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,

v.

TYLER KISTNER,

Intervenor-Defendant-Appellant.

PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION FOR ADMINISTRATIVE STAY, STAY PENDING APPEAL, AND EXPEDITED CONSIDERATION

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INTRODUCTION

In moving for an emergency stay, Appellant Tyler Kistner seeks an order that would effectively delay the election for Minnesota's 2nd Congressional District for months, in direct violation of federal law, and discard thousands of ballots already cast by lawful Minnesota voters. Every one of the factors this Court considers when presented with a motion to stay weighs strongly against granting this extraordinary relief. Kistner is not likely to succeed on the merits of his appeal (and has utterly failed to carry his burden of making a "strong showing" that he will), and he will not suffer any cognizable injury if the election proceeds. In striking contrast, if his motion is granted, Plaintiffs-Appellees and thousands of Minnesota voters who have and will cast ballots in the election that Kistner seeks to have rendered a nullity will be *severely* and *irreparably* harmed, as will all the people of Minnesota's 2nd Congressional District who will be left unrepresented until a special election is held in February of 2021.

For almost 150 years, federal law has required that every state select their U.S. Representatives in a uniform federal election on "the Tuesday next after the 1st Monday in November, in every even numbered year." 2 U.S.C. § 7. Congress has provided only very limited exceptions: a state may choose to elect its U.S. Representatives on a different date only where there is a vacancy in office "caused by [1] a failure to elect at the time prescribed by law, or [2] by the death, resignation,

or incapacity of a person elected." 2 U.S.C. § 8(a). In direct contravention, Minnesota law postpones congressional elections if a major political party *candidate* for that office dies within 79 days before the general election. Minn. Stat. § 204B.13. The Minnesota Statute was triggered this elections cycle on September 21, 2020, when the Legal Marijuana Now Party's ("LMNP") candidate for the office unexpectedly passed away.

As of today, Minnesotans have been casting ballots in that race for almost a month. Thus, if given effect, the Minnesota Statute would mean that *none* of the ballots that voters cast in the 2nd Congressional District to choose their Representative in the Congress that will commence on January 3, 2021 will be counted. Instead, all those votes will be discarded, and voters will have to turn out again in a second, entirely separate, special election that will not be held until February 9, 2021. The current Representative's term expires when the new Congress is seated. Thus, if the injunction below is stayed, not only will thousands of ballots of lawful voters in the November election be discarded, but the people of the 2nd District will be left without a U.S. Representative for at least six weeks.

Against this background, there can be little doubt the district court properly concluded that a preliminary injunction was warranted: Plaintiffs-Appellees are highly likely to succeed on their challenge, they are certain to suffer irreparable harm absent an injunction, and the public interest and the equities both weigh in favor of

holding the election as scheduled and giving effect to the ballots cast by voters in the November general election. Kistner's motion to stay casts no serious doubt on any of this. Nor has he carried his burden of justifying the extraordinary remedy of an emergency stay. The motion should be denied.

BACKGROUND

The candidates have been campaigning for months and, on September 18, voters started voting. Order, ECF No. 49, at 2. Three days later, the LMNP-nominated candidate unexpectedly passed away. *Id*.

On September 24, applying the plain language of the Minnesota Statute, Secretary of State Steve Simon announced that the election for the 2nd Congressional District seat was being postponed. *Id*. at 2. That statute provides that, when a major party candidate for any partisan office except Lieutenant Governor dies after the 79th day before that election, the election for that race is postponed until a special election to be held on the second Tuesday in February of the following year. Minn. Stat. § 204B.13, subdivs. 2(c), 7. Under § 204B.13, the rest of the election proceeds as scheduled, but county and state canvassing boards are prohibited from "certify[ing] the vote totals for [the impacted] office from the general election." *Id.* As a result, "there is no election on election day." Pls.' Reply Mot. Prelim. Inj., ECF No. 42, at 5.

