No. 20-3139

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAMES CARSON and ERIC LUCERO,

Plaintiffs–Appellants,

v.

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

Defendant–Appellee,

and

ROBERT LAROSE, TERESA MAPLES, MARY SANSOM, GARY SEVERSON, and MINNESOTA ALLIANCE FOR RETIRED AMERICANS EDUCATION FUND

Intervenor-Defendants–Appellees.

On Appeal from the United States District Court
For the District of Minnesota, No. 0:20-cv-02030-NEB-TNL
The Honorable Nancy E. Brasel

Appellants' Opening Brief

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SUMMARY AND STATEMENT ON ORAL ARGUMENT

The Minnesota Legislature—acting "by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution," *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam)—established an Election Day ballot-receipt deadline. The single nationwide Election Day, in turn, was set by Congress under its Article II authority. But the Minnesota Secretary of State, who has no authority to override the Legislature's or Congress's enactments, has committed to hold the polls open an additional seven days to receive mail-in ballots, including ones bearing no postmark. This policy is unconstitutional and preempted by federal law.

Unless enjoined, it threatens chaos come Election Day. The thousands of voters whom the Secretary and Intervenors expect to rely on the Secretary's extension and mail late-received ballots will be disenfranchised when their votes are challenged post-election and then disqualified. The Secretary's actions themselves threaten Minnesota's participation in the Electoral College and selection of the President, through safe-harbor disqualification and extended litigation. And Plaintiffs, as elector candidates and voters casting lawful ballots, directly face those harms, as well as dilution of their votes through the acceptance of thousands of votes federal law holds to be invalid.

Notwithstanding these severe harms, the district court found that Plaintiffs lack standing to pursue their claims and denied injunctive relief. The Court has already scheduled argument on what is undoubtedly a case of great public importance. It should promptly reverse.

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INTRODUCTION

This case presents vital federal-law questions that will have to be answered either now or after Election Day. The Minnesota Secretary of State has committed to accept ballots received after the Election Day deadline prescribed by the Minnesota Legislature. That policy violates the U.S. Constitution's Electors Clause, which vests sole authority for determining the "Manner" of conducting presidential elections in state legislatures and bars other state actors like the Secretary from second-guessing the legislature's determinations. It is also preempted by 3 U.S.C. § 1, which establishes a nationwide Election Day requiring "the combined actions of voters and officials to make a final selection of an officeholder," *Foster v. Love*, 522 U.S. 67, 71 (1997); under the Secretary's policy, election officials will not even have all the ballots in hand on that day.

Both the Secretary and Intervenors, who pressed for this policy, say their aim is to avoid disenfranchisement, but disenfranchisement is what the policy they defend will do. When voters rely on it to mail ballots that arrive after Election Day, those ballots will be challenged. And, because the Secretary's decision to accept such ballots violates federal law, those ballots will be disqualified and those voters disenfranchised. The lawfulness of the Secretary's policy must be resolved now to avoid that injury, the chaos that will inevitably result when large numbers of untimely ballots are challenged in the short period between Election Day and the federal law "safe harbor" for appointing electors, and the irreparable harm that Plaintiffs face as candidates and voters.

The district court did not reach the merits or the equities, ruling instead that Plaintiffs lack Article III and prudential standing. But no one disputes the fact that the Secretary's policy requires counting thousands of additional ballots that will be received after Election Day, and adding those votes to the total vote-pool necessarily dilutes Plaintiffs' lawfully cast votes, an injury that will be redressed by the relief they seek. In addition, Plaintiffs have obvious and acute interests as candidates for office in determining the rules of their own elections and avoiding post-election chaos. These interests are impaired by the Secretary's policy and the uncertainty, confusion, and risk of statewide disenfranchisement it raises. The district court's holding on prudential standing was entirely derivative of its Article III holding and fails for the same reason. The holding is also foreclosed by the Supreme Court's holding in *Bond v. United States*, 565 U.S. 211 (2011), that parties challenging governmental action as violating structural provisions like the Electors Clause assert their "own constitutional interests," not Congress's or the states'. *Id.* at 220.

