney General's office, agreed with Mr. Kistner below that *Busbee* and *Public Citizen* are on point and indistinguishable as to their respective holdings. D.Ct.Dkt. 39 at 13–21.

"failure to elect"; that's left to other sources of law, whether federal (as in *Busbee*) or state (as in *Public Citizen*). And many states have enacted such laws, all of which would be preempted under Plaintiffs' view. Kistner Br. 15 n.8. The "death…of a person elected" language supports Mr. Kistner's position, because it recognizes that unexpected deaths are the kind of things Congress recognized to trigger Section 8(a). *Cf. Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990).

e. Plaintiffs and the House both incorrectly frame the issue of this case as involving a state's attempt to circumvent or avoid the general rule that federal elections occur on election day. But this is not a case where "the Minnesota Statute ensures that no election occurs on election day," Pls' Br. 21, and the state offers hyper-technical "wordplay" in explaining how Section 7 is satisfied. *Foster v. Love*, 522 U.S. 67, 72 (1997). In *Foster*, Louisiana scheduled an open primary before the default November election day, and allowed the possibility of a special election on the November election day in those "unusual instances when one is needed"—and then defended the choice on the ground that it had changed the "manner," but not the "time" of the election. *Id.*

By contrast, Congress here expressly sanctioned special elections. Minnesota did not establish an alternative default election day, but rather sought to apply its generally applicable definition of when a "failure to elect" occurs, as Section 8(a) authorizes. Nor is this a case where "a State…refuse[s] to provide for the election of representatives to the Federal Congress." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). Minnesota conducts elections by

default on the Tuesday after the first Monday in November, and, without the injunction below, it will send a representative to Congress after the election authorized under Section 8(a). It is, then, unavailing for Plaintiffs to contend (at 14) that "[t]he Minnesota Statute clearly conflicts with § 7's mandate" of a uniform election day. *See also* House Br. 2 (same argument). Congress established an exception to that rule which curtails the preemptive scope of Section 7. Plaintiffs ultimately concede as much. *See* Pls' Br. 14–15.

Plaintiffs (at 20) accuse Mr. Kistner of failing "to acknowledge" *Public Citizen*'s warning that "Congress, in passing section 8, could not have intended…emasculation of section 7 at a state's whim." 813 F. Supp. at 830. But Mr. Kistner did acknowledge this. Kistner Br. 19–20. It is Plaintiffs who fail to acknowledge that this type of emasculation occurs only when "[a] carefully crafted law…, by its sole design, invents a 'failure to elect.'" *Pub. Citizen*, 813 F. Supp. at 830. Minnesota law does nothing like that. "[T]he Minnesota Nominee Vacancy Statute was [not] drafted or enacted in bad faith." ADD 14. It ties a failure to elect to the rare circumstance of a major-party candidate's death, which has no chance of subverting the default election day in any but the rarest occasions. It employs Minnesota's ordinary and generally applicable election-law definitions, which the state utilizes for numerous purposes. And a candidate's death "is similar to an election postponed due to natural disaster or voided due to fraud in that each is contemplated, yet beyond the state's ability to produce." *Pub. Citizen*, 813 F. Supp. at 830. Section 204B.13 qualifies as among the

"limited class of cases" that qualifies under Section 8(a). Pls' Br. 25 (quoting *Busbee*, 549 F. Supp. at 526).

For the same reason, the House misses the mark (at 13) in contending that the "federal scheme would unravel if states could seize on the 'failure to elect' provision in section 8 to set their election days based on state-policies." No one contends that a state statute setting a different default election day would satisfy Section 8. Instead, Mr. Kistner contends that a "failure to elect" occurs when an election fails under a state's ordinary and generally applicable election procedures, so long as they are not pretexts to evade the default election day. Section 204B.13 undisputedly is not such a pretext.