On September 28, U.S. Representative Angela Craig, who is running for reelection in the 2nd Congressional District, and Jenny Winslow Davies, a voter in the District, filed this lawsuit seeking an injunction preventing the Secretary from enforcing the Minnesota Statute. Plaintiffs-Appellees alleged that the Minnesota Statute is preempted by federal law as applied to elections for the U.S. House of Representatives and that, in this case, where it would result in lawfully cast ballots being discarded, it also impermissibly burdens the right to vote in violation of the First and Fourteenth Amendments. *See generally* Compl., ECF No. 1. Plaintiffs-Appellees promptly moved for a preliminary injunction the morning of September 29. Kistner, the Republican candidate, sought and was granted leave to intervene.

The Secretary and Kistner both filed papers and the district court held a hearing on October 7. On October 9, the district court issued an order granting Plaintiffs-Appellees' motion, concluding that Plaintiffs-Appellees were likely to succeed on their preemption claim and declining to address the constitutional claim. The injunction prohibits the Secretary from enforcing § 204B.13 in the November election in the 2nd Congressional District.

That same day, Kistner filed a notice of appeal and moved for a stay of the injunction in the district court. The court denied the motion on October 13. Kistner now asks this Court to stay the injunction pending appeal. The Secretary has not appealed.

ARGUMENT

"A stay of a ruling pending an appeal is an extraordinary remedy." *Enerplus Res. (USA) Corp. v. Wilkinson*, No. 1:16-CV-103, 2016 WL 8737872, at *1 (D.N.D. Oct. 5, 2016). It "is not granted as a matter of right, because it is an 'intrusion into the ordinary processes of administration and judicial review.'" *In re Uponor, Inc.*, No. 11-MD-2247 ADM/JJK, 2012 WL 4328370, at *1 (D. Minn. Sept. 20, 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)). The party seeking a stay bears the heavy burden to demonstrate (1) "a strong showing that he is likely to succeed on the merits"; (2) that he will be irreparably injured absent a stay; (3) that the issuance of the stay will not substantially injure the other parties interested in the proceeding; and (4) that the public interest lies in his favor. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "The most important factor is the [ ] likelihood of success on" appeal. *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011).

I. Kistner has not established a strong likelihood of success on the merits on appeal.

A. The district court correctly concluded that § 204B.13 is preempted by federal law.

Kistner does not contest that state statutes in conflict with the federal uniform elections statutes are preempted as a matter of law. He similarly does not contest that the plain language of the Minnesota Statute conflicts with the plain language of 2 U.S.C. § 7, which requires that all states uniformly elect their U.S. Representatives

on the same schedule, in general elections in November every even-numbered year. Instead, Kistner argues that the Minnesota Statute is saved from preemption because it fits within one of two exceptions to § 7 provided in 2 U.S.C. § 8. Kistner is wrong.

Section 8 permits states to move the date of federal elections only "to fill a vacancy," and only if that "vacancy is caused by [1] a failure to elect at the time prescribed by law, or [2] by the death, resignation, or incapacity of a person elected." As both the district court and Kistner recognized, only the first exception is relevant here. Mot. 6; Order 12–14. Minnesota's 2nd Congressional District is currently represented by U.S. Representative Craig; thus, there is no vacancy caused by "the death, resignation, or incapacity of a person elected."

The question before the district court, then, was whether a vacancy exists that was "caused by a failure to elect at the time prescribed by law," within the meaning of § 8(a). Kistner argues the statute "empower[s]" Minnesota to change the date of a federal election because a vacancy in nomination is "causal[ly] connect[ed]" to a "failure to elect." Mot. 6. But the words "nomination," "nominee," or "candidate" appear nowhere in the statutory text. Courts have consistently rejected creative interpretations like Kistner's and required that state and federal elections laws be read plainly. *See Foster v. Love*, 522 U.S. 67, 72–73 (1997) (rejecting Louisiana interpretation of law contrary to 2 U.S.C. § 7 as "merely wordplay" and requiring it to be read "straightforwardly"); *Fish v. Kobach*, 840 F.3d 710, 728 (10th Cir. 2016)

