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

**Emergency Motion for Administrative Stay,
Stay Pending Appeal, and Expedited Consideration**

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INTRODUCTION

Appellant Tyler Kistner, candidate for the U.S House of Representatives, respectfully moves the Court to stay pending appeal, to administratively stay, and to expedite review of the district court's preliminary injunction reinstating the November 3 election for Minnesota's Second Congressional District that had been cancelled and rescheduled by operation of state law after another major-party candidate died. The November 3 election stood cancelled for three weeks prior to the injunction, and the Secretary of State and election officials instructed voters casting ballots during that time that the November race was off. Untold numbers of those voters acted in reliance on that instruction, as did Kistner's campaign, his campaign donors, and his independent supporters. The district court's order reinstating the November 3 election violates the equal-protection guarantee of voter equality by subjecting different voters to different election rules based on the arbitrary distinction—indeed, the happenstance—of when they cast their votes. It was too late for the district court to upend the rules of the election. This injunction is no different from the many others that the Supreme Court and courts of appeals have stayed because they wrongly "alter[ed] the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

The district court had no sound legal basis to inflict this tumult. It concluded that Minnesota's choice to conduct a special election is preempted by federal law, but federal law expressly *authorizes* Minnesota to conduct special elections when state law deems the election inconclusive. Here, Minnesota law

provides that the death of a major-party candidate shortly before the election compromises the election and necessitates a special election the following February, with all major parties represented. This is no different from any state election law defining when the results of an election are binding and when they are not, and this cause of a "failure to elect," 2 U.S.C. § 8(a), is not materially different from a natural disaster or election fraud, which a state may lawfully determine necessitates a new election. The district court's reading of the statute conflicts with the statutory text and precedent interpreting it. It is not likely to withstand scrutiny on appeal.

Time is of the essence. Voters are now being told that the contest *will* occur, and the candidates now must restart campaign efforts that they rescheduled for early next year, expending limited resources that cannot be recovered. The Court should act promptly to administratively stay the decision below pending briefing of this motion, enter a stay pending appeal, and expedite consideration of this appeal and this emergency motion.[1]

BACKGROUND

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

[1] Mr. Kistner moved the district court for a stay pending appeal within three hours of the injunction's issuance on October 9. ECF No. 51. The Court denied that motion in a text-only order on October 13. ECF No. 57.

Legal Marijuana Now Party, which Minnesota recognizes as a "major political party" Based on its substantial and broad base of public support. *See* Minn. Stat. § 200.02, subd. 7. An LMNP candidate for a state office received more than 17,000 votes in the Second Congressional District in the 2018 general election, and LMNP anticipated that Mr. Weeks would exceed that mark in November 2020. Exhibit A, Davis Decl. ¶¶ 8–10.

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

The Secretary promptly issued a notice announcing that the November 3 election was cancelled. After expressing condolences, it stated that "[t]he law is clear on what happens next" and announced a special election for February 9, 2021. Exhibit B, Nauen Decl. Ex. 2. The notice represented that "[b]allots will not be changed," but "the votes in [the Second Congressional District] race will

[2] The impetus for this statute was the tragic case of Sen. Paul Wellstone, who died in a plane crash shortly before the 2002 election. His competitor prevailed in the contest, which went forward as scheduled. Exhibit D, Order 14 n.5.

not be counted." *Id.* The cancellation of the November 3 election was widely covered in the media.[3] Subsequently, LMNP nominated a new candidate and began to engage in voter outreach on his behalf, including through door-to-door advocacy and dissemination of campaign materials. Davis Decl. ¶ 3. Mr. Kistner's campaign cancelled events and advertising and began to plan for a February 2021 contest. Exhibit C, Grant Decl. ¶¶ 9–16. Some voters who cast ballots did not check a candidate in the Second Congressional District race. *Id.* ¶ 15.

On September 28, Rep. Craig and one of her supporters (collectively, "Plaintiffs") filed this action asserting that Minnesota's vacancy statute is "unconstitutional as applied to elections for U.S. Congress and preempted by federal law." ECF No. 1, Compl. ¶ 1. Plaintiffs alleged that 2 U.S.C. § 7 sets the Tuesday after the first Monday in November as the date of congressional elections and preempts Minnesota's vacancy statute, *id.* ¶¶ 44–55, and that the special election unduly burdens the right to vote, *id.* ¶¶ 51–56.

