No. ____

IN THE

Supreme Court of the United States

TYLER KISTNER

Intervenor-Applicant,

v.

ANGELA CRAIG and JENNY WINSLOW DAVIES

Plaintiffs-Respondents,

and

STEVE SIMON, in his official capacity as Minnesota Secretary of State

Defendant-Respondent.

Emergency Application for Stay

To the Honorable Neil M. Gorsuch
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Eighth Circuit

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PARTIES TO THE PROCEEDING

The parties to the proceeding below are as follows:

Applicant Tyler Kistner is the Republican Party of Minnesota's candidate for Congress in Minnesota's Second Congressional District for the November 3, 2020 general election, and will be the Republican Party's candidate in the special election for that district originally scheduled for February 9, 2021.

Respondents are Angela Craig and Jenny Winslow Davies. Rep. Craig is the current United States Representative for Minnesota's Second Congressional District, and is running as the Democratic candidate for reelection. Jenny Winslow Davies is a registered voter in the Second Congressional District.

Defendant below, Steve Simon, is the Secretary of State of the State of Minnesota.

RELATED PROCEEDINGS

United States District Court (D. Minn.):

Angela Craig, et al., v. Steve Simon, *et al.*, 0:20-cv-02066 WMW/TNL, October 13, 2020.

United States Court of Appeals (8th Cir.):

Angela Craig, et al., v. Steve Simon, *et al.*, 20-3126, October 23, 2020.

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TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE EIGHTH CIRCUIT:

Applicant Tyler Kistner, candidate for the U.S. House of Representatives, respectfully asks this Court for a stay of a preliminary injunction reinstating the November 3 election for Minnesota's Second Congressional District, even though that election had been cancelled and rescheduled by operation of state law after another major-party candidate died. For nearly three weeks prior to the injunction—as early voting progressed at historically high rates—voters cast their ballots in reliance on the Minnesota Secretary of State's announcement that the November race was off and that votes in the race would not be counted. Untold numbers of voters chose not to select a candidate in that race, and Mr. Kistner's campaign, his campaign donors, and his independent supporters upended their campaigning—cancelling events, scheduling new events for the February 2021 special election, postponing outreach, etc.—in reliance on Minnesota law and the Secretary's representation that the November election was off. And then a federal court switched the race back on, right in the middle of voting.

The district court's injunction reinstating the November 3 election is no different from the many injunctions that this 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). Worse, this injunction 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.

The district court had no sound legal basis to inflict this tumult, and the court of appeals did not uphold the district court's reasoning in denying Mr. Kistner's stay motion. The district court held that Minnesota's vacancy statute is preempted

wholesale as to federal elections, but federal law expressly *authorizes* states to conduct special elections when state law deems an election inconclusive. *See* 2 U.S.C. § 8(a). 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" is not materially different from exigencies like a natural disaster or election fraud that a state may lawfully determine require a special election.

Unlike the district court, the court of appeals assumed that states may lawfully schedule a special election due to "exigent circumstances," as other courts have held. But then it proceeded to override Minnesota law's policy judgment defining those circumstances, holding that Minnesota's choice to schedule a special following the death of any "major party" candidate is preempted absent some showing of a "history of electoral strength" of the candidate's party beyond that required by state law. The federal statute provides no basis to distinguish among candidates and political parties, no party pressed that argument in the courts below, and Mr. Kistner is likely to succeed under the statute *as written*.

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. Further, Minnesota voters cast ballots with no vote in the Second Congressional District election for one-third of the early voting period because the Secretary instructed them that votes would not be counted. The Court should intervene promptly to stay the injunction pending disposition of Applicant's appeal in the Eighth Circuit and his petition for a writ of certiorari to this Court.

Opinions Below

The order of the district court enjoining the Minnesota Secretary of State from enforcing Minnesota Statutes § 204B.13(7) and rescheduling the Second Congressional District election to February 2021 is reproduced at Appendix A. The order and published opinion of the Court of Appeals for the Eighth Circuit denying Mr. Kistner's emergency motion for stay is reproduced at Appendix B.

Jurisdiction

This Court has jurisdiction over this Application under 28 U.S.C. §§ 1254(1) and § 1651. Mr. Kistner intervened as a defendant before the district court, and has standing because he will suffer an "injury in fact" caused by the district court's injunction, and that injury "is likely to be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

Constitutional and Statutory Provisions Involved

This case involves Article 1, section 4, of the United States Constitution, Sections 7 and 8 of Chapter 2 of the United States Code, and Minnesota Statutes Section 204B.13, which is reproduced at Appendix C.

Statement

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 Legal Marijuana Now Party ("LMNP"), which qualified as a "major political party" under Minnesota Law 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. D.Ct.Dkt. 47, 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 votes cast in the previously-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).[1]

The Secretary promptly issued an official announcement that the November 3 election was cancelled. After expressing condolences, the announcement stated that "[t]he law is clear on what happens next" and announced a special election for February 9, 2021. D.Ct.Dkt. 19, Nauen Decl. Ex. 2. It represented that, while "[b]allots will not be changed" to reflect the cancellation, "the votes in [the Second Congressional District] race will not be counted." *Id.* The announcement was widely covered in the media.[2] Mr. Kistner's campaign cancelled events and advertising and began to plan for a February 2021 contest. D.Ct.Dkt. 53, Grant Decl. ¶¶ 9–16. Some voters who cast ballots did not vote for a candidate in the Second Congressional District race. *Id.* ¶ 15.

On September 28, Rep. Craig and one of her supporters ("Respondents") filed this action asserting that Minnesota's vacancy statute is "unconstitutional as applied

[1] 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.

[2] *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-candidates-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.

to elections for U.S. Congress and preempted by federal law." D.Ct.Dkt. No. 1, Compl. ¶ 1. Respondents 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.

On September 29, eight days after Mr. Weeks passed away, Respondents requested a preliminary injunction. Rep. Craig testified 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." D.Ct.Dkt. No. 17, Craig Decl. ¶ 11. By that time, voters had already been selecting that course of action for several days. But Respondents did not move for a temporary restraining order. Mr. Kistner moved to intervene as a defendant and subsequently filed an opposition to Respondents' injunction motion, arguing that Congress expressly authorized states to conduct special elections in in circumstances like those here. *See* 2 U.S.C. § 8(a).

The district court issued an order on October 9 granting Mr. Kistner intervenor status, granting Respondents' 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. App. A, Order Granting Preliminary Injunction (hereinafter, "DC Order") 23–24. Mr. Kistner moved that day for a stay pending appeal in the district court. The district court denied that motion on October 13, and, on the same day, Mr. Kistner filed a motion for stay pending appeal in the Eighth Circuit. That court denied the motion in a published opinion issued on October 23, 2020 (hereinafter, "CA8 Order"). App. B.[3]

[3] The Secretary defended Minnesota law in district court, but opposed a stay in the appeals court on the sole ground that it might lead to "voter confusion," a contention that the appeals court rejected as illogical because there would be no confusion were the election to occur in February 2021. CA8 Order 3.

Reasons To Grant the Application

To obtain a stay pending appeal, an applicant must show (1) a reasonable probability that the Court will consider the case on the merits; (2) a fair prospect that a majority of the Court will vote to reverse the decision below; and (3) a likelihood that irreparable harm will result from the denial of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Those factors are readily satisfied here.

Minnesota's choice to conduct a special election because of the death of a major-party candidate fits comfortably within Congress's express authorization of special elections, 2 U.S.C. § 8(a), and therefore is not preempted by the statute establishing nationwide default election day, *id.* § 7. Section 8(a) authorizes states to conduct congressional special elections in the event that (1) a "failure to elect in the time prescribed by law" (2) results in a "vacancy" in a congressional seat. These elements are amply satisfied. Minnesota's vacancy provision, Section 204B.13, requires the state to cancel an election and schedule a special election in the event that a major-party candidate dies or becomes disqualified shortly before election day. That qualifies as a "failure to elect" under Section 8(a), which does not define the term but instead necessarily looks to state election laws to ascertain when an election succeeds and when it proves inconclusive. And there is a resulting vacancy because, by operation of that law, the Second Congressional District seat will automatically become vacant on January 3, 2021. The district court's contrary conclusions conflict with the text of Section 8(a) and at least two decisions of other courts interpreting it—one summarily affirmed by this Court and another by the Eleventh Circuit.

The court of appeals did not adopt or endorse the district court's reasoning. Instead, it declined a stay based a reading of Section 8(a) entirely divorced from the statutory text and resting on the Court's own "policy" views about when the effect of state law should be disabled. It did not disagree that a state *may* schedule a special election under Section 8(a) if a candidate of the Democratic or Republican Parties dies

or is disqualified on the even of an election, but concluded that the death of Mr. Weeks, a third-party candidate, was insufficiently important to justify a special election. Nothing in the text of Section 8(a) supports that distinction. The statute does not turn on the candidate's partisan identity or on whether a federal court disagrees with the state's choice in identifying major parties, but on whether the state's choice circumvents the default election day set by 2 U.S.C. § 7. Here, Minnesota's choice turns on circumstances outside of its control and adheres to the state's ordinary and generally applicable election mechanisms that define "major" political parties and the circumstances effectuating a special election.

The injunction wreaks enormous and irreparable injury on voters, the state, and Mr. Kistner. Voters were told for weeks that votes would not be counted, and it is undisputed that voters relied on that representation by not casting votes in the Second Congressional District contest. By changing the rules in the middle of the election, and thereby subjecting voters to different rules on the basis of when they cast their ballots, the injunction violates basic equal-protection principles and severely injures the affected voters and public interest. Mr. Kistner likewise reasonably relied on Minnesota law and the Secretary's announcement that the law applied, cancelling campaign events and fundraisers and preparing for a 2021 election. The court of appeals did not dispute any of this, but expressed hope that "informed" voters might have guessed that enforcement Minnesota's law would be enjoined. But the right to vote is not contingent on whether voters are "informed" about pending litigation, which is not even a rational basis—much less a compelling interest—to justify differential treatment of voters.

I. There Is a Reasonable Probability That the Court Will Review This Case and a Fair Prospect That It Will Reverse the Decision Below

This case presents issues of overriding federal importance on which the courts have split and as to which the courts below could not even agree on a rationale. At least four members of this Court are likely to vote for certiorari if the Eighth Circuit stands by its provisional ruling, and at least five are likely to vote to reverse.

A. Federal Law Authorizes Minnesota's Choice To Conduct a Special Election

Federal law does not preempt Minnesota Statutes § 204B.13. Although 2 U.S.C. § 7 establishes a congressional-election default date of the Tuesday after the first Monday in November, the very next provision, Section 8(a), authorizes states to hold a special election at other times:

> [T]he 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). By its plain terms, the statute is triggered on the occurrence of two elements: (1) a "failure to elect" and (2) a "vacancy." Minnesota law satisfies both.