The Court should reverse the decision of the court below.

JURISDICTIONAL STATEMENT

This is an appeal from the district court's denial of a preliminary injunction on October 12, 2020. Plaintiffs timely appealed on October 13. The Court has jurisdiction under 28 U.S.C. § 1292(a)(1). Plaintiffs have standing because they are injured by the Secretary's challenged actions and the relief they seek would redress their injuries. *See infra* Argument § II.A.

STATEMENT OF THE ISSUES

The Secretary has determined not to enforce Minnesota's statutory Election Day ballot-receipt deadline, but instead to accept mailed ballots received within a week of Election Day, including those bearing no postmark. The issues presented are:

1. Whether the Secretary's departure from Minnesota law enacted by the Minnesota legislature violates the Electors Clause.

McPherson v. Blacker, 146 U.S. 1 (1892); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000); *Bush v. Gore*, 531 U.S. 98 (2000); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015).

U.S. Const., art. II, § 1, cl. 2; Minn. Stat. § 203B.08 subd. 3.

2. Whether the Secretary's policy of accepting ballots received after the nationwide Election Day is preempted by federal law.

Foster v. Love, 522 U.S. 67 (1997); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169 (9th Cir. 2001); *Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001); *Lamone v. Capozzi*, 912 A.2d 674 (Md. 2006).

U.S. Const., art. II, § 1, cl. 4; 3 U.S.C. § 1.

3. Whether the Secretary's policy of accepting ballots received after Election Day that do not bear a postmark is preempted.

Foster v. Love, 522 U.S. 67 (1997); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169 (9th Cir. 2001); *Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001); *Lamone v. Capozzi*, 912 A.2d 674 (Md. 2006).

U.S. Const., art. II, § 1, cl. 4; 3 U.S.C. § 1.

4. Whether Plaintiffs, as candidates and voters, have Article III standing to challenge the Secretary's policy.

Baker v. Carr, 369 U.S. 186 (1962); *Reynolds v. Sims*. 377 U.S. 533 (1964); *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Hillsborough Cty. Canvassing Bd.*, 123 F.Supp.2d 1305 (N.D. Fla. 2000).

U.S. Const., art. III, § 2.

5. Whether Plaintiffs have prudential standing to challenge the Secretary's policy.

Bond v. United States, 564 U.S. 211 (2011); *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

STATEMENT OF THE CASE

A. Article II of the Constitution establishes state and federal roles in enacting the laws governing presidential elections. The "Electors Clause" defines states' role as: "appoint[ing] in such Manner as the *Legislature* thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1, cl. 2 (emphasis added). Minnesota's legislative power is vested in the Minnesota Legislature. *See* Minn. Const. art. III, § 1, *id.* art. IV, § 1; *Remington Arms Co. v. G.E.M. of St. Louis, Inc.*, 102 N.W.2d 528, 534 (Minn. 1960).

The "Election Day Clause" provides that "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. Const. art. II, § 1, cl. 4. This "immediate act of the people of America" protects the selection

of the President from "cabal, intrigue, and corruption." The Federalist No. 68 at 459 (Cooke ed., 1961) (A. Hamilton).

Both Congress and the Minnesota Legislature have exercised their respective authorities to regulate presidential elections.

1. Congress has exercised its authority by setting a single Election Day "on the Tuesday next after the first Monday in November, in every fourth year." 3 U.S.C. § 1. This "mandates holding all elections for…the presidency on a single day throughout the Union." *Foster v. Love*, 522 U.S. 67, 69–70 (1997), which is November 3 this year. Congress also set the time for electors appointed in each state to meet and vote, which is December 14. 3 U.S.C. § 7.