Plaintiffs sought a preliminary injunction. They introduced a declaration from Rep. Craig testifying that the Secretary's announcement of a special election will "threaten to cause voters to forego their right to cast their ballots for the 2nd Congressional District." ECF No. 17, Craig Decl. ¶ 11. By that time,

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

voters had already been taking that course of action for several days. But Plaintiffs did not move for a temporary restraining order. Kistner moved to intervene as a defendant and subsequently filed an opposition to Plaintiffs' injunction motion.

The district court issued an order on October 9 granting Kistner intervenor status, granting Plaintiffs' preliminary-injunction motion, enjoining the operation of Minnesota's vacancy statute, and commanding the Secretary to permit ballots to be counted in the Second Congressional District race. Exhibit D, Order Granting Preliminary Injunction (hereinafter "Order") 23–24.

LEGAL STANDARD

"The party seeking a stay pending appeal must show (1) that it is likely to succeed on the merits; (2) that it will suffer irreparable injury unless the stay is granted; (3) that no substantial harm will come to other interested parties; and (4) that the stay will do no harm to the public interest." *James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544 (8th Cir. 1982).

ARGUMENT

I. This Appeal Is Likely To Succeed

Federal law does not preempt Section 204B.13. Although 2 U.S.C. § 7 establishes a congressional-election default date of the Tuesday after the first Monday in November, the next provision authorizes states to set the times of special elections:

> ….the time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to

> elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

2 U.S.C. § 8(a).

The elements of that statute are satisfied. Minnesota law reasonably deems an election compromised by the untimely death of a major-party candidate to be a "failure to elect." This will result in the "vacancy" of the Second Congressional seat as of January 3, 2021. Because of this causal connection between the failure to elect and the vacancy, 2 U.S.C. § 8(a) empowers Minnesota law to define the time of a special election for the seat. The district court gave this provision an unnaturally restrictive reading that conflicts with the views of other courts.

A. There Is a Cognizable "Vacancy"

The district court concluded that there is no "vacancy" as required under 2 U.S.C. § 8(a), "because Minnesota's Second Congressional District currently is represented in the United States House of Representatives by Representative Craig." Order 12. But a *future* vacancy caused by a failure to elect is sufficient to trigger this element. A three-judge court in *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), 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. It found that 2 U.S.C. § 8(a) "clearly indicates that a failure to elect gives rise to a vacancy and in no way suggests that a state cannot choose representatives until January after failing to elect them in November." *Id.* The

January 3, 2021 vacancy here is no more current than was the January 3, 1983 vacancy addressed in *Busbee*.[4]

The *Busbee* decision is binding on this point because it was summarily affirmed by the Supreme Court. *Busbee v. Smith*, 459 U.S. 1166 (1983). Summary affirmances are binding on points that were "essential to sustain that judgment." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979); *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1800 (2015). *Busbee*'s holding on the timing of the relevant "vacancy" was essential to its judgment, because an alternative resolution of that issue along the lines the district court adopted would have rendered 2 U.S.C. § 8(a) inapplicable and changed the outcome. *See* 549 F. Supp. at 525.

The split with *Busbee* confirms that this appeal "raise[s] serious and substantial legal issues." *Arkansas Peace Ctr.*, 992 F.2d at 147. As *Busbee* reasoned, nothing in 2 U.S.C. § 8(a) requires a current vacancy or disqualifies a vacancy that is sure to occur. *Busbee* observed that, because congressional "terms did not expire until March 4 when section 8's predecessor was enacted," it "seems inescapable" that "a vacancy [arises] upon a failure to elect and not on the expiration of the terms of the incumbent representatives." 549 F. Supp. at 525. *Busbee* also reasoned that "no one would seriously contend that section 7 would prevent a state from rescheduling its congressional elections" in the event of "a

[4] The district court's treatment of *Busbee*, Order 12–13, does not grapple with its holding on the timing of a cognizable vacancy and skips to an analysis of the meaning of "failure to elect." This misses the point that, under *Busbee*, a future vacancy due to a failure to elect is cognizable under the statute.

natural disaster," *id.* at 526, but the district court's conclusion that the vacancy must be a *present* one would lead to that result. A congressional district could be hit by a devastating earthquake days before Election Day, and under the district court's interpretation of 2 U.S.C. § 8(a) the state would be forbidden from rescheduling the election. That interpretation is unlikely to survive review.