1. Failure To Elect

By operation of Section 204B.13, the November 3 Second Congressional District contest has resulted in a "failure to elect" because a major-party candidate unexpectedly died within 79 days of the election. Minn. Stat. § 204B.13, subds. 1 & 2(c). This qualifies as a failure to elect for the same reason that any contest that proved inconclusive as a matter of the state's election code would. A "failure to elect" is not a defined term in the U.S. Code and itself references independent principles of election law, including state law. Because Section 204B.13 defines the terms under which *all* Minnesota elections succeed and fail, it qualifies under Section 8(a) as establishing "a failure to elect."

The Eleventh Circuit held as much with respect to Georgia law when it affirmed and adopted the district court's opinion in *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993). *Public Citizen* held that Georgia could legitimately find a "failure to elect" where no candidate crossed the 50-percent 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. It was sufficient that "the *statute* deems an election resulting in a mere plurality not to be a completed election." *Id.* (emphasis added). The failure to reach a 50-percent mark, the court reasoned, "is similar to an election postponed due to natural disaster or voided due to fraud," and "[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 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.

The district court adopted Respondents' contrary view that Minnesota's statute was preempted as to federal elections because "Minnesota cannot *invent* a failure to elect or *create* an exigent circumstance." DC Order 14. But Section 204B.13 does not "invent" a failure to elect any more than a majority-vote-winner requirement does. The terms "failure" and "elect" do not require that it be physically impossible to conduct an election, but merely that the election *fail* under the state's ordinary election mechanisms. For example, a three-judge court in *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983), considered an election that was barred by the preclearance requirement of Section 5 of the Voting Rights Act—a law—and,

although it was physically possible for an election to be conducted and the votes counted, the three-judge panel determined that the operation of Section 5 created a failure to elect. 549 F. Supp. at 526. The law declared the election a "failure," and that law informed the meaning of Section 8(a).

The district court reasoned that the phrase "failure to elect" distinguishes between state law and "*federal or constitutional law*" and distinguished *Busbee* (but not *Public Citizen*) on that basis. DC Order 13 (emphasis added). But there is no such distinction even implied, much less express, in the terms "failure" or "elect," which do not differentiate between state and federal law. Quite the opposite, because most election law is state law, it is the natural place to look to identify when an election fails and when it succeeds. Federal law does not contain a comprehensive elections code, it does not define when the 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 Reg. 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."). Indeed, *Busbee* took state law's ability to declare a failure to elect as a given and reasoned from that premise that federal law may as well. *See* 549 F. Supp. at 526; *see also PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) ("'[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'") (quoting *Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998)); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (same).

The district court distinguished *Public Citizen* on the ground that "the State of Georgia actually held a general election on the congressionally mandated date in November," DC 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 ("[N]o one would seriously contend that section 7 would prevent a state from rescheduling its congressional elections under such circumstances."). 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.

2. Vacancy

There is also a cognizable "vacancy." 2 U.S.C. § 8(a). By operation of Section 204B.13, the Second Congressional District seat will become open as of January 3, 2021. It does not matter that Rep. Craig currently represents the Second Congressional District because there is a certainty of a vacancy "caused by" the failure to elect. 2 U.S.C. § 8(a). The causation requirement being met, there is no basis to read a requirement that the vacancy *coincide* temporally with the failure to elect. It is typical that one event caused by another will occur temporally *after* that first event. It is therefore entirely atextual to impose a *current* vacancy requirement where the statute imposes only a causation requirement. Causation and contemporaneity are neither identical nor even compatible. In a case like this the causation requirement is easily satisfied: by operation of Minnesota Statutes § 204B.13, a vacancy as of January 3, 2021 is a certainty. Hence, there is a cognizable vacancy.

This Court has endorsed that reading of Section 8(a). The three-judge court in *Busbee* 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. 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*.

Yet the district court sided with Respondents' contrary argument and adopted the very reasoning rejected by *Busbee*, concluding 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." DC Order 12. This not only contravenes the statutory text, but also an element of the *Busbee* decision that is binding because it was summarily affirmed by this Court. *Busbee v. Smith*, 459 U.S. 1166 (1983). Summary affirmances are binding precedent of this Court as to matters that were "essential to sustain that judgment." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979); *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1800 (2015). *Busbee*'s holding on the timing of the relevant "vacancy" was essential to its judgment. 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 Busbee*, 549 F. Supp. at 525.

And *Busbee* is far more persuasive than the district court's reasoning, which did not analyze the meaning of the term "vacancy" in any depth.[4] As *Busbee* reasoned, nothing in 2 U.S.C. § 8(a) requires a current vacancy or disqualifies a vacancy that is sure to occur in the near future. *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

[4] The district court's treatment of *Busbee*, DC Order 12–13, does not grapple with its holding about the timing of a cognizable vacancy and skips to an analysis of the meaning of a "failure to elect." This misses the point that, under *Busbee*, the statute reaches a future vacancy due to a failure to elect. The court of appeals also missed this point in suggesting that the "primacy of the Voting Rights Act" may explain *Busbee*, CA8 Order 8 n.5, but this does not sidestep *Busbee*'s specific holding on the *timing* of a cognizable vacancy.

rescheduling its congressional elections" in the event of "a 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 the week before election day, and under the district court's interpretation of 2 U.S.C. § 8(a) the state would be preempted from rescheduling the election because the incumbent's term continued for several more weeks. Given this stark split with binding authority, and the erroneous principles of statutory interpretation applied, there is more than "a reasonable probability" of certiorari review and a "fair prospect" of reversal. *Hollingsworth*, 558 U.S. at 190.

B. The Court of Appeals' Policy-Based Approach Is Unsupportable

The court of appeals did not endorse the district court's reasoning that states are powerless to define a race compromised by the death of a major-party candidate a "failure to elect," but instead rested its denial of Mr. Kistner's stay motion on the premise that, for the death of a candidate to qualify as a failure to elect, "the candidate must represent a political party with a greater history of electoral strength than the Legal Marijuana Now Party in Minnesota." CA8 Order 9. That position was not pressed by Respondents below, nor is it persuasive. The court of appeals cited no statutory text supporting this proposition and relied solely on "strong federal policy reasons for…uniformity." CA8 Order 8.

This bypassing of the text in favor of unexpressed "policy" contravenes the most fundamental principles of statutory construction, which require Section 8(a) to be read "according to its terms." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). As explained, the terms "vacancy" and "failure to elect" are both applicable here, so the vague policy prescriptions the court of appeals invoked simply substituted judicial policy choices for those of the Minnesota legislature. By operation of state law, the November 3 election should have been cancelled and rescheduled. Notwithstanding

the primacy of federal law, unexpressed *policy* views are an insufficient basis for curtailing the reach of otherwise applicable state legislation.

Worse, the reading of Section 8(a) transforms the meaning of "failure to elect" into one tethered to *post hoc* adjudication on a case-by-case basis, whereas the proper reading of the statute provides clarity based on states' ordinary election mechanics that generally (as here) contain bright lines. Under the logic of the appeals court, it is unknowable in advance whether a given contingency may permit a state to reschedule an election. The court recited the levels of support LMNP candidates received in recent elections but did not opine on what levels of support would be necessary for a finding of "exigent circumstances" to be justified. CA8 Order 10. It is notable that in 1998, Minnesota elected a third-party governor, Jessie Ventura, who appointed a third-party senator to represent the State in Congress. Would the death of a candidate from that party qualify under the appeals court's reasoning? Likewise, the appeals court opined that "a major earthquake or hurricane in the congressional district on election day could justify a cancellation, but a snowstorm could not," CA8 Order 9, but what about a tropical storm or a derecho? What about a snowstorm in Georgia, as opposed to Colorado or Minnesota? What about an ice storm that results in postponement of every major athletic event and concert in town? This substitution of a free-floating policy inquiry in place of the statutory text would (if it stands) require case-specific adjudication in practically every instance, throwing elections into doubt *as voting progresses*.

The place to look for answers to these questions is not vague considerations of "policy," but the body of the state law that 2 U.S.C. § 8(a) necessarily relies upon. And the state law here does not undermine Congress's choice to establish a default election day and therefore *effectuates* the policy of "uniformity." CA8 Order 8. Section 204B.13's determination of when an election cannot be conclusive—here, based on the death of a major-party candidate—is triggered by an event that is both rare and

beyond the State's control. A major-party candidate's death is like a natural disaster or voting fraud in the relevant sense "that each is contemplated, yet beyond the state's ability to produce." *Pub. Citizen*, 813 F. Supp. at 830. For this reason, Section 204B.13 is not a "carefully crafted law that, by its sole design, invents a 'failure to elect'" to evade the default November election date of 2 U.S.C. § 7. *Id.* The major-party candidate provisions of Minnesota law tether the definition to a showing of support that is both widespread across the state and broad in total numbers of support. Minn. Stat. § 200.02, subd. 7. Minnesota uses this same provisions for *all* its election purposes, which is powerful evidence of a compelling state policy unrelated to circumventing the default election day.

The district court recognized this, finding that "the Minnesota Nominee Vacancy Statute was [not] drafted or enacted in bad faith," DC Order 14 n.5, and the court of appeals did not disagree. 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 also reasonably utilized the major-party definition it utilizes in other contexts, to provide a bright-line rule, rather than the appeals court's I-know-it-when-I-see-it approach. Nor is there cause for concern that its application will result in frequent special elections. Section 204B.13 took effect seven years ago, and this appears to be the first congressional election that triggered it.

C. Minnesota's Choice To Conduct a Fair Election in February Does Not Violate Anyone's Right To Vote

Respondents also raised an equal-protection claim in the district court, which neither the district court nor the court of appeals addressed. The claim lacks merit.

Respondents contend that conducting the Second Congressional District election in February, rather than November, places an undue burden on the right to vote. But there is no right to vote in November as opposed to February. The right to vote

simply entails a principle "that once the franchise is granted to the electorate, lines may not be drawn" on irrational bases. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966). So long as *all* Minnesota voters may cast ballots in February—and they may—the Equal Protection Clause does not privilege a November date over a February date. Nor does an alleged violation of a statutorily prescribed date, such as 2 U.S.C. § 7, amount to a constitutional offense.