C. Special Elections Do Not Place an Undue Burden on the Right To Vote

Plaintiffs contend that conducting the election in February, rather than November, places an undue burden on the right to vote. But there is no right to vote in November as opposed to February. The right to vote entails a principle "that once the franchise is granted to the electorate, lines may not be drawn" on irrational bases. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966). So long as all Minnesota voters may cast ballots on equal terms in February—and they may—the Equal Protection Clause does not privilege a November date over a February date. Nor does an alleged violation of a statutorily prescribed date, such as 2 U.S.C. § 7, amount to a constitutional offense. It should not go unnoticed that such an argument would seemingly bar Georgia's upcoming special elections.

Undeterred, Plaintiffs contend (at 28) that Section 204B.13 "inflicts a severe burden on the right to vote" under the *Anderson-Burdick* test because it "requires the Secretary to nullify *every single one* of [the] votes" in the Second Congressional District contest. That is a complete mischaracterization of this case. Section 204B.13 simply reschedules the election; it does not bar anyone from voting or "nullify" anyone's right to vote. Plaintiffs cite no authority for the proposition that *rescheduling* an election inflicts any burden on the right to vote, severe or incidental. If Plaintiffs were correct, there could be very few special or runoff elections. Even now, it appears that Georgia will conduct two runoff elections for its Senate seats. Under Plaintiffs' theory, this choice violates the right to vote of millions of Georgia voters who cast ballots in November, have now seen those ballots effectively thrown out, and now must vote again if they are to have a say in their Senate representation.

Moreover, if Plaintiffs' equal-protection theory were correct, Minnesota Statutes § 204B.13 would be unconstitutional even as applied to Minnesota's state and local elections. *See Monaghen v. Simon*, 888 N.W.2d 324, 334–35 (Minn. 2016) (ordering state boards not to certify results of an election after it occurred due to Section 204B.13). It is doubtful that 2 U.S.C. § 8(a), at least insofar as it reaches a "failure to elect in the time prescribed by law," would ever find a constitutional application under Plaintiffs' theory.

These nonsensical results find no support in the law. "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review,

and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quotation marks omitted). This Court's stay-stage ruling persuasively rejected the notion that *any* harm will accrue to *any* voters in the Second Congressional District. ADD 27. Further, there is no burden here to rescheduling an election. The opportunity to vote in February in a fair election is a "reasonable, nondiscriminatory" imposition (if that) on the right to vote, and Minnesota's interests handily justify any resulting burdens on the franchise. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008); *Org. for Black Struggle v. Ashcroft*, -- F.3d --, 2020 WL 6257167 at *2 (8th Cir. Oct. 23, 2020); *New Ga. Project v. Raffensperger*, -- F.3d --, 2020 WL 5877588, at *1 (11th Cir. Oct. 2, 2020). Further, those voters who cast absentee ballots will automatically be mailed a new absentee ballot. Minn. Stat. § 204B.13 subd. 8. The burden of casting another ballot is *de minimis*.

Meanwhile, Minnesota has compelling interests that justify the February election under any level of scrutiny. One is conducting a truly competitive election with all major parties represented. Another is ensuring that supporters of parties whose candidates have unexpectedly died or been disqualified have an opportunity to rally around and elect their preferred candidates. Another is providing that election results are truly reflective of popular will—just as with Georgia's majority-vote requirement. All of these interests qualify as compelling and justify the minor—indeed, non-existent—burdens Plaintiffs allege.

Plaintiffs are on the wrong side of equal protection in this case. The stop-and-start nature of the voting here severely and unjustifiably burdens the right of those persons who relied on Minnesota law and the Secretary's announcement and reasonably declined to vote in this race. Because different voters who voted at different points in time were given different instructions, the conduct of a November election "draw[s]" impermissible "lines." *Harper*, 383 U.S. at 665; *Bush v. Gore*, 531 U.S. 98, 105 (2000) (holding that the Equal Protection Clause forbids "arbitrary and disparate treatment of the members of [the] electorate"). Plaintiffs' contention that those persons who did cast votes in the race will be disenfranchised ignores the opportunity to vote in February on equal terms and fails to identify any arbitrary distinction between and among voters. By contrast, those who reasonably declined to cast a ballot in the Second Congressional District race will be disenfranchised without a February election. The sole arbitrary distinction at issue here is caused by the federal-court injunction, which resulted in this arbitrary classification of voters, and not by the operation of Minnesota law.