Additionally, Congress provided a statutory "safe harbor" to allow states to ensure recognition of their elector appointments. *Id.* at § 5. To qualify, a state must have "provided, by laws enacted prior to the day fixed for the appointment of electors," a means of determining "any controversy or contest concerning the appointment of" electors, and must have completed the process "at least six days before the time fixed for the meeting of the electors." *Id.* This year, the safe-harbor deadline is December 8.

2. The Minnesota Legislature exercised its Electors Clause authority by assigning its electors to the presidential candidate who receives the "highest number of votes" statewide. Minn. Stat. § 208.05. Following federal law, it set the election for the first Tuesday after the first Monday of November. *Id.* § 204D.03 Subd. 2. Voters may vote in person, *id.* § 204B.16, and those who

do must arrive at polling places before 8:00 p.m., *id.* § 204C.05. In-person voting is not permitted after Election Day.

Minnesota law also authorizes in-person absentee voting "during the 46 days before the election," *id.* § 203B.081, and mail voting, *id.* §§ 203B.04, 203B.08. No different from voters who elect to vote in person, those who elect to vote by mail must vote on or before Election Day, not after Election Day. Minnesota law mandates that absentee ballots not be counted if they arrive at polling places on Election Day "either (1) after 3:00 p.m., if delivered in person; or (2) after 8:00 p.m." *Id.* § 203B.08 subd. 3.

Reinforcing the Election Day receipt deadline, the Minnesota Secretary of State has promulgated rules establishing election procedures consistent with Minnesota and federal statutes. They direct municipal clerks to "communicate with the United States postal service facility serving the municipality with regard to the handling of absentee ballot return envelopes" and to "take all reasonable steps to ensure that all return envelopes received by the post office before 4 p.m. on election day are delivered before the closing of the polls to the ballot board." Minn. R. 8210.2500. Ballots "received after election day shall be marked as received late…and must not be delivered to the ballot board." *Id.*

B. In May 2020, a group of Minnesota voters and an organization sued the Secretary in state court, challenging *inter alia* the Election Day receipt requirements applicable to mail-in absentee ballots. A27–28. The Secretary struck a deal with the state plaintiffs providing that, "[f]or the November General Election [Secretary Simon] shall not enforce the Election Day Receipt

Deadline for mail-in ballots, as set out in Minn. Stat. §§ 203B.08 subd. 3, 204B.45, and 204B.46 and Minn. R. 8210.2220 subp. 1, and 8210.3000, that ballots be received by 8:00 p.m. on Election Day…." A35. The Secretary agreed to "issue guidance instructing all relevant local election officials to count all mail-in ballots in the November General Election that are otherwise validly cast and postmarked on or before Election Day but received by 8 p.m. within 5 business days of Election Day (i.e., seven calendar days, or one week)." A36. The agreement also provides that, when "a ballot does not bear a postmark date, the election official reviewing the ballot should presume that it was mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day." *Id.*

The Secretary and the state plaintiffs presented the agreement to the state court as a consent decree, and the state court entered it. A27–42. In evaluating the ballot-receipt deadline, the court observed simply that, because "courts around the country are wrestling with [the] issue" of ballot-receipt deadlines in light of the COVID-19 pandemic, "the Secretary's decision to enter the consent decree [is] reasonable."' A64. At no point did the state court independently determine that the ballot-receipt deadline violates any constitutional provision.[1]

C. Plaintiffs-Appellants James Carson and Eric Lucero ("Plaintiffs") are Minnesota voters who intend to vote on or before Election Day and are also

[1] The state court represented that it was "empowered to grant the preliminary injunction, or *sua sponte*, find that the requirement, as applied in the current pandemic, unconstitutionally limits voting access, and simply order precisely what the consent decree achieves," but this statement concerned the "witness requirement" that is not at issue in this case. A67.

presidential elector candidates. They filed this action on September 22, 2020, claiming (1) that the Secretary's extension of the ballot-receipt deadline conflicts with Article II's delegation of authority to "the Legislature" of Minnesota and (2) that this extension is preempted by the federal statute setting the nationwide Election Day on November 3. They moved for a preliminary injunction. A24.