B. There Is a Cognizable "Failure To Elect"

The district court also opined that there is no "failure to elect at the time prescribed by law," 2 U.S.C. § 8(a), because Section 204B.13 is the cause of the failure. It reasoned that "Minnesota cannot *invent* a failure to elect or *create* an exigent circumstance." Order at 14.

But other courts have taken the opposite view. *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993), held that Georgia law could legitimately find a "failure to elect" where no candidate crossed the 50% mark in the total vote, even though the state could have handed the race to the plurality vote-winner, as other states do. *Id.* at 830. The court found it sufficient that "the *statute* deems an election resulting in a mere plurality not to be a completed election." *Id.* (emphasis added). It reasoned that the failure to reach a 50% mark "is similar to an election postponed due to natural disaster or voided due to fraud" 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." *Id.*

Minnesota's policy choice is no different from Georgia's. Just as the Georgia General Assembly determined that an election without a majority-vote winner is not sufficiently conclusive to bind Georgia, the Minnesota Legislature

determined that an election compromised by the untimely and unforeseen withdrawal or death of a major-party candidate is not sufficiently indicative of popular will to bind Minnesota. Indeed, Section 204B.13 is no different from any other state law defining when an election is valid and when it is not. Numerous states have enacted statutes authorizing the rescheduling of elections in certain defined circumstances,[5] and all of them would be invalid under the district court's interpretation of 2 U.S.C. § 8(a).

The district court's ruling conflicts with *Public Citizen*, and *Public Citizen* has the better reading of the text. A "failure to elect," 2 U.S.C. § 8(a), is a legal construct, and the natural place to look for its meaning is state law. Federal law does not contain a comprehensive elections code, it does not define when an election outcome is legally valid, and only in exceptional circumstances does it define an outcome as *not* valid. *See North Carolina v. Covington*, 137 S. Ct. 1624, 1625–26 (2017) (per curiam); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) ("[T]he Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation."). Because state law ordinarily defines when an election succeeds or fails, 2 U.S.C. § 8(a) necessarily looks to state law to ascertain when a "failure to elect" occurs.[6]

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

[6] This principle undermines another basis the district court found to distinguish *Busbee*, that the election at issue there would "necessarily be invalid *as a violation of federal or constitutional law*" (i.e., the Voting Rights Act). Order 13. In *Public Citizen*, the election was inconclusive as a matter of *state* law, and nothing in 2 U.S.C. § 8(a) requires a federal-law violation.

Further, Section 204B.13's determination of when an election cannot be conclusive—here, based on the death of a major-party candidate close to an election—is triggered by an event that is beyond the State's control. A major-party candidate's death is like a natural disaster or election fraud in the relevant sense "that each is contemplated, yet beyond the state's ability to produce." *Pub. Citizen*, 813 F. Supp. at 830. This is not a "carefully crafted law that, by its sole design, invents a 'failure to elect'" to evade the default November election date. *Id.* The district court found that "the Minnesota Nominee Vacancy Statute was [not] drafted or enacted in bad faith." Order 14 n.5. The statute addresses Minnesota's tragic experience involving Sen. Wellstone, and its Legislature reasonably viewed an election as sufficiently compromised by such an event to treat its result as not reflecting the popular will. It is no different from any other state statute identifying, in advance and on fair, non-discriminatory terms, the rules by which an election will be deemed binding and conclusive.

The district court also distinguished *Public Citizen* on the ground that "the State of Georgia actually held a general election on the congressionally mandated date in November," Order 13–14, but *Public Citizen* itself recognized that an election could as easily be "postponed" for many reasons, such as a "natural disaster," 813 F. Supp. at 830, a point *Busbee* deemed too obvious for dispute, 549 F. Supp. at 526. The fact that the election was not postponed in *Public Citizen* is therefore not a material difference from this case. Nor would that distinction, which would render 2 U.S.C. § 8(a) inapplicable in the case of a natural disaster, make sense.