II. All Equitable Considerations Cut Against a Preliminary Injunction

Plaintiffs' failure to establish a likelihood of success alone requires reversal. *See Planned Parenthood Minn., N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 737 (8th Cir. 2008). So, too, does Plaintiffs' failure to establish irreparable harm and that the balance of equities favors relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

A. The Injunction Severely Harms Other Parties

As Mr. Kistner's opening brief recounts, the injunction imposes substantial harm on Mr. Kistner, supporters of LMNP, and the voting public. Plaintiffs' effort to discount these harms falls flat.

1. Harm to the Voting Public

It is not true that "every voter in MN-2 had an equal opportunity" to vote. Pls' Br. 35. Some voters were instructed that the congressional race was off and that votes would not be counted; others were instructed that it was on and that votes would be counted. Underlying Plaintiffs' assertion of equality is the unstated and undefended assumption that different classes of voters can be given completely opposite voting instructions consistent with the Equal Protection Clause. Under the Plaintiffs' view, the state could instruct voters in downtown Minneapolis that the presidential race is off while instructing voters in Bemidji that the race is on. That is obviously wrong because giving voters conflicting voting instructions inherently privileges one group of voters (those who received correct information) over another (those who received incorrect information). *See, e.g.*, *Harper*, 383 U.S. at 665. In any event, in the balance of equities, the total "confusion and consequent incentive to remain away from the polls" takes on supreme importance. *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006).[5]

It is not true that Mr. Kistner merely "speculates" that some voters did not vote. That fact is actually uncontroverted: a declaration Plaintiffs fail to cite

[5] Plaintiffs' contention (at 40) that "*Purcell* is irrelevant because the election has already occurred" forgets that the election had not occurred when the district court issued its injunction, which is the ruling on appeal.

provides sworn testimony that voters, in reliance on the Secretary's announcement, did not cast votes in the Second Congressional District race. ADD 50. The Court must also account for Rep. Craig's own sworn testimony that the Secretary's "statement and any postings put up as a result of the Posting Requirement threaten to cause voters to forego their right to cast their ballots for the 2nd Congressional District." D.Ct.Dkt. 17, Craig Decl. ¶ 11. Plaintiffs know as well as anyone that voters instructed that their votes will not count will decline to make a choice in the race.

Plaintiffs' contention (at 35) that each voter had "until October 20 to cancel his or her ballot and request a new absentee ballot or vote in person" simply describes the equal-protection injury. At a minimum, those voters lucky enough to learn that the instructions they received were reversed by a federal court would have to undertake the arduous process of *cancelling* a ballot and starting over, whereas voters who voted after the injunction bore no such burden. This severe burden on the right to vote was borne unequally and, to survive constitutional scrutiny, must be justified by a compelling interest. Plaintiffs identify none.

Moreover, Plaintiffs are wrong that it is "entirely unclear how a voter would have been aware of the Secretary's first announcement…but entirely unaware of…the Secretary's second announcement that votes would be counted." Pls' Br. 36. Voters who voted early in person were confronted with announcements at polling places that votes would not be counted. Those who relied on that instruction had no reason to return to the polling place or otherwise confirm

the rules of the election *after they had already voted*. Further, voters who conducted research in advance of voting would have learned of the Secretary's announcement at the time of mailing their votes, and, after casting their votes, moved on to other endeavors. If this reality were otherwise, the Supreme Court would not have warned "lower federal courts" not to "alter the election rules on the eve of an election," as it has so frequently done. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

It is also easy to see how voters would be "entirely unaware of this lawsuit." Pls' Br. 36. This may come as a surprise to election lawyers, but most voters care little about election lawsuits, and few pay them the slightest attention. As a factual matter, it is undisputed that at least some voters, otherwise inclined to vote in the Second Congressional District race, chose not to in reasonable reliance on the instructions they were given.[6] The harms to those voters are severe, and the district court abused its discretion in changing the rules of the election after voting began.