The state plaintiffs intervened (hereinafter, "Intervenors"), and they and the Secretary contended that Plaintiffs lack Article III and prudential standing, are bound by the consent-decree order, brought this case too late to impact the November 3 election, and identified no violation of federal law. The district court held a hearing and, on October 12, denied the injunction motion on the grounds that Plaintiffs lack Article III and prudential standing. Plaintiffs' appealed on October 13, moved the district court for an injunction pending appeal, and subsequently moved this Court for the same relief and expedited consideration. On October 23, the Court granted that latter request and set this case for expedited briefing and argument on October 27.

SUMMARY OF ARGUMENT

The district court abused its discretion in denying Plaintiffs' requested injunction.

I. Plaintiffs are likely to succeed on their claims that the Secretary's policy violates the Electors Clause and acts of Congress establishing Election Day pursuant to its Election Day Clause authority.

A. The Secretary is not "the Legislature" of Minnesota and has no authority to override the ballot-receipt deadline established by the Minnesota Legislature. Because that deadline was enacted under the Legislature's "direct grant of authority made under Art. II," *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam), the Secretary's choice to override it violates the Electors Clause. Legislatures' Elections Clause authority "cannot be taken from them or modified," even by "their State constitutions." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). The Minnesota Constitution gives the Secretary no role whatsoever in the state's "legislative function," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015), and neither the Electors Clause nor Minnesota law permit delegation of legislative authority to the Secretary.

B. The Secretary's seven-day extension of the ballot-receipt deadline contravenes Congress's establishment of a single nationwide Election Day. Because Election Day must mark the "consummation" of voting, *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001), ballots must be received by Election Day to comply with Congress's bright-line command,

which preempts the Secretary's November 10 deadline. Exacerbating the conflict, the Secretary's postmark "presumption" that ballots received by November 10 be regarded as timely unlawfully directs that even ballots mailed after Election Day be counted.

II. The Secretary's and Intervenors' various justiciability arguments are untenable.

A. Plaintiffs have standing as both candidates and voters. As candidates, they have a direct interest in the rules by which their own election will be conducted, and in obtaining clarity of those rules, that is impaired by the Secretary's policy. As voters, Plaintiffs face injury through the dilution of their lawfully cast votes when the Secretary requires the counting of thousands of additional votes that federal law holds to be ineligible. And as both candidates and voters, they face the threat that Minnesota will be excluded altogether from selection of the President because the Secretary's policy violates the federal "safe harbor" for choosing electors and risks protracted litigation that may extend (and in recent experience, has extended) well past the vote of the Electoral College.

B. As for prudential standing, the district court's view that "the Minnesota Legislature and Congress suffered the injury" for which Plaintiffs seek relief is foreclosed by *Bond v. United States*, 564 U.S. 211 (2011), among other precedents.

C. The Secretary's and Intervenors' argument below for abstention under *Younger v. Harris*, 401 U.S. 37 (1971), conflicts with *Sprint Communications,*

Inc. v. Jacobs, 571 U.S. 69 (2013), because the state-court proceeding for which they seek deference "does not fall within any of the three exceptional categories" to which *Younger* is limited, *id*. at 79. In addition, *Younger*'s requirements are unsatisfied.

D. Intervenors' argument below that Plaintiffs are bound by the consent decree relies on the incorrect notion, which Minnesota law rejects, that Plaintiffs were in privity with the Secretary or the various Republican Party organizations that intervened in state court. Plaintiffs played no role in, and exercised no control over, the litigation of that action, and that is dispositive.