C. Plaintiffs' Equal Protection Claim Is Meritless

The district court did not address Plaintiffs' equal-protection argument, Order 15, and Mr. Kistner is likely to succeed on it. Plaintiffs' claim under 2 U.S.C. § 7 is not an equal-protection claim, and a violation of a statute (and there is none here) would not make an equal-protection claim. *See, e.g.*, *Marler v. Mo. State Bd. of Optometry*, 102 F.3d 1453, 1457 (8th Cir. 1996); *Weir v. Nix*, 114 F.3d 817, 821 n.7 (8th Cir. 1997).

Plaintiffs' contention that a February special election burdens the right to vote is backwards: it is the unforeseen death of a major-party candidate that caused an election disruption and the disenfranchisement of that candidate's supporters and party. Section 204B.13 is part of the cure, not the disease. The requirement that voters submit ballots again in February is a minor price to pay for the integrity of the election, for the opportunity of major-party supporters to run and vote for their preferred candidate, and for the election to properly reflect the will of the voters. This is a "reasonable, nondiscriminatory" imposition (if that) on the right to vote, and Minnesota's interest in a fair election with participation by all major parties is a legitimate regulatory interest that justifies any resulting burdens on the franchise. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008); *see also New Georgia Project v. Raffensperger*, --F.3d--, 2020 WL 5877588, at *1 (11th Cir. Oct. 2, 2020).

Indeed, as explained below, it is the injunction here that imposes a severe, unjustified, and unacceptable burden on the right to vote. The injunction forces members of the public to vote on uneven terms. Votes have been cast for weeks

on the reasonable understanding that no election would occur in the Second Congressional District, and supporters of Mr. Weeks have not had the opportunity to put a replacement candidate on the November 3 ballot. The reinstatement of an election in the middle of voting, weeks after it was cancelled, throws the election into chaos. The Secretary's approach, by contrast, followed the rule of law and matched reasonable expectations that a special election will occur in February 2021.

In short, Minnesota's interests qualify as "important regulatory interests" that justify non-discriminatory burdens on the right to vote, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), and, in fact, qualify as *compelling* interests that avoid, rather than work, an equal-protection violation. *Cf. Monaghen v. Simon*, 888 N.W.2d 324, 331 (Minn. 2016). Mr. Kistner is likely to succeed on this issue on appeal.

II. The Equitable Factors Weigh in Favor of a Stay

The equities favor a stay. Voting proceeded for nearly three weeks after Mr. Weeks's passing, and voters declined to vote in the Second Congressional District race in reasonable reliance on the Secretary's announcement of a special election. Plaintiffs waited eight days to move for injunctive relief and never sought a temporary restraining order to stop the damage that was occurring day by day, minute by minute. The only way to conduct the election consistent with the Equal Protection Clause is to conduct it in February, as Minnesota law prescribes.

A. Mr. Kistner Will Suffer Irreparable Harm

Mr. Kistner, his supporters, and thousands of other voters, will suffer irreparable harm in the absence of a stay. Elections cannot be stopped and restarted on a dime, especially *after voting begins*. The district court was incorrect that its injunction "*restores* and *maintains* the *status quo*." Order 23. The *status quo* is that the November 3 election is off, and voters and Mr. Kistner's campaign took action in reasonable reliance on that *status quo*.

Beginning on September 24, voters in the Second Congressional District were informed that the election was cancelled, that votes would not be counted, and that a special election would be held in February 2021. This disincentivized voters who cast ballots after September 24 from making any choice in the Second Congressional District race, and voters did in fact follow that course. Grant Decl. ¶ 15. Now that the district court has ordered the contest to proceed, a second group of voters will vote with the understanding that the November election is occurring. They will be incentivized to vote in that race.