Indeed, Respondents' argument actually cuts against their position. Respondents contended below that the stop-and-start nature of the voting here burdens the right to vote, but the persons whose right to vote is impermissibly burdened by the changed circumstances are those who relied on Minnesota law and the Secretary's announcement and reasonably declined to vote in this race. Because different voters who voted at different points in time were given different instructions, the conduct of a November election "draw[s]" impermissible "lines." *Harper*, 383 U.S. at 665; *Bush v. Gore*, 531 U.S. 98, 105 (2000) (holding that the Equal Protection Clause forbids "arbitrary and disparate treatment of the members of [the] electorate"). Respondents' contention that those persons who did cast votes in the race will be disenfranchised ignores the opportunity to vote in February on equal terms and fails to identify any arbitrary distinction between and among voters. By contrast, those who reasonably declined to cast a ballot in the Second Congressional District race will be disenfranchised without a February election. The sole arbitrary distinction at issue here is caused by the federal-court injunction, not the Secretary's decision to follow Minnesota law and hold a February election.

The bevy of burdens Respondents purport to find in a special election are not "severe" and therefore do not trigger strict scrutiny under the *Anderson-Burdick* test. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). The court of appeals held as much, concluding that "any current confusion among voters about the effect of a vote for Representative in November 2020 would be largely immaterial" if

the statute is given "effect" because the February special election provides a second opportunity to vote in the *same* race. CA8 Order 3 n.1. It is not a severe burden for voters in November not to see their votes counted, when they are able to vote in February in a fair election with all major parties represented. Nor is it a burden to cast a second vote: special elections in Congress are not unusual, and the *opportunity* to cast a ballot is not a *burden* on the right to vote.

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

In short, the opportunity to vote in February in a fair election is a "reasonable, nondiscriminatory" imposition (if that) on the right to vote, and Minnesota's interests handily justify any resulting burdens on the franchise. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008); *see also New Ga. Project v. Raffensperger*, No. 20-13360-D, 2020 WL 5877588, at *1 (11th Cir. Oct. 2, 2020). Notably, if this were not true, Minnesota Statutes § 204B.13 would be unconstitutional even as applied to *Minnesota's* state and local elections, which are governed by the Equal Protection Clause as much as are congressional elections. Since the burdens Respondents purport to identify would exist any time Section 204B.13 resulted in cancellation of an election and scheduling of a special election, which always happens on the eve of an election, it is difficult to imagine any circumstance where Minnesota would be justified in applying this statute. That position is untenable.

II. Irreparable Harm Will Result Without 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. Respondents waited eight days from Mr. Weeks's passing 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*." DC 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, D.Ct.Dkt. 17, Craig Decl. ¶ 11, and voters did in fact follow that course, D.Ct.Dkt. 53, 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.

As discussed, this differential treatment inflicts a *constitutional* harm through the "arbitrary and disparate treatment of the members of [the] electorate." *Bush*, 531 U.S. at 105. Election rules must "satisfy the minimum requirement for nonarbitrary

treatment of voters necessary to secure the fundamental right" to vote. *Id.* The "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.

"[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.*, No. 81-03876, 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 district court correctly 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." DC Order 5. Those interests will be irreparably harmed without a stay.

The appeals court disagreed, positing that "an informed candidate or voter would have been aware then that the status of the election was not resolved" because of Plaintiffs' lawsuit. CA8 Order 11. But that is no basis for distinguishing between and among voters. Just as "[a] citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm," *Reynolds v. Sims*, 377 U.S. 533, 568 (1964)," a voter is no more or less qualified by virtue of watching the District of

Minnesota's docket or happening upon a story about the lawsuit on the evening news or in a paper and guessing at the outcome. Here, the *state* informed voters that the race was off, and it was not incumbent on voters to do further research to vet that representation. Nor would such a requirement make sense: "It is easy to file complaints and drop documents into the federal record." *O'Keefe v. Chisholm*, 769 F.3d 936, 943 (7th Cir. 2014). Numerous election challenges are brought, many are meritless, and there was no reason for voters to view Plaintiffs' claim as colorable or potentially meritorious—or to make an evaluation of that nature at all. Besides, four days passed between the Secretary's announcement and the filing of the lawsuit, and voting progressed during that time. At a minimum, the voters who cast votes during that time frame have suffered discrimination.

Mr. Kistner's campaign acted in reasonable reliance on the Secretary's announcement, rescheduling campaign and fundraising events and strategic meetings. D.Ct.Dkt. 53, 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 Respondents 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.[5] It is for precisely these reasons that this 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 Ore.*, No. 20A21 (U.S. Aug. 11, 2020); *Merrill v. People First of Ala.*, No. 19A1063 (U.S. July 2, 2020); *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020). Courts of appeals have followed suit. *See, e.g.*, *New Ga. 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 Respondents are, at least in part, the cause of the disenfranchisement. Mr. Weeks passed away on September 21, but

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[5] 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-record-setting-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 were cast by the time of the district court's injunction.

Respondents 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 and the Secretary's widely-publicized announcement that no November 3 election could occur for the Second Congressional District seat. Respondents' delay, and the contribution of that delay to widespread and severe irreparable harm, is yet another reason an injunction should never have issued. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("A party requesting a preliminary injunction must generally show reasonable diligence."); *see also Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers). This 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. As the court of appeals explained:

> [A] stay would allow the state statute to take effect, and permit the election for Representative to occur in February 2021 rather than November 2020. In that case, any current confusion among voters about the effect of a vote for Representative in November 2020 would be largely immaterial.

CA8 Order 3 n.1. 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 Rep. Craig "will be forced to conserve campaign resources in anticipation of a potential special election in February," DC Order 17, describes a comparatively insubstantial burden, one that 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. 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," DC 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," DC Order 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. *See Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) ("In appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public."); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (same). 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 prevent the violation of a party's constitutional rights." *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (quotation marks omitted); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (same); *Def. Distributed v. United States Dep't of State*, 838 F.3d 451, 458 (5th Cir. 2016) (same); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (same); *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 884 (3d Cir. 1997) (same); *cf. United States v. Raines*, 362 U.S. 17, 27 (1960) ("[T]here is the highest public interest in the due observance of all the constitutional guarantees."). 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 Rep. Craig has had to navigate in any event, the opportunity 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, knowing exactly what races are actually occurring when they cast their ballots.

Conclusion

The Court should stay the district court's injunction pending disposition of Applicants' appeal in the Eighth Circuit and petition for a writ of certiorari in this Court .

Respectfully Submitted,

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October 23, 2020

No. ____

IN THE

Supreme Court of the United States

TYLER KISTNER

Intervenor-Applicant,

v.

ANGELA CRAIG and JENNY WINSLOW DAVIES

Plaintiffs-Respondents,

and

STEVE SIMON, in his official capacity as Minnesota Secretary of State

Defendant-Respondent.

Appendix to Emergency Application for Stay

To the Honorable Neil M. Gorsuch
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Eighth Circuit

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APPENDIX B

Order of the United States Court of Appeals for the Eighth Circuit, 20-3126, October 23, 2020.

APPENDIX C

Minnesota Statute § 204B.13.

Appendix A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Angela Craig and Jenny Winslow Davies, Plaintiffs, v. Steve Simon, *in his official capacity as Minnesota Secretary of State*, Defendant, and Tyler Kistner, Movant/Intervenor Defendant.	Case No. 20-cv-2066 (WMW/TNL) **ORDER GRANTING MOTION TO INTERVENE AND GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

This lawsuit, commenced after the death of the Legal Marijuana Now Party's (LMNP) candidate for Minnesota's Second Congressional District, involves a challenge to a Minnesota law that requires postponing the election date for a specific seat if a major political party candidate for that seat dies within 79 days before the general election. Minn. Stat. § 204B.13. Before the Court is Movant Tyler Kistner's motion to intervene and Plaintiffs' motion for a preliminary injunction. (Dkts. 14, 24). For the reasons addressed below, Kistner's motion to intervene is granted and Plaintiffs' motion for preliminary injunction is granted.

BACKGROUND

Plaintiff Angela Craig is the current United States Representative for Minnesota's Second Congressional District and is running for re-election. Plaintiff Jenny Winslow

Davies is a voter in Minnesota's Second Congressional District who has already cast her ballot for the upcoming November 2020 general election. Early voting in Minnesota began on September 18, 2020.

On September 21, 2020, the LMNP candidate for Minnesota's Second Congressional District, Adam Weeks, unexpectedly died. Under Minnesota Statutes Section 204B.13 (Minnesota Nominee Vacancy Statute), if a "major political party" candidate[1] nominated to run in an upcoming election dies after the 79th day before the general election, the election date for that race is postponed and votes cast in the general election for that office must not be certified. Minn. Stat. § 204B.13, subdiv. 2(c). The Minnesota Nominee Vacancy Statute further provides that the Governor of Minnesota must issue a writ calling for a special election, conducted on the second Tuesday in February of the year following the year the vacancy in nomination occurred, to fill the seat for which the nominee vacancy occurred. Minn. Stat. § 204B.13, subdiv. 7.

On September 24, 2020, in response to Weeks's death, Defendant Steve Simon, the Minnesota Secretary of State, issued a public statement that "[e]ligible voters in the Second Congressional district should continue to vote" and that, although the Second Congressional District race would still appear on the ballot, under Minnesota law "the votes in that race will not be counted."

[1] It is undisputed that the LMNP is a "major political party," as defined under Minnesota Statutes Section 200.02, subdiv. 7.

On September 28, 2020, Plaintiffs commenced this lawsuit challenging the Minnesota Nominee Vacancy Statute as preempted by federal law and unconstitutional. Plaintiffs filed the pending motion for a preliminary injunction on September 29, 2020, seeking a court order for declaratory and injunctive relief. Specifically, Plaintiffs seek an order enjoining the Minnesota Secretary of State from (1) enforcing the Minnesota Nominee Vacancy Statute, (2) refusing to give legal effect to ballots cast in the general election for Minnesota's Second Congressional District, and (3) communicating to Minnesota voters that their ballots cast in the general election for Minnesota's Second Congressional District will not be counted.

On September 30, 2020, Movant Tyler Kistner, the Republican Party of Minnesota's candidate for Congress in Minnesota's Second Congressional District, moved to intervene in this case as a party defendant.

ANALYSIS

I. Motion to Intervene

The Court must first address Kistner's motion to intervene as a party defendant so as to determine whether his arguments in opposition to Plaintiffs' motion for a preliminary injunction may be considered. Federal Rule of Civil Procedure 24 governs motions to intervene and provides two avenues for intervention—intervention of right under Fed. R. Civ. P. 24(a) and permissive intervention under Fed. R. Civ. P. 24(b). Kistner seeks to intervene as of right and seeks permissive intervention in the alternative. Fed. R. Civ. P. 24(a), (b). Although no party opposes Kistner's motion to intervene, the Court evaluates Kistner's motion under the applicable legal standards.