III. The equities favor an injunction. The Secretary's policy will inflict irreparable harm on Plaintiffs, in the forms of vote dilution and risk of disenfranchisement, while also inducing thousands of Minnesota voters to cast ballots that are subject to disqualification because federal law holds them to be ineligible. These harms are irreparable and severe. Meanwhile, the Secretary has *no* interest in derogating from state law, violating the Constitution, or misleading to the general public into believing that untimely votes are somehow timely. Only an injunction can protect the public from the Secretary's reckless disregard of federal law, which threatens widespread disenfranchisement and an election meltdown.

STANDARD OF REVIEW

The Court reviews the district court's denial of a preliminary injunction "for abuse of discretion," but it "review[s] de novo" its "legal conclusions." *Grand River Enters. Six Nations, Ltd. v. Beebe*, 467 F.3d 698, 701 (8th Cir. 2006).

ARGUMENT

I. Plaintiffs Are Likely To Succeed on the Merits

A. The Secretary's Policy Violates the Electors Clause

The Secretary's actions in instructing election officials to count ballots received after the 8:00 p.m. Election Day deadline violate the Electors Clause of Article II by arrogating to himself, an executive actor, the authority to regulate the "Manner" of presidential elections, which the Electors Clause vests solely with the "Legislature" of each state.

1. The Electors Clause Bars the Secretary From Overriding the Minnesota Legislature's Determination of the "Manner" of Conducting Presidential Elections

The Article II delegation of authority over presidential elections confers on state legislatures a share of federal constitutional lawmaking authority. As the Supreme Court unanimously held in *Palm Beach*, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." 531 U.S. at 76. This provision "convey[s] the broadest power of determination" and "leaves it to the legislature *exclusively* to define the method" of appointment of electors. *McPherson*, 146 U.S. at 27 (emphasis added). Because "[t]his power is conferred upon the legislatures of the States by the Constitution of the United States," it "cannot be taken from them or modified" even by "their

State constitutions." *Id.* at 35; *see also Palm Beach*, 531 U.S. at 78 (vacating a state-court order on that basis); *Bush v. Gore*, 531 U.S. 98, 112–13 (2000) (hereinafter "*Bush*") (Rehnquist, J., concurring); *Case of Electoral College*, 8 F.Cas. 427, 432–33 (C.C.D.S.C. 1876).[2]

It necessarily follows that the Secretary may not override regulations governing the upcoming presidential election established by the Minnesota Legislature. The word "legislature" was "not one 'of uncertain meaning when incorporated into the Constitution.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). By empowering one body of the state to prescribe election rules, the Constitution denies it to other state bodies and officials, including the Secretary. *McPherson*, 146 U.S. at 25 ("[T]he legislature possesses plenary authority to direct the manner of appointment[.]"); *id*. at 27 (power belongs "to the legislature exclusively"); *Bush*, 531 U.S. at 104 ("[T]he state legislature's power to select the manner for appointing electors is plenary[.]").

Further, the Article II delegation of authority is the states' sole basis for regulating presidential elections. This power is neither inherent nor persevered under the Tenth Amendment. *Cook v. Gralike*, 531 U.S. 510, 522 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). Because there is no basis for Minnesota to regulate elections to the presidency outside of the delegation

[2] The Electors Clause delegates authority "to provide a complete code for [presidential] elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). The ballot-receipt deadline plainly falls within the scope of this authority.

of Article II, any regulation not promulgated by the Minnesota Legislature is beyond the very authority of Minnesota, as a sovereign, to regulate in this arena.

