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,

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

Reply in Support of Emergency Motion for Administrative Stay, Stay Pending Appeal, and Expedited Consideration

R. REID LEBEAU
JEFFREY K. HOLTH
BENJAMIN N. PACHITO
THE JACOBSON LAW GROUP
Jacobson, Magnuson, Anderson & Halloran, P.C.
180 E. Fifth St., Suite 940
St. Paul, MN 55101
(651) 644-4710
rlebeau@thejacobsonlawgroup.com

ANDREW M. GROSSMAN
RICHARD B. RAILE
JENNA M. LORENCE
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Attorneys for Intervenor-Defendant–Appellant

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INTRODUCTION

Plaintiffs' reading of 2 U.S.C. § 8(a) is divorced from the text, which authorizes states to conduct a special election if there is a "vacancy" caused by a "failure to elect." Because a vacancy will ensue as a result of what Minnesota law undisputedly deems a failed election, the provision is satisfied. Plaintiffs' contrary interpretation is so pinched and atextual that it would deny states the ability to reschedule elections following a natural disaster, the paradigmatic cause of a "failure to elect" triggering Section 8(a).

And the equities of this case present no contest. The lead Plaintiff, Rep. Craig, testified below that the Secretary's representation would cause voters not to select a candidate in the Second Congressional District race, and it is undisputed that voters did just that for *weeks*. To restart the election now would violate the Equal Protection Clause and severely impinge on the right to vote.

ARGUMENT

I. This Appeal Is Likely To Succeed

The parties agree that federal law authorizes a special election at a time of its choosing if a "vacancy" is "caused by a failure to elect." 2 U.S.C. § 8(a). The text provides two elements: (1) a vacancy and (2) a failure to elect. Plaintiffs are wrong (at 6) to call this a "creative" interpretation; it is literally what the statute states.

A. Vacancy. The can be no serious dispute that, but for the injunction, a vacancy will occur. Plaintiffs deny (at 6) that this qualifies as a "vacancy" because "Minnesota's 2nd Congressional District is currently represented by U.S.

Representative Craig." But *Busbee v. Smith* 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. 494, 525 (D.D.C. 1982). There is no difference between this case and *Busbee* for purposes of the vacancy element.

Plaintiffs do not deny that *Busbee* is binding by virtue of the Supreme Court's affirmance, 459 U.S. 1166 (1983), but attempt (at 8–9) to distinguish *Busbee* because the future vacancy there was caused by the Voting Rights Act, not state law. But that goes to the meaning of "failure to elect," not to the existence *vel non* of a vacancy. If Plaintiffs were right about the meaning of "vacancy," there would not have been one in *Busbee*. "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." 549 F. Supp. at 525.

B. Failure to Elect. Plaintiffs' assertion that Mr. Kistner has "no authority" for asserting that the phrase "failure to elect" can be triggered by state law overlooks *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993). There, it was the "*state's decision* to interpret a plurality result as being inconclusive" that caused the "failure to elect." *Id.* at 830 (emphasis added). If Plaintiffs (at 8) were correct that a state must be "actually *unable* to elect at the time prescribed by law," *Public Citizen* would have come out

the other way. It was obviously possible for Georgia to deem the plurality vote winner the elected representative, as other states do.

Plaintiffs insistence (at 8) that "a state cannot manufacture exigent circumstances" is irrelevant because Minnesota law does no such thing. *Public Citizen* correctly observed that "[a] carefully crafted law that, by its sole design, invents a 'failure to elect' cannot be thought to create an 'exigent' circumstance." *Id.* at 830. And the district court here recognized that Minnesota's vacancy statute does not have that purpose. Order 14 n.5. Nor does it have that effect. Minnesota law did not bring about the death of a major-party candidate, nor does it have the ability to "manufacture" it. Because Minnesota law lacks the "ability to produce" this event it shares the "common element that makes [its] occurrence an 'exigent' circumstance." *Pub. Citizen*, 813 F. Supp. at 830.

Plaintiffs' recitation of the tragic Wellstone incident only reiterates Minnesota' compelling basis for enacting Section 204B.13—which also justifies any incidental burdens on the right to vote (*see infra* § I.C)—and that it is not aimed at circumventing 2 U.S.C. § 7 and its default Election Day. This statute took effect seven years ago, this appears to be the first congressional election that triggered it, and there is no cause for concern that its application will result in frequent special elections.[1]

[1] For this reason, the House of Representatives' observation (at 10) that a "failure to elect" should be a "seldom" occasion is beside the point: this *is* a rare occasion. And *Busbee* rejected the House's contention that only the events listed in the legislative history qualify as a failure to elect. 549 F. Supp. at 526.