A. Standing

As a threshold matter, the United States Court of Appeals for the Eighth Circuit has held that "Article III standing is a prerequisite for intervention in a federal lawsuit." *Curry v. Regents of Univ. of Minn.*, 167 F.3d 420, 422 (8th Cir. 1999) (internal quotation marks omitted); *see also Mausolf v. Babbitt*, 85 F.3d 1295, 1299–1300 (8th Cir. 1996). Article III of the United States Constitution limits federal jurisdiction to actual cases or controversies. U.S. Const., art. III, § 2, cl. 1; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Hargis v. Access Capital Funding, LLC*, 674 F.3d 783, 790 (8th Cir. 2012). The standing inquiry requires the litigant to (1) have suffered an injury in fact, (2) establish a causal connection between the injury and the challenged action, and (3) show that the injury would be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560–61; *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007).

1. Injury in Fact

An alleged injury must be "concrete, particularized, and either actual or imminent." *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 834 (8th Cir. 2009) (internal quotation marks omitted). "The law recognizes economic, non-economic, and indirect economic injuries, for standing purposes." *Animal Prot. Inst. v. Merriam*, 242 F.R.D. 524, 527 (D. Minn. 2006). A prospective intervening defendant may establish an imminent injury sufficient for the purpose of standing by demonstrating that the remedies sought by the plaintiff, if granted, would threaten the prospective intervenor's interests. *See South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003) (concluding that "[s]uccess by

[the plaintiff] in the whole litigation would impair the proposed intervenors' interests," and reversing the district court's denials of the motions to intervene).

Kistner argues that he has an interest in ensuring that the Minnesota Nominee Vacancy Statute is enforced, as it would impact his candidacy and campaign for Minnesota's Second Congressional District. Plaintiffs seek to have the Minnesota Nominee Vacancy Statute enjoined and declared preempted by federal law and unconstitutional. Such an injunction and declaration would threaten Kistner's alleged interests. *See id.* Moreover, as alleged, this injury is concrete, particularized, and imminent, because it personally impacts Kistner's interests with respect to the impending election. Therefore, Kistner has established an injury in fact.

2. Causation

A proposed intervenor satisfies the traceability requirement if the defendant would be compelled to cause the alleged injury to the intervenor if the plaintiff prevails. *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1093 (8th Cir. 2011). Here, if the Court were to conclude that the Minnesota Nominee Vacancy Statute is either preempted by federal law or unconstitutional, Minnesota's Secretary of State would be compelled to refrain from enforcing the statute, and Kistner would suffer the injuries he alleges. Therefore, Kistner satisfies the causation requirement of standing.

3. Redressability

An alleged injury that includes the enforcement of certain policies may be redressable by a judicial determination that the challenged policies are permitted. *Id.* If this Court determines that the Minnesota Nominee Vacancy Statute is enforceable, then

Kistner would not suffer the injuries he alleges. Therefore, Kistner satisfies the redressability element of standing.

Because Kistner has demonstrated an injury in fact, causation, and redressability, Kistner has met his burden of demonstrating that he has Article III standing. *See Lujan*, 504 U.S. at 560–61; *accord Mineta*, 495 F.3d at 569.

B. Intervention as of Right

The merits of Kistner's motion to intervene under Federal Rule of Civil Procedure 24 may be considered because Kistner, as a proposed intervenor, has demonstrated he has Article III standing. *See Curry*, 167 F.3d at 422. A court must permit intervention as of right to a proposed intervenor who: "(1) files a timely motion to intervene; (2) claims an interest relating to the property or transaction that is the subject of the action; (3) is situated so that disposing of the action may, as a practical matter, impair or impede the movant's ability to protect that interest; and (4) is not adequately represented by the existing parties." *Nat'l Parks Conservation Ass'n v. U. S. Env't Prot. Agency*, 759 F.3d 969, 975 (8th Cir. 2014) (internal quotation marks omitted).

When assessing whether a motion to intervene is timely, a district court considers "(1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties." *Tarek ibn Ziyad Acad.*, 643 F.3d at 1094. Here, Kistner filed his motion to intervene two days after Plaintiffs filed the complaint. The litigation was at an early stage when Kistner moved to intervene. Moreover, the approximately 48 hours that elapsed

between the filing of the complaint and Kistner's motion to intervene do not constitute a delay. Therefore, Kistner's intervention is, unquestionably, timely.

Kistner claims an interest relating to the subject matter of this litigation as he is a candidate for Minnesota's Second Congressional District. The pending motion for a preliminary injunction asks this Court to determine whether the Minnesota Nominee Vacancy Statute is preempted by federal law or is unconstitutional. As a nominee in the election for Minnesota's Second Congressional District, Kistner has an interest in the subject matter and the outcome of this litigation.

The Court's decision in this matter could impair or impede Kistner's ability to protect the interest that he claims in the enforcement of the Minnesota Nominee Vacancy Statute. The Minnesota Nominee Vacancy Statute dictates that votes will not be certified in the November general election for Minnesota's Second Congressional District. Minn. Stat. § 204B.13, subdiv. 2(c). Given the short period of time between the commencement of this case and the November general election, resolution of these questions presented must be expedited because these questions will be moot in less than one month. Kistner has a limited window of time in which to protect the interest he claims in the enforcement of the Minnesota Nominee Vacancy Statute and his ability to protect the interest he claims would be practically impaired if he is not permitted to intervene.

Finally, as a candidate for Minnesota's Second Congressional District, Kistner holds interests in this litigation that may be separate and distinct from the interests of Minnesota's Secretary of State. As such, without Kistner's intervention, his interests are not adequately represented by the existing defendant.

In summary, because Kistner's intervention as a party defendant in this matter is proper as an intervention of right under Rule 24(a)(2), Fed. R. Civ. P., Kistner's motion to intervene as a party defendant is granted.[2]

II. Motion for Preliminary Injunction

A district court considers four factors to determine whether preliminary injunctive relief is warranted: (1) the movant's likelihood of success on the merits, (2) the threat of irreparable harm to the movant, (3) the state of balance between the harm to the movant and the injury that granting an injunction will inflict on other parties to the litigation and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). The purpose of a preliminary injunction is to maintain the status quo. *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994). The burden rests with the moving party to establish that injunctive relief should be granted. *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). And this Court is mindful that preliminary injunctive relief is an extraordinary remedy that is never awarded as of right. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

A. Likelihood of Success on the Merits

The first *Dataphase* factor is the movant's likelihood of success on the merits. *Dataphase*, 640 F.2d at 114. A party seeking a preliminary injunction need not demonstrate actual success on the merits, but that party must demonstrate a likelihood of success. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987). In

[2] In light of Kistner's status as a party defendant, subsequent references to "Defendants" in this Order include the Minnesota Secretary of State and Kistner.

opposing Plaintiffs' motion for preliminary injunction, Defendants argue that Plaintiffs are unlikely to succeed on the merits as to either their preemption claim (Count 1) or their constitutional claim (Count 2).

1. Preemption

In Count 1 of the complaint, Plaintiffs allege that the Minnesota Nominee Vacancy Statute is preempted by federal law, which requires elections for members of the United States House of Representatives to be held on the Tuesday after the first Monday in November in every even-numbered year. 2 U.S.C. § 7. Defendants counter that Minnesota Statutes Section 204B.13 is consistent with, and does not conflict with, federal law.

"A fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). As relevant here, "state law is naturally preempted to the extent of any conflict with a federal statute." *Id.* As such, a state law is preempted if "it is impossible for a private party to comply with both state and federal law" or if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 372–73 (internal quotation marks omitted). For example, regulations pertaining to federal elections that are "made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Foster v. Love*, 522 U.S. 67, 69 (1997) (internal quotation marks omitted).

Article I of the United States Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such

Regulations, except as to the Places of [choosing] Senators." U.S. Const. art. I, § 4, cl. 1 (the Elections Clause). "[I]t is well settled that the Elections Clause grants Congress the power to override state regulations by establishing uniform rules for federal elections, binding on the States." *Foster*, 522 U.S. at 69. As such, although the legislature of each state may prescribe the time, place, and manner of holding elections for the United States House of Representatives, the United States Congress is authorized to alter those state laws through federal legislation. The United States Congress has done precisely that in 2 U.S.C. § 7, which unequivocally provides:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

This year, the Tuesday after the first Monday in November is November 3, 2020. Therefore, federal law requires the general election this year to occur on November 3, 2020.

The United States Congress also has provided limited exceptions to the foregoing requirement for general elections, however. These exceptions grant state governments the authority to regulate federal elections in certain prescribed circumstances. As relevant here, elections *to fill a vacancy* may be held at a time other than the date of the general election:

> [T]he 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) (emphasis added) (Federal Vacancies Statute).

Under the Minnesota Nominee Vacancy Statute, if a major political party candidate nominated to run in an upcoming election dies after the 79th day before the general election, the county and state canvassing boards are prohibited from certifying the vote totals from the general election for that office. Minn. Stat. § 204B.13, subdiv. 2(c). The office instead must be filled at a special election. *Id.* By statute, the special election is to be held on the second Tuesday in February of the year following the year the vacancy in nomination occurred. Minn. Stat. § 204B.13 subdiv. 7. As such, the Minnesota Nominee Vacancy Statute is inconsistent with the congressionally mandated general election date established in Title 2, United States Code, Section 7. Defendants do not appear to dispute that this conflict exists.

Instead, Defendants argue that the Minnesota Nominee Vacancy Statute is not preempted by federal law because the exception in the Federal Vacancies Statute grants the State of Minnesota authority to legislate the timing of a special election to fill a vacancy. The Federal Vacancies Statute describes a "vacancy" as one that is "caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected." 2 U.S.C. § 8(a). Absent the existence of such a "vacancy," Congress has not granted state governments the authority to establish when to hold an election for the United States House of Representatives.

Defendants' argument relies on the presumption that a "vacancy in a nomination," as addressed in the Minnesota Nominee Vacancy Statute, is a "vacancy" for purposes of the Federal Vacancies Statute. But when considering the text of the Federal Vacancies Statute as a whole, the term "vacancy" is used exclusively to describe a representative's

"seat," the "person elected," or the state's "representation" in the United States House of Representatives. 2 U.S.C. § 8; *see also United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole."). Here, there is neither a vacant "seat" nor a vacancy of "representation" because Minnesota's Second Congressional District currently is represented in the United States House of Representatives by Representative Craig. Therefore, the Federal Vacancies Statute, 2 U.S.C. § 8, does not save Minnesota Statutes Section 204B.13 from being preempted by federal law because the Federal Vacancies Statute does not apply to the present circumstance in which there is no "vacancy," as that term is used in the statute.