The constitutional Framers understood the Elections Clause as an expansive delegation to state legislatures. As with the delegation to regulate the "Times, Places, and Manner" of congressional elections under the "Elections Clause" of Article I, the Constitution's Framers "settled on a characteristic approach, assigning the issue to the state legislatures" and giving no indication that "courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing any such thing." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019).[3]

There is then no authority for the Secretary to establish the law governing the time of presidential elections, let alone rules that *directly contradict* statutes enacted by Minnesota's legislature. Neither the Minnesota Legislature nor Congress passed laws providing that voters may vote up to *seven days* after Election Day, and the bright-line legislative deadline of 8:00 p.m. on that date for ballots to *arrive* reflects a clear and unmistakable legislative *rejection* of the Secretary's position. The Secretary's new election rules have no basis

[3] Indeed, the delegated authority to state legislatures under the Electors Clause is far more expansive than under the Elections Clause, because the Framers eliminated any role of Congress in overriding states legislatures' choices regarding the "Manner" of selecting electors. *Compare* U.S. Const. art. II, § 1, cl. 2 *with id.* art. II, § 1, cl. 4. Congress's authority over presidential elections is therefore limited to laws that do not "interfere with the power of a state to appoint electors or the manner in which their appointment shall be made." *Burroughs v. United States*, 290 U.S. 534, 544 (1934). Only applicable provisions of the *federal* Constitution limits legislatures' Electors Clause authority. *See Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *Bush*, 531 U.S. at 104–05.

whatsoever in the Constitution or Minnesota statutory law and stand in direct contravention of that law. In short, the Constitution delegates no authority to the Secretary, and the Secretary's policy contravenes the law established by the body that *does* possess delegated authority.

This violation of Minnesota law has a *federal* constitutional significance. It is Article II itself that delegates the power to regulate elections, so "the text of the election law itself…takes on independent significance." *Bush*, 531 U.S. at 112–13 (Rehnquist, J., concurring). "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Id.* at 113. The question whether rules promulgated by the Secretary constitute as manner restrictions "direct[ed]" by the Minnesota "Legislature," U.S. Const. art. II, § 1, cl. 2, is a federal constitutional question for this Court to resolve. The answer is no.

2. The Proffered Justifications for the Secretary's Policy Are Unavailing

The Secretary's and Intervenors' assorted arguments cannot overcome the fact that the Secretary is not the Minnesota Legislature and plays no role in "the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367.

a. It is not relevant, as the Secretary contends, that he believes that the 8:00 p.m. deadline violates the Minnesota Constitution. Because "[t]his power is conferred upon the legislatures of the States by the Constitution of the United States," it "cannot be taken from them or modified" even by "their State

constitutions." *McPherson*, 146 U.S. at 27; *see also Palm Beach*, 531 U.S. at 76–77. Following *McPherson*, state courts have repeatedly held that state constitutional provisions "may not operate to 'circumscribe legislative power' granted by the Constitution of the United States." *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 286–87 (Neb. 1948); *see also Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 694 (Ky. 1944); *Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *In re Opinions of Justices*, 45 N.H. 595, 601–07 (1864); *Chase v. Miller*, 41 Pa. 403, 409 (1862); *PG Pub. Co. v. Aichele*, 902 F.Supp.2d 724, 748 (W.D. Pa. 2012). If there was any question remaining, *Palm Beach* laid it to rest when it vacated the Florida Supreme Court's order requiring a recount on the ground that it may have been tainted by consideration of the state constitution rather than simply implementing the state legislature's mandate. 531 U.S. at 76.

The Secretary and Intervenors have identified no authority holding otherwise. The Secretary relied below on cases interpreting the Elections Clause of Article I, including *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787 (2015), and *Smiley*, 285 U.S. at 355, but both decisions undermine his position. Their holding that the Elections Clause does not permit a state legislature to "prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution," *Arizona*, 576 U.S. at 817–18, refers to the "lawmaking *process*" established by a state constitution. *Id.* at 804 (emphasis added); *see also id.* at 808–13. *Smiley* held that a congressional redistricting plan was not valid under the Elections Clause

where the state's governor vetoed the law, consistent with the "*manner*…in which the Constitution of the state has provided that laws shall be enacted." 285 U.S. at 368 (emphasis added). Likewise, *Arizona* held that a redistricting commission, and the ballot initiative that created it, belonged to "the State's prescriptions for lawmaking," 576 U.S. at 808, and therefore fit within the term "Legislature" of the Elections Clause, "which encompasses all legislative authority conferred by the State Constitution, including initiatives adopted by the people themselves." *Id.* at 793.