Finally, with no law or facts to pound, Plaintiffs pound the table, contending (at 33–34) that Mr. Kistner did not preserve an equal-protection argument below. This is flat wrong. First, Mr. Kistner did present the argument in opposing the preliminary-injunction motion. D.Ct.Dkt. 41 at 16 (warning of "the stark

[6] Plaintiffs assert at various points that the Secretary told people to vote in the Second Congressional District race even though their votes would not be counted. But the only record evidence shows that the Secretary told people to vote—i.e., to vote in the numerous *other* races—and that votes in the Second Congressional District race would not be counted. D.Ct.Dkt. 19-1, Nauen Decl. Ex. 2.

disenfranchisement of voters who submitted ballots before the death of the major party candidate whose votes will not count"); *id.* at 15 (warning of "chaos, confusion, and potential disenfranchisement"); *see also* D.Ct.Dkt. 39 at 24–25. Whatever difference in emphasis Plaintiffs may purport to discern between Mr. Kistner's briefing below and here is immaterial. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534–35 (1992) (citations omitted). It does not require extensive briefing to preserve an argument. *United States v. Ritchie Special Credit Invs., Ltd.*, 620 F.3d 824, 835 (8th Cir. 2010). Second, Plaintiffs admit (at 34) that Mr. Kistner extensively briefed this point in his stay motion, which afforded the district court "a clear opportunity to review" the issue. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992); *see also Green Tree Servicing, L.L.C. v. Clayton*, 689 F. App'x 363, 370 (5th Cir. 2017). There is no waiver.[7]

2. Harm to LMNP Supporters

The district court clearly erred in concluding that the harm to LMNP supporters in voting for a dead candidate "was grossly outweighed by the harms that would accrue to *all* voters in MN-2" with a special election. Pls' Br. 37–38. This Court's stay-stage ruling rejected the notion that *any* harm will accrue to *any* voters in the Second Congressional District. ADD 27. Plaintiffs

[7] The highly expedited nature of the district-court proceeding presents an "exceptional circumstance" that would justify waiving the preservation requirement, even if it were not satisfied. *Green Tree Servicing*, 689 F. App'x at 370 (quotation marks omitted).

nonsensically demand an explanation from Mr. Kistner as to why voting for a deceased candidate is any different from voting for a living candidate, as if this were not obvious. Pls' Br. 38 n.12. Whatever may occur in some exceptionally rare "cases," a dead candidate remains, in fact, *dead* and therefore unable to advance a political cause, whether in campaigning or in office. *Cf. Monty Python's Flying Circus*, *Dead Parrot Sketch*, (BBC Television Broadcast Dec. 7, 1969).

Plaintiffs also excuse the district court's confused focus on state action, positing that "the District Court was making the uncontroversial point that it cannot enter an injunction to undo a death." Pls' Br. 37 n.11. But no one asked the district court to resurrect the dead. The point instead is that the Minnesota legislature acted to address what it identified to be a serious problem (following the death of Sen. Wellstone), and the district court had the duty to weigh in the balance the *benefits* of the Minnesota law it enjoined. The district court's disregard of those benefits (and the commensurate injury of denying them through injunction) was an abdication of its duty, not a sound weighing of equities.

3. Harm to Mr. Kistner's Campaign

The district court's injunction irreparably harmed Mr. Kistner by restarting an election he reasonably understood was cancelled. ADD 49–50. Plaintiffs' principal response, that Mr. Kistner failed to raise this argument below, is incorrect. *See* D.Ct.Dkt. 41 at 18 (contending that "Mr. Kistner would be subject to the same alleged harms as Plaintiff Craig"). The district court had the opportunity to consider these arguments, they comport with the "consistent claim" Mr. Kistner has made in this case that the equities cut against injunctive relief,

Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995), and they are properly before the Court. Further, Plaintiffs concede that Mr. Kistner raised these arguments in his stay motion. *See Whittaker Corp.*, 953 F.2d at 515.