Defendants argue that "exigent circumstances" prevent holding the election for Minnesota's Second Congressional District during the November general election because the death of Weeks will result in a failure to elect a representative. In support of this argument, Defendants rely on *Busbee v. Smith*, 549 F. Supp. 494, 525 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983). But *Busbee* is inapposite. In *Busbee*, the United States District Court for the District of Columbia held that the State of Georgia's congressional election could be scheduled for a date other than the first Tuesday after the first Monday in November in order to remedy the racially discriminatory effects of the State of Georgia's electoral procedure that had been held unlawful under the Voting Rights Act of 1965. *Busbee*, 549 F. Supp. at 519–20. In *Busbee*, had the State of Georgia proceeded with the congressional election on the November general election date, any result of the general election would have been *necessarily invalid* because the method for choosing the candidates on the ballot for that November general election violated federal law. *Busbee*,

549 F. Supp. at 523 ("In cases like this one, however, where it is no longer feasible, due to either the passage of time or an independent constitutional requirement, to use the old [voting] procedures, section 5 of the Voting Rights Act might well prohibit the state from holding its congressional elections on the date specified by 2 U.S.C. § 7."). Consequently, *Busbee* involved a vacancy caused by an anticipated and inevitable "failure to elect" a representative—a circumstance in which the Federal Vacancies Statute expressly applies. *Id.* at 524–25 (quoting 2 U.S.C. § 8).[3] Here, the parties do not argue, and the record does not suggest, that if the election for Minnesota's Second Congressional District occurs on November 3, 2020, as mandated by the United States Congress, the results of the general election would necessarily be invalid *as a violation of federal or constitutional law*. *Busbee*, therefore, does not govern this case because the winner of the November general election for Minnesota's Second Congressional District will not have been selected in a manner that necessarily violates federal law such that there is a "failure to elect" a representative.[4]

Relying on *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga. 1993), *aff'd*, 992 F.2d 1548 (11th Cir. 1993), Defendants also argue that an exigent circumstance permits a state to hold an election on a date other than the general election date. But in *Public Citizen*, the State of Georgia actually held a general election on the congressionally

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[3] The *Busbee* court also acknowledged that the Federal Vacancies Statute "creates an exception to [2 U.S.C. § 7]'s absolute rule in a *limited class of cases*." *Id.* at 526 (emphasis added).

[4] If Weeks were to posthumously win the November 3, 2020 general election, it is possible that a "failure to elect" will have occurred. But unlike the circumstances in *Busbee*, that outcome is not inevitable in this case.

mandated date in November, pursuant to Title 2, United States Code, Section 7. The general election resulted in a plurality, such that a "failure to elect" actually resulted. *Public Citizen*, 813 F. Supp. at 830. And 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. Here, the State of Minnesota cannot *invent* a failure to elect or *create* an exigent circumstance by refusing to certify the vote totals for Minnesota's Second Congressional District.[5] *See id.* ("A carefully crafted law that, by its sole design, invents a 'failure to elect' cannot be thought to create an 'exigent' circumstance. This would unreasonably contort the word's definition, and allow any state to premeditate a complete avoidance of section 7's dictates . . . ."). Defendants characterize the failure to elect as arising from Weeks's death. But the death of a candidate, without more, does not inevitably result in a failure to elect a representative.[6]

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[5] To be clear, the Court is not suggesting that the Minnesota Nominee Vacancy Statute was drafted or enacted in bad faith. Rather, the parties' briefing and arguments indicate that the Minnesota Nominee Vacancy Statute was drafted in response to the untimely death of Senator Paul Wellstone, who tragically died in a plane crash approximately two weeks before the November general election in 2002. Notably, however, unlike in this case, the death of Senator Wellstone caused a "vacancy" as defined by the Federal Vacancies Statute because an *elected person*, as opposed to an unelected *nominee*, had died.

[6] Under Minnesota law, the duly elected candidate, who is entitled to receive a certificate of election for a United States House of Representatives office, is the candidate who receives the highest number of votes legally cast at the election. *See* Minn. Stat. §§ 204C.33, subdiv. 1; 204C.40, subdiv. 1; 209.12. The death of Weeks, without more, does not prevent this from occurring on November 3, 2020, with respect to the general election for Minnesota's Second Congressional District. Rather, the Minnesota Nominee Vacancy Statute is the direct cause of the "failure to elect" that, according to Defendants, inevitably will occur. But, as the district court reasoned in *Public Citizen*, a state cannot pass a law that "invents a 'failure to elect' . . . to create an 'exigent' circumstance" so as to

Rather, any anticipated failure to elect a representative for Minnesota's Second Congressional District on November 3, 2020, would be a direct consequence of the Minnesota Nominee Vacancy Statute. For these reasons, the analysis in *Public Citizen* also does not apply in this case.

Therefore, Plaintiffs have demonstrated a likelihood of success on the merits as to their claim that federal law preempts the Minnesota Nominee Vacancy Statute.

2. Unconstitutional Burden on Plaintiffs' Rights

Plaintiffs also allege, in Count 2 of the complaint, that the public statements of the Minnesota Secretary of State—specifically those asserting that votes cast for candidates for Minnesota's Second Congressional District in the November 3, 2020 general election will not be counted—unconstitutionally burden the rights of voters who have, or otherwise would, cast their ballots in the general election. Because the Court concludes that Plaintiffs have demonstrated a likelihood of success on the merits of their claim that the Minnesota Nominee Vacancy Statute is preempted by federal law, the Court need not address alternative reasons that this statute may be unenforceable. *See O'Brien v. U.S. Dep't of Health & Human Servs.*, 766 F.3d 862, 863 (8th Cir. 2014) (observing that "the doctrine of constitutional avoidance particularly counsels us not to give unnecessary answers to constitutional questions" (citing *Ashwander v. TVA*, 297 U.S. 288, 345–48 (1936))).

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alter the federally mandated date on which a general election must be held. 813 F. Supp. at 830. That is the circumstance presented here.

B. Threat of Irreparable Harm

The second *Dataphase* factor the Court considers is whether Plaintiffs will suffer irreparable harm absent a preliminary injunction. *Dataphase*, 640 F.2d at 114. "Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009). To establish the need for injunctive relief because of irreparable harm, the movant "must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013) (internal quotation marks omitted); *see also Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 915 (8th Cir. 2015). A mere "possibility of harm" is insufficient. *Roudachevski v. All-American Care Ctrs., Inc.*, 648 F.3d 701, 706 (8th Cir. 2011). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

In the absence of a preliminary injunction, Plaintiffs argue, Representative Craig will suffer irreparable harm. First, Plaintiffs argue that Representative Craig will suffer irreparable harm because some voters who would otherwise cast their ballots for Representative Craig in November 2020 will not vote. As a consequence, Representative Craig might lose their votes, Plaintiffs contend. Also, if the Minnesota Nominee Vacancy Statute is enforced, Representative Craig will need to limit campaign efforts weeks before

the November general election and subsequently campaign for three additional months. Davies also will suffer irreparable harm, Plaintiffs argue, because the vote she cast in the November 3, 2020 general election for Minnesota's Second Congressional District will not count. And without a preliminary injunction she will be forced to vote twice, and will be unrepresented in the United States House of Representative for more than a month.

While Kistner argues Plaintiffs will not suffer irreparable harm, the Secretary of State concedes that Plaintiffs will suffer irreparable harm.

Representative Craig will suffer irreparable harm absent this Court issuing a preliminary injunction. According to Plaintiffs, Representative Craig will be forced to conserve campaign resources in anticipation of a potential special election in February, which will require candidates to campaign—and expend campaign resources—for several additional months. Although Kistner does not share Representative Craig's concerns about campaigning for three additional months, it is undisputed that campaigning is an expensive, time-consuming and resource-intensive endeavor. And these burdens are enhanced by the ongoing COVID-19 pandemic. This is a substantial burden at least on Representative Craig, if not all of the candidates, that cannot be remedied by an award of damages in the future.

Absent a preliminary injunction, Davies will also suffer irreparable harm by not having her vote count such that she is required to vote twice, and by the absence of uninterrupted congressional representation in the United States House of Representatives. Courts routinely recognize that restrictions on voting rights constitute irreparable injury. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)

(collecting cases). Indeed, "included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots *and have them counted*." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (emphasis added) (internal quotation marks omitted). Here, the Minnesota Nominee Vacancy Statute does more than restrict voting rights. The statute also decrees that votes for the election in question—including votes that have already been cast—will not be counted at all. Exclusion of these votes from consideration in the election undoubtedly restricts or violates the voting rights of those qualified voters who cast them. Therefore, the injuries to Davies arising from the Minnesota Nominee Vacancy Statute are irreparable.

Plaintiffs, therefore, have demonstrated that they will suffer irreparable harm if a preliminary injunction is not granted.

C. Balance of Harms

The third *Dataphase* factor the Court considers is the balance of harms to the parties. *Dataphase*, 640 F.2d at 114. This factor also supports an entry of a preliminary injunction. Here in the United States, the right to vote *and to have one's vote count* is a fundamental right. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (discussing the "franchise of voting" as a "fundamental political right") (internal quotation marks omitted); *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 234 (6th Cir. 2011) (concluding that the "right to vote includes the right to have one's vote counted on equal terms with others") (internal quotation marks omitted); *Akizaki v. Fong*, 461 P.2d 221, 223 (Haw. 1969) ("Implicit in [the right to vote] is the right to have one's vote count . . . ."). If the Minnesota Nominee Vacancy Statute is enforced, Davies who has already cast her ballot in

Minnesota's Second Congressional District race will not have her vote count for that race. Instead she will be forced to vote twice. Defendants discredit the burden of voting twice. But the burden of voting twice is significant. And the practical reality of voting during a global pandemic compounds the burden for voters who wish to vote in person and must leave their homes in the winter to vote in a crowded polling location. In addition, Davies—like all residents of Minnesota's Second Congressional District—will be unrepresented in the United States House of Representatives for more than a month if a preliminary injunction is not granted. Moreover, Representative Craig will suffer significant harm because she will have expended resources and structured her campaign in accordance with the expectation that her campaign would conclude in November 2020.

Defendants argue that if this Court grants a preliminary injunction, everyone who votes for Weeks will not have their votes count. But if this Court does *not* issue a preliminary injunction, *not a single vote* cast in the November general election for Minnesota's Second Congressional District will count. By granting the preliminary injunction, this Court ensures that all properly cast votes in the November general election, including the votes cast for Weeks, will be counted. Therefore, the balance of harms weighs strongly in favor of granting a preliminary injunction.