("*Foster* establishes that the reading to be applied to the federal and state statutes at issue is a plain one."); *Gonzalez v. Arizona*, 677 F.3d 383, 398 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013) (rejecting Arizona's "creative interpretation" of state elections statute and concluding the court would "not strain to reconcile a state's federal election regulations with those of Congress, but" instead would "consider whether the state and federal procedures operate harmoniously when read together naturally"). Plainly read, there are only two limited circumstances in which a vacancy arises under § 8, and a vacancy *in nomination* is not one of them. The language of the statute suggests the opposite: it directly addresses the death "of a person elected." Had Congress intended to authorize states to delay congressional elections upon the death of a *candidate*, "it would have so indicated." *Fish*, 840 F.3d at 729.

Not helped by the statutory text, Kistner turns to the scant case law interpreting it. But neither of the two cases on which he relies—*Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983), and *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993)—supports his expansive interpretation of § 8. Properly understood, both cases actually support Plaintiffs-Appellees. *See also* Order 12–15 (discussing both cases and finding neither favored defendants' position).

In *Busbee*, the D.C. District Court concluded that § 8's failure-to-elect exception was met when, shortly before Georgia was scheduled to hold its next election for U.S. Representatives, a federal district court determined its congressional apportionment map was unlawful under the Voting Rights Act of 1965. 549 F. Supp. at 519–20. Kistner misreads *Busbee*, arguing that it endorses a temporal rule that allows a state to move congressional elections whenever a candidate dies in close proximity to an election—which *might* lead to a vacancy in office. But *Busbee* does no such thing. To the contrary, in that case another federal law (the VRA) *required* Georgia to obtain approval of its congressional plan "before it [could be] implement[ed]." *Id.* at 515 (quoting 42 U.S.C. § 1973c). Georgia's failure to obtain such approval necessarily "*preclude[d]* holding an election" on the date prescribed by federal law. *Id*. at 525 (emphasis added).

In contrast, the death of one candidate assuredly does *not* preclude Minnesota from holding an election for the 2nd Congressional District on November 3, or otherwise create a circumstance where the state is actually *unable* to elect at the time prescribed by law. Indeed, the election is already well underway. Three major-party candidates are listed on the ballot for this office, including the incumbent and her leading opponent, and voters are voting in that race. On election day, the votes for the 2nd Congressional District race will be ready for counting and certification like the votes for every other race on the ballot. Far from being inevitable, any vacancy

caused by a "failure to elect" would only occur in the event the LMNP candidate posthumously receives a majority of the votes cast in that election. *See* Order 13 n.4.

States, of course, hold elections even when a candidate passes away prior to the election. Minnesota itself did so in 2002, when sitting U.S. Senator Paul Wellstone tragically died a mere eleven days before the election that year. Minnesota had not yet enacted the statute at issue here, and that election occurred as scheduled. The only thing that precludes Minnesota's holding of the election for the 2nd Congressional District on November 3 is Minnesota's own statutory law.

But as the court recognized in the second case upon which Kistner relies, *Public Citizen*, a state cannot manufacture exigent circumstances by enacting state laws creating additional exceptions to 2 U.S.C. § 7. *See* 813 F. Supp. at 830. In that case, moreover, Georgia actually *held* an election on the federally-required date. *See* Order 13–14. The "failure to elect" followed because a candidate failed to obtain a majority of the votes cast as required under Georgia law. As the district court correctly noted, "it was this failure to elect that triggered the special-election exception under the Federal Vacancies Provision resulting in a runoff election held by the State of Georgia after the November general election." *Id*. at 14.

