

No. 20-3126

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Angela Craig and Jenny Winslow Davies,
Plaintiffs-Appellees,
vs.

Steve Simon, in his official capacity as the Minnesota Secretary of State,
Defendant,
and

Tyler Kistner,
Intervenor-Defendant-Appellant.

**ON INTERLOCUTORY APPEAL FROM UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
CASE No. 20-CV-2066 (WMW/TNL)**

**DEFENDANT SIMON'S BRIEF IN OPPOSITION TO APPELLANT'S
MOTION FOR STAY OF PRELIMINARY INJUNCTION**

KEITH ELLISON
Attorney General
State of Minnesota

NATHAN J. HARTSHORN
Assistant Attorney General
Atty. Reg. No. 0320602

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1252

ATTORNEY FOR DEFENDANT

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Minnesota Secretary of State Steve Simon opposes the motion to stay the district court’s preliminary injunction filed by Appellant Tyler Kistner.¹ Because a stay at this point threatens harm to the voters in Minnesota’s Second Congressional District and to election officials, the Court should deny Appellant’s motion.

BACKGROUND

The district court granted a preliminary injunction in this matter on October 9, enjoining enforcement of Minnesota’s nomination vacancy statute, Minn. Stat. § 204D.13, subd. 2(c), and requiring the Secretary to refrain from enforcing the challenged statute, to “give legal effect to the ballots cast in the November 3, 2020, general election for Minnesota’s Second Congressional District,” and to cease notifying voters in the Second Congressional District that their votes in the congressional race would not be counted. *Craig v. Simon*, ___ F. Supp. 3d ___, No. 20-cv-2066, 2020 WL 5988497, at *10 (D. Minn. Oct. 9, 2020). In the same order, the district court granted Appellant’s motion to intervene as a defendant. *Id.* at *3-4. Appellant filed this appeal and filed a motion in district court to stay the preliminary injunction. *Craig v. Simon*, No. 20-cv-2066 (D. Minn.

¹ Secretary Simon was not notified of this Court’s briefing schedule on this motion and has learned that the deadline for responses passed earlier today. The Secretary asks the Court to accept and consider this memorandum as it is important for the Secretary to be heard on an issue affecting the administration of an election in Minnesota.

Oct. 9, 2020) (Dkt. #51). The district court denied the stay. *Id.* (Dkt. #57). Appellant now bring his stay request to this Court.

ARGUMENT

The Court should deny Appellant's motion because it threatens to wreak havoc on the administration of Minnesota's 2020 general election. The voters of Minnesota's Second Congressional District have been told first that their congressional election will be postponed according to statute and then, confusingly, that the statute would not be enforced and the election would proceed on November 3. Reversing course once again by telling these voters that the election is re-postponed will only serve to deepen voter confusion. Appellant's motion should be denied.

The Secretary disagrees with the district court's preliminary determination regarding the validity of the nomination vacancy statute. Nonetheless, now that election day is mere weeks away, the balance of the harms in this matter cuts against granting the stay Appellants request. A party seeking a stay of a preliminary injunction pending appeal must show, among other things, that it "will suffer irreparable injury unless the stay is granted," that "no substantial harm will come to other interested parties," and that "the stay will do no harm to the public interest." *Ark. Peace Ctr. v. Ark. Dep't of Pollution*, 992 F.2d 145, 147 (8th Cir. 1993). Further, in the election context, courts ruling on motions for equitable relief

“just weeks before an election” must take into account considerations that are specific to election cases and to the realities of court proceedings and the time they require. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). “Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” *Id.* Under these standards, Appellant’s motion for a stay fails.

It does not appear that Appellant will suffer any harm if the stay is denied. Under the district court’s order, Appellant will appear on the ballot on November 3, and all votes cast for him will be counted and given legal effect. This is the same status Appellant would enjoy if the election were postponed according to the nomination vacancy statute.

Moreover, any risk of injury that Appellants claim must be weighed against the clear and present danger that continued eleventh-hour litigation presents to Minnesota’s electoral system. A stay, and the resulting confusion that would ensue from further dispute over the procedures under which Minnesota’s 2020 general election is to be conducted, indisputably threatens the interests of the Secretary and of all other election officials in Minnesota. Although the Secretary disagrees with the district court’s preliminary determinations regarding the validity of the

nomination vacancy statute, the public interest in an orderly and functional election process must take priority.

Voters in Minnesota's Second Congressional District, the Secretary, and other election officials have been taken on a rollercoaster ride. The Second Congressional District election was originally set for the presumptive date of November 3, 2020. Just weeks before that date, a major party candidate died unexpectedly, triggering a postponement of the congressional election under Minnesota election law. The Secretary communicated this information to the affected voters. Days later, the district court issued a preliminary injunction requiring the election to be held on November 3. These rapid and diametrically opposite changes create a high risk of voter confusion. *See Purcell*, 549 U.S. at 4-5. Staying the district court's preliminary injunction will continue this oscillation of information conveyed to voters just a few weeks before election day. It would increase voter confusion. Voters need clarity of information. In order to provide that clear information, the Secretary needs finality in the rules of the election.

The stay Appellant requests therefore threatens serious harm to all election officials in Minnesota, because it would create further voter confusion and hamper the Secretary's ability to provide clear, consistent information, less than three weeks before the election. For the same reasons, a stay would do considerable

damage to the public interest, because Second Congressional District voters' certainty about the date of their congressional election and the effect of votes cast would be compromised. *Cf. Purcell*, 549 U.S. 1, 4-5.

CONCLUSION

The Secretary disagrees with the district court's preliminary determinations regarding the validity of the nomination vacancy statute, and he retains the right to appeal a future final judgment to this Court. In the immediate term, however, Minnesota voters' right to have their voices heard in a general election that is not marred by widespread procedural confusion or, worse, system malfunction far outweighs the value of a theoretical emergency interlocutory appellate order overturning the injunction. Because a functioning election system is more important to the people of Minnesota than the date of the 2020 Second Congressional District election, the Secretary respectfully requests that the Appellant's motion be denied.

Dated: October 16, 2020

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

s/ **Nathan J. Hartshorn**
NATHAN J. HARTSHORN
Assistant Attorney General
Atty. Reg. No. 0320602

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2134
(651) 757-1252 (Voice)
(651) 297-1235 (Fax)
nathan.hartshorn@ag.state.mn.us

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2020 a true and correct copy of the foregoing was filed using the Court's CM/ECF system and will be served by electronic filing upon all counsel of record who have appeared or will appear in this case.

s/ **Nathan J. Hartshorn**

Nathan J. Hartshorn

Assistant Attorney General

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/ **Nathan J. Hartshorn**
Nathan J. Hartshorn
Assistant Attorney General