This differential treatment is a *constitutional* harm. The Equal Protection Clause forbids "arbitrary and disparate treatment of the members of [the] electorate." *Bush v. Gore*, 531 U.S. 98, 105 (2000). Election rules must therefore "satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right" to vote. *Id.* In short, "uneven treatment" of voters violates the Equal Protection Clause. *Id.* at 531. The injunction necessarily results in uneven treatment of voters on the arbitrary basis of when they cast their votes. *See Moore v. Circosta*, No. 5:20-CV-507-D, 2020

WL 5880129, at *7 (E.D.N.C. Oct. 3, 2020) (granting a temporary restraining order to prevent a state from subjecting different voters casting votes at different times during absentee voting to different rules).

"[E]ach qualified voter must be given an equal opportunity to participate in [the] election," *Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 56 (1970), but the injunction here denies equal treatment and results in disenfranchisement on an uneven basis—a paradigmatic irreparable harm. *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 2016 WL 6584915, at *17 (D.N.J. Nov. 5, 2016) (collecting cases). The burdens are especially obvious as to the supporters of Mr. Weeks, who now have no candidate representing their major party in the November election. But the burdens extend to all who voted under the reasonable understanding that the Second Congressional District race was rescheduled.

These harms accrue directly to Mr. Kistner, whose supporters' rights are now compromised and severely burdened. *See Burdick v. Takushi*, 504 U.S. 428, 438 (1992) ("the rights of voters and the rights of candidates do not lend themselves to neat separation"); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (same). The court below found that Mr. Kistner has identified harms that are "concrete, particularized, and imminent, because [the requested relief] personally impacts Kistner's interests with respect to the impending election." Order at 5. Those interests will be irreparably harmed without a stay.

Mr. Kistner's campaign acted in reasonable reliance on the Secretary's announcement, rescheduling campaign and fundraising events and strategic

meetings. Grant Decl. ¶¶ 8–10. Other campaigns and supporters of Mr. Kistner stopped disseminating Kistner campaign materials. *Id.* ¶ 11. The campaign cancelled advertising and declined to purchase advertising time that it would have otherwise purchased. *Id.* ¶ 12. Donors otherwise inclined to give to the campaign chose to fund other causes and candidates, and donations plummeted after it was announced that the election would not occur in November. *Id.* ¶ 13. Independent expenditures related to the contest also appear to have ceased. *Id.* ¶ 14. As noted, voters have indicated that they did not cast votes in the Second Congressional District contest. *Id.* ¶ 15. Meanwhile, the campaign has made plans for the February election. *Id.* ¶ 16.

These choices were eminently reasonable: it would have made no sense for the Kistner campaign to run a full-court-press campaign in September and October for a contest that would not occur until February. *Id.* ¶ 17. Under longstanding Minnesota law, the *status quo* is a February 2021 election, not a November 2020 election. Votes have been cast, money has been spent, choices have been made, and the wheels on the election were spinning at full speed *before* the injunction—indeed *before Plaintiffs sought it*. All of these harms are uniquely *irreparable* because no court can turn back the clock to September 24 and start the election again.

"Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). That risk is now a certainty, since tens of

thousands of votes have been cast.[7] It is for precisely these reasons that the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election" and stayed lower-court orders on this basis. *Republican Nat'l Comm.*, 140 S. Ct. at 1207; *see also Clarno v. People Not Politicians Oregon*, No. 20A21 (U.S. Aug. 11, 2020); *Merrill v. People First of Alabama*, No. 19A1063 (U.S. July 2, 2020); *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020). Federal courts of appeals have followed suit. *See, e.g.*, *New Georgia Project*, 2020 WL 5877588, at *4; *Democratic Nat'l Comm. v. Bostelmann*, No. 20-2835, 2020 WL 5951359, at *3 (7th Cir. Oct. 8, 2020). The injunction here inflicts harms beyond those deemed worthy of stays pending appeal in these cases: the district court ordered an election to occur that has been—for *weeks*—cancelled.