Crucially, all the ballots cast in the November election at issue in *Public Citizen were counted*. It was thus akin to Minnesota holding its election as scheduled, but the deceased candidate winning the race. Under such circumstances,

Minnesota would fit within the exceptions set forth in § 8. But, Kistner instead asks this Court to enter a stay that would invalidate all the ballots cast for the 2nd Congressional District in the November election. There is no authority whatsoever to support his position. Rather, consistent with *Busbee*'s focus on inevitability, *Public Citizen* made clear that an exigent circumstance arising before the election is one that "preclude[s] holding an election" on the federally prescribed date. 813 F. Supp. at 831. Notably, no party to this case contends that the circumstances here *preclude* holding the election on November 3, 2020, and for good reason: they don't.

Kistner also argues that because the federal elections code is not "comprehensive," state law is the natural place to discern when a "failure to elect" has occurred. Mot. 9. He cites no authority for this surprising assertion, and circuit courts have come to the opposite conclusion. The Tenth Circuit recently cautioned against the dangers of "finely pars[ing]" federal elections statutes "for gaps or silences into which state regulation might fit." *Fish*, 840 F.3d at 729. Rather, courts "refrain from doing so because were states able to build on or fill gaps or silences in federal election statutes[,] . . . they could fundamentally alter the structure and effect of those statutes. If Congress intended to permit states to so alter or modify federal election statutes[,] . . . it would have so indicated." *Id.*; *see also Gonzalez*, 677 F.3d at 398 (rejecting Arizona's "creative interpretation of the state and federal statutes in an effort to avoid a direct conflict"). The court in *Public Citizen* similarly indicated

that states cannot use "section 8 to circumvent holding an election on November 3, or honoring its results." 813 F. Supp. at 831.

But that is exactly what the Minnesota Statute does, and it is the key difference between that statute and the run-off statute in *Public Citizen*. There Georgia was required to "hold[] an authentic general election on" the date prescribed by § 7, meaning "the results of that election [were] fully binding upon the state." *Id*. at 830. Reasoning that the limited exceptions in § 8 could not be read to "emasculate" § 7, the court observed that "[a]lthough the [Georgia] run-off takes place on a separate day, it does not negate section 7's effect. *The run-off does not reschedule the earlier general election, nor does it negate that election's outcome*." *Id*. (emphasis added). The Minnesota Statute does precisely the opposite. Section 204B.13 mandates that "there is no election on election day." Pls.' Reply Mot. Prelim. Inj. 5.

This is precisely the danger contemplated by the Elections Clause of the Constitution, Art. I, § 4, cl. 1. Writing for the Court in *Arizona v. Inter Tribal Council of Arizona, Inc.*, Justice Scalia observed that the "grant of congressional power" to preempt contrary state election laws "was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." 570 U.S. at 8. "[S]tate legislative choices," must yield to the requirements of § 7. *Foster*, 522 U.S. at 69–70.

In sum, Weeks' unexpected death does not mean Minnesota cannot hold a federal election on November 3. Any supposed "failure to elect" on that date is simply an "invent[ion]" created by § 204B.13, not an inevitability caused by the death of Weeks. *See* Order 14–15 n.6 (quoting *Public Citizen*, 813 F. Supp. at 830). Accordingly, Kistner fails to meet his heavy burden to demonstrate a likelihood of success on the merits.

B. Kistner also fails to establish a likelihood of success on Plaintiffs-Appellees' constitutional claim.

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

But in the event this Court were to reach that claim, Kistner is not likely to succeed on this point either. First, Kistner misunderstands the claim. He wrongly asserts that the equal protection claim is not a constitutional claim because it entails the violation of a statute. Mot. 11. But Plaintiffs-Appellees do not allege that the *Minnesota Statute* is being violated; they allege it is the *enforcement* of that statute that violates the First and Fourteenth Amendments to the U.S. Constitution by unduly burdening the fundamental right to vote, in that it calls for the wholesale

rejection of all ballots cast in the race for the 2nd Congressional District in the ongoing general election. *See* Compl. 14–16; Prelim. Inj. Mem., ECF No.14, at 14–17.