Here, the ballot-receipt deadline obviously was enacted through Minnesota's lawmaking process: the Minnesota Legislature passed the law, and the Governor signed it. And the Secretary's abandonment of the law obviously does *not* conform to Minnesota's lawmaking prescriptions: the Secretary presented a judge with a consent decree implementing such relief as he deemed appropriate and obtained an order approving it. Laws are enacted in Minnesota when the Legislature presents a bill to the Governor and the Governor signs it, Minn. Const. art. IV, § 23, not when the Secretary presents a consent decree to a judge and the judge approves it.

Even if *Smiley* and *Arizona* somehow prescribed a limited role for legislatures in regulating congressional elections under the Elections Clause, which could be circumscribed by executive officials and courts, that would not reach the Electors Clause. The *Arizona* holding depends on the theory that "[t]he meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon

the character of the function which that body in each instance is called upon to exercise." 576 U.S. at 808 (quotation marks omitted). For example, "appointing," "consenting," and "ratifying" functions exclude any state actors other than the legislature itself—e.g., governors, referendums, initiatives—whereas "legislative" functions do not. *Id.* at 808 n.17.

The Electors Clause differs from the Elections Clause in several respects, the most important here being that it concerns the power to "appoint." *See McPherson*, 146 U.S. at 28 (observing that "[t]he appointment of delegates was, in fact, made by the legislatures directly" in many states for generations after the founding). Indeed, *McPherson* explained that the "power" under the Electors Clause "is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions *any more than can their power to elect senators of the United States*" before the ratification of the Seventeenth Amendment. *Id.* at 35 (emphasis added). All Justices in *Arizona* agreed that senators before the Seventeenth Amendment could be appointed *only* by the legislature—without restriction by governors, referendums, or initiatives (not to mention secretaries of state). 576 U.S. at 807–08. It follows that the power under the Electors Clause is likewise the legislature's alone, as *McPherson*, *Palm Beach*, and *Bush* hold.

b. For the same reasons, it does not matter that the Secretary obtained a state court's approval to violate state law. Because the power to regulate presidential elections derives "solely from the constitution of the United States," state officials carrying out the legislature's directives are "in no wise subject to

the control…of the judicial department." *Case of Electoral College*, 8 F.Cas. at 433–434. In *Palm Beach*, it was a state court's actions that the Supreme Court deemed to violate the Electors Clause. *See* 531 U.S. at 78; *see also Bush*, 531 U.S. at 110–11. "No state legislator or executive *or judicial officer* can war against the Constitution without violating his undertaking to support it," *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (emphasis added).

In any event, the Minnesota state court did not determine that the ballot-receipt deadline violates the Minnesota Constitution, only that, because "courts around the country are wrestling with [the] issue" of ballot-receipt deadlines in light of the COVID-19 pandemic, "the Secretary's decision to enter the consent decree [is] reasonable."' A64–65. That is not an independent constitutional determination, and the premise has proven false: the Supreme Court "has consistently stayed" court orders holding such deadlines to violate federal rights. *Democratic Nat'l Comm. v. Bostelmann*, No. 20-2835, 2020 WL 5951359, at *2 (7th Cir. Oct. 8, 2020) (collecting cases).

c. Nor did the Minnesota Legislature authorize the Secretary's Policy. The Secretary and Intervenors relied below on Minnesota Statutes § 204B.47, which authorizes the Secretary "adopt alternative election procedures" only "[w]hen a provision of the Minnesota Election Law cannot be implemented as a result of an order of a state or federal court…." This argument fails for multiple reasons.