The Court is mindful that there are competing potential harms to the parties. Minnesota's Secretary of State concedes that Plaintiffs will suffer irreparable harm, but argues that there also would be irreparable harm to the State of Minnesota, to the LMNP party, and to the voters in Minnesota's Second Congressional District if this Court grants Plaintiffs the relief Plaintiffs seek. If Plaintiffs receive the requested relief, Minnesota's

Secretary of State (1) would be enjoined from enforcing the Minnesota Nominee Vacancy Statute, (2) would have to remove any notices posted about the Minnesota Nominee Vacancy Statute, and (3) would have to correct statements suggesting that votes cast in the November general election for Minnesota's Second Congressional District will not count. Indeed, conflicting announcements from Minnesota's Secretary of State as to the status of votes cast in the November general election might cause some confusion. But it is also likely that the September 24, 2020 announcement generated confusion for some voters because general elections are the norm and special elections are not. And Minnesota's Secretary of State issued an announcement on September 24, 2020, that ballots will not be counted in the November general election for Minnesota's Second Congressional District, and Minnesota's Secretary of State must now clarify that all otherwise proper votes *will count* for every single race on the ticket, specifically including the race for Minnesota's Second Congressional District. But these countervailing potential harms do not tip the balance in favor of the Defendants. The balance of harms supports the entry of a preliminary injunction.

D. Public Interest

Finally, the fourth *Dataphase* factor this Court considers when determining whether to issue a preliminary injunction is the public interest. *Dataphase*, 640 F.2d at 114. "[I]t is always in the public interest to protect constitutional rights." *Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019). Voters have an unparalleled interest in the fair, impartial administration of elections, free from improper restraints or constrictions on the cherished right to vote. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)

(citing *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)). This right to vote is "of the most fundamental significance under our constitutional structure." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). It logically follows that voters have a substantial interest in congressional representation that arises from their substantial interest in the right to vote. If a preliminary injunction is not granted, two public-interest consequences will undisputedly occur. First, all votes cast for Minnesota's Second Congressional District in November will be discarded. Second, every constituent in Minnesota's Second Congressional District will have no representation in the United States House of Representatives for more than a month. Given the overwhelming importance for Minnesota's Second Congressional District voters to be able to vote in the November general election and to have uninterrupted representation in the United States Congress, the public interest weighs in favor of granting Plaintiffs' motion for a preliminary injunction.[7]

[7] Defendants argue other public interests are involved. For example, because Weeks's name remains on the ballot, if he were to win this election posthumously, he would not be able to represent those who cast their vote for him. The Minnesota Nominee Vacancy Statute is one way of increasing voter choice in the event of a candidate's death. *See Monaghen v. Simon*, 888 N.W.2d 324, 331 (Minn. 2016) (explaining that one purpose of the Minnesota Nominee Vacancy Statute is to preserve the voters' choice of eligible candidates for an election). The Minnesota Secretary of State argues that because LMNP voters cannot vote for the candidate of their choice, LMNP voters might suffer irreparable harm. But any irreparable harm LMNP voters might suffer is the result of the unexpected death of their candidate, not the result of a state law that likely is preempted by federal law. Harm caused by the death of a major political party nominee is materially different from harm caused by state action. The Court cannot enjoin harm caused by Weeks's death, but the Court can enjoin harm caused by likely unenforceable state action.

III. The *Purcell* Doctrine

Minnesota's Secretary of State argues that this Court should abstain under the *Purcell* doctrine. *See generally Purcell*, 549 U.S. at 4. In *Purcell*, the plaintiffs challenged the State of Arizona's voter-identification law and sought a preliminary injunction enjoining its enforcement. *Id.* at 2–3. The United States District Court for the District of Arizona denied plaintiffs' motion for a preliminary injunction, and the United States Court of Appeals for the Ninth Circuit issued an interlocutory injunction pending appeal. *Id.* Holding that it is "necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court," the Supreme Court of the United States concluded that the Ninth Circuit's failure to do so constituted legal error. *Id.* at 5. But the Supreme Court underscored that it expressed "no opinion . . . on the correct disposition, after full briefing and argument, of the appeals from the District Court's . . . order or on the ultimate resolution of these cases." *Id.* *Purcell* establishes that it is improper for a court of appeals to fail to give deference to a district court's discretionary ruling on a motion for preliminary injunction affecting the election process. But, as this Court is considering the merits of a preliminary injunction in the first instance, *Purcell* does not require this Court to abstain from granting Plaintiffs' motion for a preliminary injunction.

To be sure, *Purcell* permits a federal court to abstain from issuing an order that could affect an impending election when that action could "result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. And the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140

S. Ct. 1205, 1207 (2020) (involving district court order, issued five days before the scheduled election, that "fundamentally alter[ed] the nature of the election"). Here, the preliminary injunction Plaintiffs seek does not fundamentally alter the nature or rules of the election, create voter confusion, or create an incentive for voters to remain away from the polls. As consistent with long-established federal law, a preliminary injunction *restores* and *maintains* the status quo that existed until the Minnesota Secretary of State's September 24, 2020 announcement following the death of the LMNP candidate.[8] As such, abstention is not warranted in this case.

ORDER

Based on the foregoing analysis and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Movant Tyler Kistner's motion to intervene as a party defendant, (Dkt. 24), is **GRANTED**.

2. Plaintiffs' motion for a preliminary injunction, (Dkt. 14), is **GRANTED**.

3. Defendant Steve Simon, in his official capacity as Minnesota Secretary of State, is **ENJOINED** as follows:

   a. Because Plaintiffs are likely to succeed on the merits of their claim that Minnesota Statutes Section 204B.13 is preempted by federal law,

[8] Notably, absentee voting had begun prior to the death of the LMNP's candidate on September 21, 2020, and the Minnesota Secretary of State has acknowledged that the ballots will not be changed prior to the November 3, 2020 general election. The Minnesota Secretary of State's September 24, 2020 announcement also observed that "eligible voters in the Second Congressional district should continue to vote." This Order is consistent with that statement.

Minnesota Statutes Section 204B.13 shall not be enforced as to Minnesota's Second Congressional District race in the November 3, 2020 general election;

b. The Minnesota Secretary of State shall not refuse to give legal effect to the ballots cast in the November 3, 2020 general election for Minnesota's Second Congressional District; and

c. The Minnesota Secretary of State shall not impede the right of Minnesota's voters to vote in the November 3, 2020 general election for Minnesota's Second Congressional District by communicating to voters that their ballots will not be counted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 9, 2020

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge

Appendix B

United States Court of Appeals
For the Eighth Circuit

No. 20-3126

Angela Craig; Jenny Winslow Davies,

Plaintiffs - Appellees,

v.

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

Defendant,

Tyler Kistner,

Intervenor Defendant - Appellant.

Appeal from United States District Court
for the District of Minnesota

Submitted: October 16, 2020
Filed: October 23, 2020

Before LOKEN, COLLOTON, and BENTON, Circuit Judges.

COLLOTON, Circuit Judge.

We consider here a motion for stay of an injunction entered by the district court in a dispute relating to the general election scheduled for November 3, 2020. The appellant, Tyler Kistner, is the candidate of the Republican Party for the United States House of Representatives in the Second Congressional District of Minnesota. Appellee Angela Craig is the incumbent Representative and the candidate of the Democratic-Farmer-Labor Party for that office. Appellee Jenny Winslow Davies is a voter in the district.

The dispute arises from the death of a third candidate in the race, Adam Weeks, on September 21, 2020. Weeks was the candidate of the Legal Marijuana Now Party, which is recognized as a "major political party" under Minnesota law. Minnesota law accords "major" party status to the LMN Party because the party's candidate for state auditor received at least five percent of the statewide vote in 2018. *See* Minn. Stat. § 200.02, subd. 7(a)(1).

The lawsuit concerns the validity of a Minnesota statute that addresses the administration of an election when a candidate of a "major political party" dies after the seventy-ninth day before the general election. As applicable here, the statute provides that "the general election ballot shall remain unchanged, but the county and state canvassing boards must not certify the vote totals for that office from the general election, and the office must be filled at a special election held in accordance with this section." Minn. Stat. § 204B.13, subd. 2(c). The section continues that the governor "shall issue a writ calling for a special election to be conducted on the second Tuesday in February of the year following the year the vacancy in nomination occurred"—in this case, February 9, 2021. *Id.* § 204B.13, subd. 7.

Craig maintains that the Minnesota statute is preempted by federal law. The Constitution provides that Congress may regulate the time of elections for

Representatives, U.S. Const. art. I, § 4, cl.1, and this Election Clause confers "the power to pre-empt." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14 (2013). States have responsibility "for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997) (internal citation omitted).

A federal statute provides that the day for election of Representatives is "[t]he Tuesday next after the 1st Monday in November, in every even numbered year." 2 U.S.C. § 7. But another section, at issue here, authorizes the States to prescribe "the time for holding elections in any State . . . for a Representative . . . *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." *Id*. § 8(a) (emphases added).

The crux of the dispute is whether Minnesota has authority under § 8(a) to schedule a special election for February 2021 "to fill a vacancy" that will be "caused by a failure to elect at the time prescribed by law," that is, on November 3, 2020. The State's position is that because Minn. Stat. § 204B.13 provides that the canvassing boards must not certify the vote totals from November 3 in light of candidate Weeks's death, there will be a "failure to elect" a Representative "at the time prescribed by law," and the State may thus prescribe the time for an election to fill the vacancy.[1]

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[1]The Minnesota Secretary of State defended the state statute in the district court. In response to the motion for a stay pending appeal, he says that he disagrees with the district court's preliminary determination, but nonetheless opposes a stay of the injunction, because it would result in "voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). We do not rely on the Secretary's rationale, because a stay would allow the state statute to take effect, and permit the election for Representative to occur in February 2021 rather than November 2020. In that case, any current confusion among voters about the effect of a vote for Representative in November 2020 would be largely immaterial.