Courts apply the *Anderson-Burdick* balancing test to such claims. If the burden is severe, the policy imposing that severe burden "must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). Even if the burden is less than severe, the court asks whether a state interest justifies the burden imposed, by "weigh[ing] 'the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id*. (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Here, the *Anderson-Burdick* test is easily satisfied. Prelim. Inj. Mem. 12–14. Although the district court did not address this claim, it made several determinations relevant to the analysis. Specifically, it concluded that in the absence of an injunction, Plaintiffs-Appellees will suffer substantial irreparable harms: validly cast votes will not be counted; voters will need to vote twice during a pandemic; and voters in the 2nd Congressional District will be unrepresented for more than a month. *See* Order 17–19. Kistner *completely* ignores these harms, and he fails to even

acknowledge (let alone apply) *Anderson-Burdick*. *See* Mot. 11–12. For these reasons alone, he has failed to demonstrate a likelihood of success.

On the state-interest side, Kistner suggests that Minnesota's interest in enforcing its statute is in ensuring that all major political parties can participate in the November election. *See* Mot. 11. But the district court's injunction does not derogate that interest: all major parties, including the LMNP, appear on the ballot. To the extent Kistner bases his argument on the assertion that "supporters of Weeks have not had the opportunity to put a replacement candidate on the November 3 ballot," Mot. 12, his dispute is with § 204B.13, which prohibits changing the ballot, not with the district court's injunction, *see* § 204B.13 subdiv. (2)(c).

In short, the district court determined the harms to Plaintiffs-Appellees and Minnesota voters will be great in the absence of an injunction. Minnesota has no sufficiently compelling interest to justify these severe burdens. *See* Prelim. Inj. Mem. 16–17. Because the *Anderson-Burdick* test tips decidedly in Plaintiffs-Appellees' favor, and Kistner has failed to argue—let alone establish—otherwise, Kistner has not established a likelihood of success on the merits of Plaintiffs-Appellees' constitutional claim.

II. The equitable factors weigh strongly against a stay.

A. Kistner has not established that he will be irreparably injured absent a stay.

"The failure to demonstrate irreparable harm is an independently sufficient ground to deny a stay." *Turner v. Lafayette Cty. Sch. Dist.*, No. 4:92-CV-4040, 2019 WL 1104180, at *5 (W.D. Ark. Mar. 8, 2019) (citing *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003)). To establish irreparable harm, the movant "must show that the harm is certain, great, and of such imminence that there is a clear and present need for equitable relief." *Id.* at *5. It is not clear how Kistner could be harmed, much less irreparably, by a federal election that will occur at the same time as the election for every other House seat across the country.

First, Kistner argues that his campaign has suffered "uniquely irreparable" harms because it "acted in reasonable reliance on the Secretary's announcement, rescheduling campaign and fundraising events and strategic meetings." Mot. 14–15 (emphasis removed). But these are past alleged harms; they do not demonstrate the *future* irreparable injury required for a stay. *See, e.g.*, *Hilton*, 481 U.S. at 776 (noting question is whether movant "*will* be irreparably injured absent a stay" (emphasis added)); *see also Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986) ("The [party seeking a stay pending judicial review] must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.") (citation omitted).

Plaintiffs-Appellees filed suit on Monday, September 28, within two business days of the Secretary's announcement that the election would be postponed and sought expedited injunctive relief. Under these circumstances it was hardly reasonable for Kistner to have ceased campaigning. Moreover, Kistner did *not* cease campaign activities; instead he participated in fundraising events, meet-and-greets, and debates.[1] And Kistner has held events since the injunction issued.[2]

Second, Kistner claims voters who cast their ballots before and after the injunction have been treated differently. Mot. 13–14 (citing *Bush v. Gore*, 531 U.S. 98, 105 (2000)). It is not at all clear why he believes this to be the case. All lawful voters who cast their ballots in the ongoing election will have their ballots counted. Even when the Secretary announced the postponement, he still urged voters to vote. *See* https://www.sos.state.mn.us/about-the-office/news-room/secretary-simon-releases-statement-on-death-of-cd2-candidate/. Further, the Secretary has since announced that the election will take place as scheduled. *See* https://www.sos.state.mn.us/about-the-office/news-room/secretary-simon-

[1] *See, e.g.*, https://www.mncd2republicans.org/event/KistnerFundraiserinRosemount/5f5bd16d3401360004708cca?after=2020-09-24 (fundraiser); https://www.mncd2republicans.org/event/AppleValleyMeet %2526GreetforTyler-Sue/5f696f0e0a5df00004eb09c8?after =2020-09-24 (meet-and-greet); https://www.youtube.com/watch?v=qfe0tjXsSZs (debate).