The need for a stay is all the greater because Plaintiffs are, at least in part, the cause of the disenfranchisement. Mr. Weeks passed away on September 21, but Plaintiffs waited a full eight days to move for an injunction and, even then, did not seek a temporary restraining order. The State and thousands of voters thus spent weeks taking action in reliance on the State's (lawful) determination

[7] 17.9% of Minnesota voters have already cast their ballots. David H. Montgomery, *Minnesota absentee voting on record-setting pace*, MPRNews, October 9, 2020, https://www.mprnews.org/story/2020/10/09/minnesota-absentee-voting-on-recordsetting-pace.
In recent Second Congressional District elections, approximately 350,000 ballots were cast. *See, e.g.*, State and Federal Results in Congressional District 2, 2016, Minnesota Secretary of State, https://electionresults.sos.state.mn.us/results/Index?ErsElectionId=100&scenario=StateFedCongressional&DistrictId=557. If District 2 is on pace with the rest of Minnesota, around 60,000 votes have been cast so far.

and the Secretary's widely-publicized announcement that no November 3 election could occur for the Second Congressional District seat. Plaintiffs' delay, and the contribution of that delay to widespread and severe irreparable harm, is yet another reason an injunction should never have issued, *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013); *Hirschfeld v. Bd. of Elections in City of New York*, 984 F.2d 35, 39 (2d Cir. 1993), and is an independent reason why this Court should enter a stay.

B. No Other Party Will Suffer Irreparable Harm

A stay will not inflict substantial harm on any interested party. The harms alleged to accrue against Rep. Craig are not severe. She can run in February 2021, just as in November 2020, and can spend the same fungible money at either time. The district court's finding that Ms. Craig "will be forced to conserve campaign resources in anticipation of a potential special election in February," Order at 17, describes a comparatively insubstantial burden, which applies to all candidates evenly (including Mr. Kistner); can be overcome with appropriate budgeting and prudent campaign management; and, besides, appears to be *exacerbated* by the injunction, since Rep. Craig was compelled to assume for a time that no November election would occur and adopt appropriate contingency measures.

Further, the burdens on the right to vote equally apply to Rep. Craig's own supporters, who (like everyone else) were instructed that no election would occur on November 3. So, it is perplexing that Rep. Craig has sought to disenfranchise persons who might have otherwise voted for her. Meanwhile, if

Rep. Craig's true (unstated) concern is that she would prefer to run without a living LMNP candidate on the ballot, that is ordinary election competition, not irreparable harm.

The harm the district court identified to co-Plaintiff Davies is that "she is required to vote twice," Order 17, but the opportunity to vote is not a severe burden on the right to vote. Any burden of that nature is substantially outweighed by the burdens on voters who *already voted* under a different set of rules. Meanwhile, "the absence of uninterrupted congressional representation in the United States House of Representatives," Opinion 17, is for little more than a month. Any harm that short hiatus in representation carries is outweighed by the voting rights of tens of thousands of residents in the Second Congressional District who will be forced to vote on unequal terms without a stay.

C. The Public Interest Favors a Stay

For the same reasons, the public interest weighs decidedly in favor of a stay. On the one side of the balance are tens of thousands of votes that will be cast on fundamentally unfair terms, as some voters believed they were voting in the Second Congressional contest and many others believed they were not. These interests are of the highest order—outweighing even a state's interest in election administration (which is itself harmed, not advanced, by the injunction). *See, e.g.*, *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) ("There is no contest between the mass denial of a fundamental constitutional right and the modest administrative burdens to be borne by Secretary [of State]'s office and other state and local offices involved in elections."); *United States v. Berks*

Cty., 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003) (recognizing that "administrative expenses…are far outweighed by the fundamental right at issue."). The burden the injunction imposes on fundamental rights is severe to the utmost degree, and practically no interest could outweigh it.

"[I]t is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008).[8] Only a stay can vindicate those rights. Although the opinion below posits that the right to vote can be vindicated by a November election, it is impossible to administer that election on an even playing field and in a fair way. *See Bush*, 531 U.S. at 110 (calling ballot counting to a close where it "will be unconstitutional" in application). On the other side of the scale are the slight burdens of campaign management issues Ms. Craig has had to navigate in any event, the need to vote in February, and a short hiatus in representation. These minor burdens are handily justified by the rights of untold numbers of voters who deserve a *fair* election.

CONCLUSION

The Court should stay the injunction pending appeal. It should also issue an administrative stay pending briefing on this motion and expedite consideration of this appeal and this motion

[8] Overruled on other grounds by *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012).

Dated: October 13, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. 27(a) because it is 5,166 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.

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I hereby certify that on October 13, 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. I also certify that on the same day the following counsel have been served via electronic mail and overnight delivery.

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