The district court ruled that the Minnesota statute is likely preempted, ordered that § 204B.13 must not be enforced as to the election on November 3 for Representative from the Second District, and enjoined the Minnesota Secretary of State from refusing to give legal effect to the ballots cast for Representative on November 3. (The court also enjoined the Secretary of State from communicating to voters that their ballots will not be counted.) The district court reasoned that the State "cannot *invent* a failure to elect or *create* an exigent circumstance by refusing to certify the vote totals for Minnesota's Second Congressional District." The court rejected the State's position that a failure to elect will arise from candidate Weeks's death, and concluded that "the death of a candidate, without more, does not inevitably result in a failure to elect a representative." The court allowed, however, that if "Weeks were to posthumously win the November 3, 2020 general election, it is possible that a 'failure to elect' will have occurred."[2]

Kistner argues that we should stay the district court's injunction, because he will suffer irreparable harm without a stay, he is likely to succeed on the merits of an appeal, and he satisfies the other criteria for a stay pending appeal. *See Brady v. NFL*, 640 F.3d 785, 789 (8th Cir. 2011) (per curiam). Kistner maintains that Minnesota is

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[2]Some States provide that if a candidate dies, then the election will proceed, and if the decedent receives more votes than any living candidate, then the decedent will be "deemed" or "considered" elected, and a vacancy will arise at the beginning of the new term in the following January. *See* Cal. Elec. Code § 15402(b); Conn. Gen. Stat. § 9-460; Haw. Rev. Stat. § 11-118(c)(2); Md. Code Ann. Elec. Law § 5-1302(b); Mo. Rev. Stat. § 115.379.1; Nev. Rev. Stat. § 293.368(3)-(4); N.Y. Elec. Law § 6-150; Okla. Stat. tit. 26, § 1-105(C); Tenn. Code Ann. § 2-5-204(e); Tex. Elec. Code Ann. § 145.005; Wis. Stat. § 8.35(3); Wyo. Stat. Ann. § 22-18-101(d). Minnesota law does not include such a provision, and we express no view on whether a State may "deem" a deceased person elected to office, whether a majority vote for a deceased person would result in a "failure to elect" under 2 U.S.C. § 8(a), or whether the living person who receives the most votes would be elected to office. *See also* U.S. Const. art. I, § 5, cl. 1 (providing that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members").

permitted to make a policy choice that "an election compromised by the untimely and unforseen withdrawal or death of a major-party candidate is not sufficiently indicative of popular will to bind Minnesota." As such, he contends, the State may declare invalid the election on November 3, and then schedule a special election to fill a vacancy that will be caused by a failure to elect on the originally scheduled date.

The Minnesota statutory provision at issue was enacted in 2013. The legislative history suggests that it was prompted in part by the election of 2002, during which a candidate for United States Senator, Paul Wellstone, died on October 25. In that election, the Democratic-Farmer-Labor party substituted a new candidate who competed in the general election, although some absentee ballots already cast were counted for Wellstone. Many States still provide for substitution of a candidate on the November ballot in the event of a death.[3] The legislative record in Minnesota, however, suggests that the substitution of candidates as an election date approaches may be complicated by the need to reprogram accessible voting equipment required by the Help America Vote Act, 52 U.S.C. § 21081(a)(3)(A)-(B), a 45-day minimum

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[3] *See* Ala. Code § 17-13-23; Alaska Stat. § 15.25.110; Ariz. Rev. Stat. § 16-343; Ark. Code Ann. §§ 7-1-101(37)(A), 7-7-104; Colo. Rev. Stat. § 1-4-1005; Conn. Gen. Stat. § 9-460; Del. Code Ann. tit. 15, § 3306; Ga. Code Ann. §§ 21-2-134(b)-(f), 21-2-289; Haw. Rev. Stat. § 11-118; Idaho Code § 34-715; 10 Ill. Comp. Stat. Ann. 5/7-61; Ind. Code §§ 3-13-2-1, -3; Iowa Code § 43.78; Kan. Stat. Ann. § 25-3905(a); Ky. Rev. Stat. Ann. § 118.105(3), (5)-(6); Md. Code Ann. Elec. Law § 5-1003; Mass. Gen. Laws ch. 53, § 14; Mich. Comp. Laws § 168.139; Miss. Code Ann. § 23-15-317; Mo. Rev. Stat. § 115.363.3; Mont. Code Ann. § 13-10-327; Neb. Rev. Stat. § 32-627; N.H. Rev. Stat. Ann. § 655:39; N.J. Stat. Ann. § 19:13-20; N.M. Stat. Ann. § 1-8-8; N.Y. Elec. Law § 6-148; N.C. Gen. Stat. § 163-114; N.D. Cent. Code § 16.1-11-18(4)-(6); Ohio Rev. Code Ann. § 3505.01(B); Okla. Stat. tit. 26, § 1-105(A)-(B); Or. Rev. Stat. § 249.190; 25 Pa. Cons. Stat. § 2939; 17 R.I. Gen. Laws § 17-15-38(a); S.C. Code Ann. § 7-11-55; S.D. Codified Laws § 12-6-56; Tenn. Code Ann. § 2-13-204; Utah Code Ann. § 20A-1-501(1); Vt. Stat. Ann. tit. 17, § 2381; Va. Code Ann. § 24.2-539; W.Va. Code § 3-5-19(a)(7); Wis. Stat. § 8.35(2); Wyo. Stat. Ann. § 22-5-401(a)-(b).

window for transmitting absentee ballots under the Military and Overseas Voter Empowerment Act, 52 U.S.C. § 20302(a)(8)(A), and the dilemma of how to count absentee votes already cast for the decedent by voters who would not have an opportunity to consider a substituted candidate.[4] *See* Minn. House of Reps., 88th Sess., Comm. on Elecs., Recording of Fourth Meeting (Jan. 24, 2013), https://www.house.leg.state.mn.us/Committees/minutes/88008/4649; Minn. House of Reps., 88th Sess., Comm. on Elecs., Recording of Tenth Meeting (Feb. 19, 2013), https://www.house.leg.state.mn.us/Committees/minutes/88008/4843. Two other States provide for postponing a congressional election in November if a candidate dies and other criteria are met; those laws call for a new election in December. *See* Iowa Code § 49.58; S.C. Code Ann. § 7-11-55.

On the constitutionality of Minn. Stat. § 240B.13, Kistner's argument against preemption proceeds from the two principal judicial decisions in the area. *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983), held that where the State of Georgia failed to remedy a violation of the Voting Rights Act of 1965 by the time of a regular November election, the State was not required to conduct certain elections for the House of Representatives on the date specified in 2 U.S.C. § 7. The court reasoned that "where exigent circumstances arising prior to or on the date established by section 7 preclude holding an election on that date, a state may postpone the election until the earliest practicable date." *Id*. at 525. Although the

[4]Some States provide that if a deceased candidate is replaced on the ballot, then votes already cast for the decedent will be counted as votes for the substituted candidate. *See* Colo. Rev. Stat. § 1-4-1005(4)(b)(II); Fla. Stat. § 100.111(3)(a); 8 N.C. Admin. Code 6B.0104. One State specifies that if a candidate dies after ballots have been printed, then the name will be crossed off the ballot, and "no votes shall be cast for the candidate." Idaho Code § 34-912. Two States direct that votes for a deceased candidate are not to be counted, 17 R.I. Gen. Laws § 17-15-38(a); Va. Code Ann. § 24.2-541, although one permits absentee voters who have cast ballots before a substitution of candidate to receive new ballots and vote again in the affected race. Va. Code Ann. § 24.2-541.

vacancy statute, 2 U.S.C. § 8(a), as originally enacted in 1872, referred to filling a vacancy "if, *upon trial*, there shall be a failure to elect" on the date fixed for election, Act of Feb. 2, 1872, ch. 11, § 4, 17 Stat. 28, 29 (emphasis added), and was revised to use the current language in 1874 without comments by the revisers suggesting a change in meaning, *see* 549 F. Supp. at 525 n.15, the *Busbee* court rejected the view that a "failure to elect" was limited to situations where no candidate obtained the requisite majority of the votes cast on the statutory election date. *Id*. at 526. The court asserted, by way of analogy, that if a natural disaster occurred on the date of a federal election, then "no one would seriously contend that section 7 would prevent a state from rescheduling its congressional elections under such circumstances." *Id*.

Kistner also invokes *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993) (per curiam), which rejected a claim that a run-off election for United States Senate that was held in late November was a nullity because it was conducted on a day other than the earlier Tuesday prescribed by § 7. The court ruled that the State of Georgia legitimately could construe a mere plurality vote on election day as an inconclusive vote that resulted in a "failure to elect" within the meaning of § 8(a). The court reasoned that "[a] state's decision to interpret a plurality result as being inconclusive is not itself unconstitutional," *id*. at 830, and concluded that § 8 "does permit states to prescribe different times for elections when they experience a legitimate failure to elect due to exigent circumstances after making an honest attempt to do so." *Id*. at 831. The decision did not specifically characterize the run-off election as one to "fill a vacancy" within the meaning of § 8(a), but approved Georgia's definition of the time for holding the election as "continuing" through the run-off election in late November. *Id*. at 830.

Kistner gleans two propositions from these decisions. First, the phrase "failure to elect" in § 8(a) is not limited to situations where no candidate obtains the requisite majority vote on election day, and it is broad enough to encompass an outright cancellation or postponement of an election as in *Busbee*. Second, a "failure to elect"

may result from a policy choice of a State, as with Georgia's refusal to accept a plurality vote as conclusive in *Public Citizen*, even where other States would make a different policy choice and declare a successful election. Taking the propositions together, Kistner asserts that Minnesota's policy choice not to certify the vote totals for Representative from the November 3 election, due to the death of a "major" party candidate, creates a legitimate "failure to elect" under § 8(a) and allows the State to fill the resulting vacancy in a special election.

We need not decide whether to endorse all of what *Busbee* and *Public Citizen* say about 2 U.S.C. §§ 7 and 8.[5] It is an open question whether a State may refuse to certify results of an election for United States Representative based on a natural disaster, death of a candidate, or other event beyond the State's control. Perhaps this is an area where additional federal legislation would be necessary to authorize postponement of a congressional election in certain extraordinary situations.

But assuming the correctness of *Busbee* and *Public Citizen* for the sake of analysis, we still must address whether Minnesota's particular policy choice in § 204B.13 is sufficient to justify declaring a legitimate "failure to elect" under § 8(a) that would allow the State to "fill a vacancy" in the office of Representative. Section 7 establishes a uniform date for federal elections. There are strong federal policy reasons for this uniformity, including to ensure that some States who vote earlier cannot influence voters in other States, and to avoid a burden on citizens who would

[5]The *Busbee* decision was summarily affirmed by the Supreme Court, but this means only that the judgment was affirmed, and "the rationale of the affirmance may not be gleaned solely from the opinion below." *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1801 (2015) (internal quotation omitted). *Busbee* included a separate holding based on "the primacy of the Voting Rights Act" that arguably was an independent ground for decision that could have supported the affirmance. *See* 549 F. Supp. at 524 ("We hold, in short, that a court's duty under section 5 of the Voting Rights Act to disapprove changes in voting procedures that discriminate in purpose or effect is unaltered by any supposed conflict with 2 U.S.C. § 7.").

be forced to turn out on two different election days. *See Foster*, 522 U.S. at 73-74; Cong. Globe, 42d Cong., 2d Sess. 141 (1871) (remarks of Rep. Butler). If federal law permits a State to cancel an election for Representative based on events beyond the State's control, then we believe the reasons for cancellation would have to be compelling or akin to "exigent circumstances," as *Busbee* and *Public Citizen* suggest.