[2] *See, e.g.*, https://www.facebook.com/events/627877254588652/ (fundraiser); https://www.facebook.com/Goodhuerepublicans/photos/a.159134727606280/1480567872129619/?type=3&theater (meet-and-greet).

statement-on-ruling-in-second-congressional-district-case/. Kistner's "equal protection" argument is meritless, and certainly falls far short of satisfying his burden to obtain a stay.

Moreover, "[g]overning caselaw," "instructs that the irreparable harm factor concerns whether the *stay applicant* will suffer irreparable harm absent a stay," not whether third parties will be harmed. *Turner*, 2019 WL 1104180, at *6 (citing *Hilton*, 481 U.S. at 776) (quotation and alterations omitted) (emphasis added). Kistner focuses specifically on "the supporters of *Mr. Weeks*, who now have no candidate representing their major party in the November election," and "all who voted under the reasonable understanding that the Second Congressional District race was rescheduled." Mot. 14 (emphasis added). But Kistner does not explain how these harms—if they even exist—accrue to him. *Cf. Hilton*, 481 U.S. at 776.

Finally, even if potential third-party harms were somehow relevant, Kistner is simply wrong on the claimed "harm." LMNP supporters *can* cast a ballot for that party as Weeks remains on the ballot. And voters who cast their ballots prior to the injunction may recast their ballots if they wish. Under Minnesota law, *all* absentee voters have the right to cancel their ballots until fourteen days before the election and request a new ballot, vote in person at the local election office, or visit a polling place on election day. *See* Minn. Stat. § 203B.121 subdivs. (2)–(4); Minn. R. 8210.2600(1); 2020 Minn. Sess. Law Serv. Ch. 77 (H.F. 3429) § 1(3) (West);

https://www.sos.state.mn.us/elections-voting/other-ways-to-vote/vote-early-by-mail/. Rather than "disenfranchising" voters, the injunction ensures that the votes of all Minnesotans for the 2nd Congressional District race are counted rather than discarded, as Kistner would have this Court effectively order.

The *Purcell* principle also does not warrant a stay. *See* Mot. 15–16 (quoting *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). If anything, it weighs strongly against it. Absentee voting in Minnesota began on September 18, six days before the Secretary announced he would postpone the election. Absentee voters who cast ballots between September 18 and September 24 did so based on the understanding that the election would take place in November as required by federal law. The injunction *restored* the *status quo* in place at the start of the voting period. To the extent Kistner is concerned about voter confusion, a stay would *cause* confusion because the Secretary has now assured voters that they "should continue to vote this race on their ballots, and pursuant to the district court ruling, those votes will be counted." Secretary Simon Statement, https://www.sos.state.mn.us/about-the-office/news-room/secretary-simon-statement-on-ruling-in-second-congressional-district-case/.

Finally, Plaintiffs-Appellees did not delay in seeking injunctive relief, much less "cause" any "disenfranchisement" by filing their Complaint within two business days of the Secretary's announcement. Mot. 16–17. By any measure, they moved

expeditiously. Kistner's claims of "disenfranchisement" are not remotely well founded.

B. Other parties will be substantially harmed if a stay is entered.

The third factor is "whether issuance of the stay will substantially injure the other parties interested in the proceeding." *Hilton*, 481 U.S. at 776. As the district court found, Plaintiffs-Appellees and voters in the 2nd Congressional District would all be irreparably harmed absent a preliminary injunction. Order 17–18. By issuing a stay, this Court would reimpose those harms.