Meanwhile, Plaintiffs' contention that Mr. Kistner should not have relied on the Secretary's assertions ignores that they are grounded in Minnesota law and represent the position of the executive official charged with administering the state's election laws. And Plaintiffs' suggestion that Mr. Kistner continued *some* campaigning, particularly after the injunction, does not rebut the undisputed facts that Mr. Kistner's campaign rescheduled events, meetings, and fundraisers; canceled advertising; and lost out on contributions. Plaintiffs presented no evidence below, at any stage, to the contrary.

B. Plaintiffs Are Not Materially Harmed Without an Injunction, and No Harm Could Outweigh the Harms To Others

Plaintiffs identify no irreparable harm. The alleged harms to Rep. Craig, such as the time and cost of "three additional months campaigning," Pls' Br. 30, are born equally by Mr. Kistner, Rep. Craig's competitor. The harms to Rep. Craig in her capacity as a candidate could only be irreparable if they placed her at a "competitive disadvantage." *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 592 (8th Cir. 1984). Because Rep. Craig's asserted burdens are born equally by all candidates, they are not harms and, in any event, are repaired through a special election on even terms. *See, e.g.*, *Jacob v. Bd. of Directors of the Little Rock Sch. Dist.*, 2006 WL 8206657, at *7 (E.D. Ark. Sept. 1, 2006) (finding no irreparable harm in "the disadvantage faced by every challenger for public office who

faces an incumbent"); *Iowa Voter All. v. Black Hawk Cty.*, 2020 WL 6151559, at *4 (N.D. Iowa Oct. 20, 2020) (finding no irreparable harm where plaintiffs identified nothing "that hinders their rights or that could influence the outcomes of the election"); *Russo v. NCS Pearson, Inc.*, 462 F. Supp. 2d 981, 990 (D. Minn. 2006) (finding no irreparable harm where alleged disadvantage was speculative). This is not a matter of "weighing harms," Pls' Br. 30 n. 7, but of their absence.

Meanwhile, Plaintiff Davies will suffer no harm to her right to vote, because she may vote in February. Plaintiffs (at 31) ask the Court to carry this point "to its logical conclusion" that "Minnesota could repeatedly invalidate Appellee Davies' vote," but nothing like that has occurred here or ever. Minnesota law calls for a special election on even terms—just as Georgia law does—not for some baseless and repeated cancelling of elections. There is no harm in a rescheduled election on even terms under Minnesota's generally applicable election mechanisms. Meanwhile, Plaintiffs' contention that even a short hiatus in representation constitutes serious harm would have rendered the 2008 Minnesota senatorial recount, which lasted nearly a year, an unconscionable injury, rather than (as it was) part of the ordinary give-and-take of election administration intended to discern and carry out popular will. The same applies to Georgia's upcoming special elections.

Finally, any harm Plaintiffs might experience without an injunction pales in comparison to the inequality the injunction imposes. Plaintiffs "agree" (at 42) that elections cannot be stopped and restarted after voting begins, and that is precisely what occurred. For weeks, Minnesota voters were told that the race

was off, and then the district court started it up again, to the enormous detriment of voters who relied on the instructions they had been given. Plaintiffs' contentions that voters should have known that a federal court would upend the operation of Minnesota law are both unsupported and divorced from reality.

CONCLUSION

The Court should vacate the injunction below.

Dated: November 9, 2020

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CERTIFICATE OF COMPLIANCE

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

1. It complies with the type volume limitations of Rule 32(a)(7) because it contains 6,492 words, excluding the parts of the brief exempted by Rule 32(f).

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Dated: November 9, 2020

/s/ Andrew M. Grossman
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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 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.

Dated: November 9, 2020

/s/ Andrew M. Grossman
ANDREW M. GROSSMAN