Equally unpersuasive is Plaintiffs' contention (at 9) that Section 8(a) applies only where the state "actually *held* an election on the federally-required date." Plaintiffs have no response to Appellant's argument (at 10) that this reading would render Section 8(a) inapplicable when a natural disaster or act of God prevents the election from going forward. Both *Busbee* and *Public Citizen* identified a disaster as the paradigmatic situation where Section 8(a) applies. *Public Citizen*, 813 F. Supp. at 830 (opining that "natural disasters, and…fraud and a tie vote [are] examples of 'exigent' circumstances warranting state rescheduling" (underlining added)); *Busbee*, 549 F. Supp. a 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)). Plaintiffs cite no authority holding that a failure to elect requires the election to be conducted, and the precedents dismiss that notion as one that "no one would seriously contend." *Busbee*, 549 F. Supp. at 526.

Finally, Plaintiffs' suggestion (at 6) that Section 8(a)'s reference to the "death" of "a person elected" excludes candidate death as a basis for rescheduling an election ignores that the statute expressly regards "death…of a person elected" and "failure to elect" as *alternative bases* for its 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 therefore not required to show a "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. Mot. 9 n.5. If anything, the "death…of a person elected" language supports Mr. Kistner's position, because it recognizes that unexpected deaths are the kind of exigencies that Congress understood to trigger Section 8(a). *See, e.g., Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990).

C. Right to Vote. Plaintiffs are incorrect (at 12–13) that Mr. Kistner's motion disregards *Anderson-Burdick*. Mr. Kistner's motion contends that Section 204B.13 is a "reasonable, nondiscriminatory" imposition" on voting rights that "Minnesota's interest…justifies," which is the *Anderson-Burdick* test, and argues this test under leading *Anderson-Burdick* cases. Mot. 11.

Nor do Plaintiffs identify any severe burden on the right to vote. *See* Opp. 13–14. The supposed burden of voting in February is the *same* burden voters always bear in exercising their fundamental right, and the non-counting of votes is not disenfranchisement but a *rescheduling* of the election so that it can be held *for all voters* on terms that are fair under the Constitution and Minnesota's important public policies. *See New Georgia Project v. Raffensperger*, --F.3d--, 2020 WL 5877588, at *2 (11th Cir. Oct. 2, 2020). Plaintiffs cite no case where these types of burdens are deemed severe under the *Anderson-Burdick* framework, and numerous courts, including the Supreme Court, have rejected the contention that voting "during a pandemic," Opp. 13, is a severe burden. *Democratic Nat'l Comm. v. Bostelmann*, --F.3d-- 2020 WL 5951359, at *2 (7th Cir. Oct. 8, 2020) ("The [Supreme] Court has consistently stayed orders by which federal judges have used COVID-19 as a reason to displace the decisions of the policymaking branches of government.") (collecting cases).

Further, for reasons expounded below, the injunction places a severe and unequal burden on the right to vote and therefore cannot cure any burden that *might* exist under the application of Section 204B.13, which is justified by Minnesota's compelling interest in conducting an election with the participation of all major-party candidates.

II. The Equities Require a Stay

A. Harm Without a Stay

1. It is Plaintiffs who "*completely* ignore[]…harms" inflicted on the right to vote. Opp. 13. They have no good solution to the problem that *voting occurred for weeks* under the representation that votes in the Second Congressional race would not count, and it is uncontroverted that voters chose not to select candidates in that election based on that representation. Grant Decl. ¶ 15. *Plaintiffs'* own evidentiary showing *supports this*, as Rep. Craig herself submitted a sworn declaration 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." Craig Decl. ¶ 11.

It is therefore baffling that Rep. Craig now disputes her own sworn testimony by telling this Court that "[i]t is not at all clear why [Mr. Kistner] believes" that "voters who cast their ballots before and after the injunction have been treated differently." Opp. 16. To break this down:

- On September 24, the Secretary publicized that the race was off and votes "will not be counted." Craig Decl. ¶ 11. Rep. Craig testified that "because of these statements by the State that their votes will not be counted" voters

will "forego their right to cast ballots." *Id.* Voters did just that. Grant Decl. ¶ 15.

- Four days passed (and eight from Mr. Weeks's passing), and voters continued to vote without selecting a candidate in that race. Plaintiffs did nothing.
- On September 28, Plaintiffs filed this case. Voters continued to vote without selecting a candidate in that race.
- On September 29, Plaintiffs moved for a preliminary injunction (but not a temporary restraining order). Voters continued to vote without selecting a candidate in that race.
- Ten more days passed. Nothing happened. Voters continued to vote without selecting a candidate in that race.
- On October 9, near the close of business, the Court issued its injunction. *Only then* were voters informed that the race was on. By then, thousands of voters—in historic early voting at record levels—had cast their ballots.