The Secretary conceded and the district court found that Representative Craig will be irreparably harmed absent a preliminary injunction by the loss of votes that otherwise would have been cast for her and by having to limit campaign efforts just weeks before the November election in order to conserve resources and/or raise additional funds for a potential special election in February. Order 17; Prelim. Inj. Mem. 15. Kistner's unsupported argument that these harms are insubstantial should be rejected. Mot. 17; *see League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Once the election occurs, there can be no do-over and no redress."); *Peer v. Lewis*, No. 06-60146-CIV, 2008 WL 2047978, at *10 (S.D. Fla. May 13, 2008) (concluding "as a matter of law, [ ] an individual cannot recover damages for a lost election"), *aff'd*, No. 08-13465, 2009 WL 323104 (11th Cir. Feb. 10, 2009).

Voters, including Davies, will also be irreparably harmed. The Minnesota Statute "restricts voting rights" and "decrees that votes for the election in question—including votes that have already been cast—will not be counted at all." Order 18. Kistner does not dispute that harm but instead attempts to minimize it by claiming "the opportunity to vote [a second time] is not a severe burden on the right to vote." Mot. 18. This conclusory statement, without support, hardly supports a stay. *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("[A]ll qualified voters have a constitutionally protected right to vote . . . and to have their votes counted." (citations omitted)). It is also particularly ill-founded here, where the U.S. Supreme Court has recognized that part of Congress's motivation for enacting 2 U.S.C. § 7 was the concern that states might otherwise burden the right to vote, including specifically by imposing a "burden on citizens forced to turn out on two different election days to make final selections of federal officers in Presidential election years." *Foster*, 522 U.S. at 73.

Absent the preliminary injunction, the Minnesota Statute would have unlawfully disenfranchised *every single voter* in the 2nd Congressional District. As the district court concluded, the injunction "ensures that all properly cast votes in the November election, including the votes cast for Weeks, will be counted." Order 19.

C. The public interest strongly weighs in favor of denying the motion.

The final factor examines whether a stay pending appeal lies within the public interest. *Hilton*, 481 U.S. at 776. Here, this factor weighs strongly against the motion to stay as well. The protection of constitutionally protected rights necessarily serves the public interest. *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds*, *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012) ("[I]t is always in the public interest to protect constitutional rights."). If the injunction is stayed, moreover, "two public-interest consequences will undisputedly occur. First, all votes cast for Minnesota's 2nd Congressional District in November will be discarded. Second, every constituent in Minnesota's 2nd Congressional District will have no representation in the United States House of Representatives for more than a month." Order 21. Kistner's argument to the contrary rests on the false premise that voters who did not vote in the 2nd Congressional District race are now foreclosed from doing so, making it "impossible to administer [the] election on an even playing field and in a fair way." Mot. 19. But voters in Minnesota can cancel a returned ballot by October 20 and request a new ballot, vote in person at the local election office, or visit a polling place on election day.

Kistner claims that only a stay can vindicate voters' constitutional rights. Mot. 19. This is exactly backwards; the injunction provides every voter in the district the

opportunity to cast a ballot and have their vote counted, whereas a stay would result in the disenfranchisement of every voter who has voted in the race.

CONCLUSION

Plaintiffs-Appellees respectfully request that the Court deny the motion.

Dated: October 16, 2020

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

The undersigned counsel of record hereby certifies, pursuant to Fed. R. App. P. 32(g), that:

1. Appellees' Opposition to Motion for Administrative Stay, Stay Pending Appeal, and Expedited Consideration complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this brief contains 5,100 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft Office version 16 in Times New Roman 14.

s/Charles N. Nauen
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CERTIFICATE OF VIRUS FREE

Pursuant to Local Rule 28(h)(2) of the Eighth Circuit Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief has been scanned for computer viruses and is virus free.

s/Charles N. Nauen
Charles N. Nauen

CERTIFICATE OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF

I hereby certify that on October 16, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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