Applying this demanding standard, we do not think Kistner is likely to succeed on the merits of his contention that § 204B.13, as applied to the current situation, may coexist with the federal election laws. *See Gonzalez v. Arizona*, 677 F.3d 383, 398 (9th Cir. 2012) (en banc) ("[W]e do not strain to reconcile a state's federal election regulations with those of Congress, but consider whether the state and federal procedures operate harmoniously when read together naturally."), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013). If the death of a candidate ever would justify cancellation of an election and declaration of a "failure to elect" under § 8(a), then we think it likely that the candidate must represent a political party with a greater history of electoral strength than the Legal Marijuana Now Party in Minnesota. By analogy to the natural disaster hypothetical favored by Kistner, perhaps a major earthquake or hurricane in the congressional district on election day could justify a cancellation, but a snowstorm could not, even if experience showed that the blizzard was likely to depress turnout by five percent. *See* Brad T. Gomez et al., *The Republicans Should Pray for Rain: Weather, Turnout, and Voting in U.S. Presidential Elections*, 69 J. Politics 649, 656 (2007) ("When measured as deviations from their normal values, rain and snow elicit a negative and statistically significant effect on voter turnout.").

The Minnesota statute itself acknowledges that not every death of a candidate on the ballot would warrant cancellation of an election for Representative. If a candidate of the Green Party, the Independence Party, or the Libertarian Party were to die, then the election would proceed. Minnesota law defines the LMN Party as a "major political party," such that death of the party's candidate nullifies the election,

but that designation by the State does not control the preemption question under federal law.

According to data available to us from the Minnesota Secretary of State, no candidate from the LMN Party has ever won federal or state office in Minnesota. In the 2016 presidential election, the party's candidate won 0.38% of the vote. In 2018, the party's candidates for United States Senator in two separate elections garnered 2.55% and 3.70% of the vote, respectively. The party did not run a candidate for Governor or for United States Representative in seven of the eight congressional districts, including the Second District. The party's candidate for Representative in the Fourth District received 4.19% of the vote. As noted, the LMN candidate for state auditor received 5.28% of the statewide vote, thus barely crossing the five-percent threshold in a down-ballot statewide race and qualifying the party for "major political party" status under state law.[6]

In our judgment, assuming for analysis that 2 U.S.C. §§ 7 and 8(a) would allow a State to cancel an election in some scenarios, the State's justification for deviating from the uniform election date based on the death of candidate Weeks is insufficient to show that Kistner has a substantial likelihood of success on appeal. Even if the death of a Republican or Democratic-Farmer-Labor candidate could qualify as an exigent circumstance that would allow the State to cancel an election and trigger a vacancy in office, we think it unlikely that the rationale would extend to the death of a third-party candidate from a party with the modest electoral strength exhibited to date by the Legal Marijuana Now Party in Minnesota. Voters who wish to show support for the agenda of the LMN Party may still cast a vote for the decedent. But it is unlikely that federal law allows Minnesota to cancel the election on account of

[6]Considering only the Second Congressional District, the vote percentages were similar. The LMN Party candidates for United States Senator in 2018 received 2.47% and 3.53%, respectively, and the candidate for state auditor collected 5.27% of the vote.

candidate Weeks's death and to select a new date in February 2021 to fill a vacancy caused by the cancellation.

Kistner also cites harm arising from the Secretary of State's announcement on September 24 that votes in the election for Representative on November 3 would not be counted. On September 28, however, Craig filed this action; an informed candidate or voter would have been aware then that the status of the election was not resolved. The district court entered its injunction on October 9, and the Secretary of State issued a new statement that voters should continue to vote the Second District race on their ballots. Under Minnesota law, any absentee voter who undervoted between September 24 and October 9 had the right until October 20 to cancel his or her ballot and request a new absentee ballot or vote in person. *See* Minn. Stat. § 203B.121 subds. 2-4; Minn. R. 8210.2600(1); 2020 Minn. Sess. Laws, ch. 77, § 1, subd. 3. The potential that some voters nonetheless forwent a vote for Representative due to the Secretary's interim announcement is not sufficient to justify cancelling the election if federal law otherwise would not permit that step. That a short period of uncertainty affected campaign fundraising and tactical decisions by the candidates also does not justify a stay of the injunction without a likelihood of success on the merits.

For these reasons, the motion for an administrative stay and a stay pending appeal is denied. Kistner's motion to expedite the appeal is granted, and the clerk is directed to establish an expedited briefing schedule.

Appendix C

204B.13 VACANCY IN NOMINATION; PARTISAN OFFICE.

Subdivision 1. **Partisan office.** (a) A vacancy in nomination for a partisan office must be filled in the manner provided by this section. A vacancy in nomination exists for a partisan office when a major political party candidate who has been nominated in accordance with section 204D.03, subdivision 3, or 204D.10, subdivision 1:

(1) dies;

(2) withdraws by filing an affidavit of withdrawal, as provided in paragraph (b), at least one day prior to the general election with the same official who received the affidavit of candidacy; or

(3) is determined to be ineligible to hold the office the candidate is seeking, pursuant to a court order issued under section 204B.44.

(b) An affidavit of withdrawal filed under paragraph (a), clause (2), must state that the candidate has been diagnosed with a catastrophic illness that will permanently and continuously incapacitate the candidate and prevent the candidate from performing the duties of the office sought, if elected. The affidavit must be accompanied by a certificate verifying the candidate's illness meets the requirements of this paragraph, signed by at least two licensed physicians. The affidavit and certificate may be filed by the candidate or the candidate's legal guardian.

Subd. 2. **Partisan office; nomination by party; special election.** (a) Except as provided in subdivision 5, a major political party may fill a vacancy in nomination of that party's candidate as defined in subdivision 1, paragraph (a), clause (1), (2), or (3), by filing one nomination certificate with the same official who received the affidavits of candidacy for that office.

A major political party may provide in its governing rules a procedure, including designation of an appropriate committee, to fill a vacancy in nomination for any federal or state partisan office. The nomination certificate shall be prepared under the direction of and executed by the chair and secretary of the political party and filed within the timelines established in this section. When filing the certificate the chair and secretary shall attach an affidavit stating that the newly nominated candidate has been selected under the rules of the party and that the individuals signing the certificate and making the affidavit are the chair and secretary of the party.

(b) In the case of a vacancy in nomination for partisan office that occurs on or before the 79th day before the general election, the major political party must file the nomination certificate no later than 71 days before the general election. The name of the candidate nominated by the party must appear on the general election ballot.

(c) Except as provided in subdivision 5, in the case of a vacancy in nomination for a partisan office that occurs after the 79th day before the general election, the general election ballot shall remain unchanged, but the county and state canvassing boards must not certify the vote totals for that office from the general election, and the office must be filled at a special election held in accordance with this section. Except for the vacancy in nomination, all other candidates whose names appeared on the general election ballot for the office must appear on the special election ballot for the office. New affidavits of candidacy or nominating petitions may not be accepted, and there must not be a primary to fill the vacancy in nomination. The major political party may file a nomination certificate as provided in paragraph (a) no later than seven days after the general election. On the date of the general election, the county auditor or municipal clerk shall post a notice in each precinct affected by a vacancy in nomination under this paragraph, informing voters of the reason for the vacancy in nomination and the procedures for filling the vacancy in nomination and conducting a special

election as required by this section. The secretary of state shall prepare and electronically distribute the notice to county auditors in each county affected by a vacancy in nomination.

Subd. 2a. **Partisan office; filing period.** A vacancy in nomination for a partisan office due to a withdrawal of a candidate under section 204B.12, subdivision 1, may be filled in the manner provided in sections 204B.06, 204B.09, and 204B.11, except that all documents and fees required by those sections must be filed within five days after the vacancy in nomination occurs. There must be a two-day period for withdrawal of candidates after the last day for filing.

If there is more than one candidate at the end of the withdrawal period to fill the vacancy in nomination, the candidates' names must appear on the primary ballot. Otherwise, the candidate's name must appear on the general election ballot.

Subd. 3. [Repealed, 1991 c 320 s 16]

Subd. 4. [Repealed, 2013 c 131 art 5 s 10]

Subd. 5. **Candidates for governor and lieutenant governor.** (a) If a vacancy in nomination for a major political party occurs in the race for governor, the political party must nominate the candidates for both governor and lieutenant governor. If a vacancy in nomination for a major political party occurs in the race for lieutenant governor, the candidate for governor shall select the candidate for lieutenant governor.

(b) For a vacancy in nomination for lieutenant governor that occurs on or before the 79th day before the general election, the name of the lieutenant governor candidate must be submitted by the governor candidate to the filing officer no later than 71 days before the general election. If the vacancy in nomination for lieutenant governor occurs after the 79th day before the general election, the candidate for governor shall submit the name of the new lieutenant governor candidate to the secretary of state within seven days after the vacancy in nomination occurs, but no changes may be made to the general election ballots.

(c) When a vacancy in nomination for lieutenant governor occurs after the 79th day before the general election, the county auditor or municipal clerk shall post a notice in each precinct affected by the vacancy in nomination. The secretary of state shall prepare and electronically distribute the notice to county auditors. The county auditor must ensure that each precinct in the county receives the notice prior to the opening of the polls on election day. The notice must include:

(1) a statement that there is a vacancy in nomination for lieutenant governor and the statutory reason for the vacancy in nomination as provided in subdivision 1, paragraph (a), clause (1), (2), or (3);

(2) a statement that the results for the governor and lieutenant governor will be counted and that no special election will be held for that race; and

(3) a list of all candidates in the governor and lieutenant governor's race, listed in order of the base rotation. The listing of candidates shall include the name of the candidate to fill the vacancy in nomination for lieutenant governor. If the name of the candidate has not yet been named, then the list must include the date by which the candidate will be named.

Subd. 6. [Repealed, 2013 c 131 art 5 s 10]

Subd. 7. **Date of special election.** If a special election is required under this section, the governor shall issue a writ calling for a special election to be conducted on the second Tuesday in February of the year following the year the vacancy in nomination occurred. Except where otherwise provided in this section,

the writ shall be issued and the special election conducted according to the requirements of sections 204D.22 to 204D.27.

Subd. 8. **Absentee voters.** At least 46 days, but no more than 50 days, before a special election conducted under this section, the county auditor shall transmit an absentee ballot for the special election to each applicant for an absentee ballot whose application for an absentee ballot for the preceding general election was recorded under section 203B.04 or 203B.17. New applicants for an absentee ballot may be provided a ballot in the manner specified in chapter 203B.

Subd. 9. **Appropriation.** In the case of a statewide special election under this section, the amount necessary is appropriated to the secretary of state to cover costs incurred by the state, county, and municipal governments to conduct the special election.

History: *1981 c 29 art 4 s 13; 1986 c 444; 1991 c 320 s 8-12; 2011 c 65 s 2,3; 2012 c 187 art 1 s 31; 2013 c 131 art 5 s 1-7; 2015 c 70 art 1 s 21-23; 2017 c 40 art 1 s 44,45*