The inequality could hardly be more severe, palpable, or painfully obvious. Voters had been instructed their votes would not count, and the injunction now reverses that instruction for those voting now. Nor is it any use that "the Secretary…still urged voters to vote," Opp. 16, when (1) the Secretary did not urge voters to vote *in this race*, Mot. Ex. B, and (2) it is a conceded fact that "because of these statements by the State that their votes will not be counted" voters will "forego their right to cast ballots," Craig Decl. ¶ 11.

Plaintiffs offer ice-cold comfort from the possibility that voters can "cancel" their ballots and re-vote, but that itself is a far greater burden on the right to vote than a special election is in February—since many voters will not have heard of the resurrection of the dead election or the possibility of voting a second time (voting twice is usually not wise or encouraged) or the October 20 deadline for doing so. Opp. 21. But the bigger problem is that these burdens are borne on an *unequal* basis: voters who were informed that the race was occurring do not need to do these things for their vote to count; only voters who were told otherwise bear that severe burden. That is "arbitrary and disparate treatment of the members of [the] electorate." *Bush v. Gore*, 531 U.S. 98, 105 (2000).

The *Purcell* principle requires a stay, and Plaintiffs and the Secretary invoke it incorrectly. Applying *Purcell*, the Supreme Court recently held that an *appellate* tribunal has authority to stay a *district court* order that "alters the election rules so close to the election date." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). If it is too late for this Court to intervene means, it was too late for the district court to intervene.

2. Equally perplexing is Plaintiffs' assertion (at 17) that Mr. Kistner is not harmed. For one thing, because "the rights of voters and the rights of candidates do not lend themselves to neat separation," *Burdick v. Takushi*, 504 U.S. 428, 438 (1992), irreparable harm to Mr. Kistner's voters—an undisputed fact—is irreparable harm to Mr. Kistner and his campaign. *See Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973). Further, Mr. Kistner is irreparably harmed through the actions taken in reliance on the Secretary's assertions. *See* Grant Declaration

¶¶ 5–20. Plaintiffs fault Mr. Kistner for that reliance, but taking state law and the chief state election official at their word is more than reasonable, especially when "[t]he law [was] clear on what happens next." Mot. Ex. B. Plaintiffs attempt to gin up a fact dispute on Mr. Kistner's evidentiary showing of harm, but they present no evidence below on this point. And the suggestion that Mr. Kistner continued *some* campaigning, particularly after the injunction, does not rebut the undisputed facts that Mr. Kistner's campaign postponed events, meetings, and fundraisers; canceled advertising; and lost out on contributions. Grant Decl. ¶¶ 8–17.

B. Balance of Equities and the Public Interest

The public interest weighs heavily in favor of a stay, given the injury to those voters who relied on state law and the Secretary's announcement. The Court should also be mindful of the injuries suffered by supporters of a major party whose candidate passed away. Plaintiffs' callous response (at 17) that "LMNP supporters can cast a ballot for that party as Weeks [i.e., the deceased candidate] remains on the ballot" only confirms the serious injury to LMNP members and supporters. The LMNP lacks any living candidate to make its case to voters, and the replacement candidate it selected does not appear on ballots for the November election. Only a special election will be fair. Plaintiffs' plea (at 18) that the votes cast be "counted rather than discarded" does not appreciate that doing so effectively disables the LMNP and renders some votes more equal than others (those that omitted a choice in this race).

The harms on the other side of the scale are comparatively minimal. It is not an irreparable harm that some voters have been told that the race is back on. Opp. 18. Those voters who proceed to vote in this race will not be harmed since they, like everyone, may vote in February. And it is false that the opportunity to vote on fair terms means that votes "will not be counted at all." Opp. 20 (quoting Order 18). All votes will be counted in February. Nor is there a "lost election" for Rep. Craig, Opp. 19, who may also participate in February.

CONCLUSION

The motion should be granted.

Dated: October 16, 2020

/s/ R. Reid LeBeau
R. REID LEBEAU
JEFFREY K. HOLTH
BENJAMIN N. PACHITO
THE JACOBSON LAW GROUP
Jacobson, Magnuson, Anderson & Halloran, P.C.
180 E. Fifth St., Suite 940
St. Paul, MN 55101
(651) 644-4710
rlebeau@thejacobsonlawgroup.com

/s/ Andrew M. Grossman
ANDREW M. GROSSMAN
RICHARD B. RAILE
JENNA M. LORENCE
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Attorneys for Intervenor-Defendant–Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. 27(a) because it is 2,550 words. It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Calisto MT font, a proportionally spaced face with serifs. This document has been scanned for viruses and is virus free.

/s/ Andrew M. Grossman
ANDREW M. GROSSMAN
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697 (phone)
(202) 861-1783 (fax)
agrossman@bakerlaw.com

Attorney for Intervenor-Defendant–Appellant

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 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.

/s/ Andrew M. Grossman
ANDREW M. GROSSMAN
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697 (phone)
(202) 861-1783 (fax)
agrossman@bakerlaw.com

Attorney for Intervenor-Defendant–Appellant