First, the delegation theory behind this argument depends on the *Arizona* case, which, as discussed, interpreted the Elections Clause, not the Electors

Clause. By contrast, *McPherson* treated the Electors Clause as on the same footing as the provisions authorizing state legislatures to appoint senators before the Seventeenth Amendment, *McPherson*, 146 U.S. at 35, and *Arizona* declined to place the Elections Clause on that footing, 576 U.S. at 806–808 & n.17.[4] There is no serious argument that the Minnesota Legislature, prior to the Seventeenth Amendment, could have delegated its power to appoint senators to the Secretary. The same principal applies to the Electors Clause. Indeed, *Bush* rejected reliance on a similar Florida statute conferring remedial authority on state courts in favor of the clearly expressed intent of the state legislature. 531 U.S. at 110–11 (discussing Fla. Stat. Ann. § 102.168(8)); *see also id*. at 113–14 (Rehnquist, C.J., concurring).

Second, the delegation theory fails even under the *Arizona* standard, which looks to a state's own "prescriptions for lawmaking" to assess whether the actor promulgating the rules in question constituted its legislature. 576 U.S. at 808. Here, the Secretary has not been engrafted into Minnesota's lawmaking process. The Minnesota Constitution gives the Secretary no lawmaking role, and, in Minnesota, "legislative power,…can never be delegated." *Remington Arms Co.* 102 N.W.2d at 534 (quotation marks omitted); *see also W. St. Paul Fed'n of*

[4] The Secretary has cited the dissent of Chief Justice Roberts for the proposition that the scope of the Elections and Electors Clauses is identical. *See Arizona*, 576 U.S. at 839 (Roberts, C.J, dissenting) (relying on *McPherson* in interpreting the Elections Clause). Were that proposition true, the Chief Justice's view would have prevailed, and *Arizona* would have come out the other way. *See* 576 U.S. at 807–08 (rejecting the Chief Justice's position). The *Arizona* majority did not cite *McPherson* and could not have distinguished it if had it held that the Electors and Elections Clauses have the same scope.

Teachers v. Indep. Sch. Dist. No. 197, W. St. Paul, 713 N.W.2d 366, 377 (Minn. Ct. App. 2006). Section 204B.47 can only be a delegation of *executive* power and does not include the Secretary within Minnesota's "prescriptions for lawmaking." It is not like "the referendum and the Governor's veto." 576 U.S. at 808.

Third, Minnesota Statutes § 204B.47 does not even apply in this case. Because the Minnesota Legislature enacted this provision "by virtue of a direct grant of authority made under art. II, § 1, cl. 2, of the United States Constitution," *Palm Beach*, 531 U.S. at 76, this Court "necessarily must examine the law of the State" for itself. *Bush*, 531 U.S. at 114 (Rehnquist, J., concurring). Under this standard, Section 204B.47 is not applicable. It assumes a valid exercise of judicial authority, and, as described, the federal Constitution does not permit a state court to invalidate Electors Clause legislation under state law. Moreover, it is not true that the receipt deadline "*cannot* be implemented as a *result*" of a court order. Minn. Stat. § 204B.47 (emphasis added). Rather, as the state court recognized, the choice to depart from state law was "*the Secretary's decision*." A64–65. (emphasis added). The Secretary could have chosen differently. *See Bostelmann*, 2020 WL 5951359, at *2.

d. The Secretary has repeatedly argued that the Supreme Court resolved these issues in his favor in *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (2020) (per curiam). Not so. The lower court's extension of the ballot-receipt deadline—the election-law alteration the Secretary cites as relevant here—was "not challenged in [the Supreme] Court."

Id. at 1206. For that reason, the Eleventh Circuit rejected the same argument the Secretary has, nonetheless, continued to press. *New Georgia Project v. Raffensperger*, No. 20-13360-D, 2020 WL 5877588, at *3 (11th Cir. Oct. 2, 2020).

B. The Secretary's Policy Is Preempted by Federal Law

The Secretary's policy also violates Congress's choice, pursuant to its exclusive Election Day Clause power, to establish November 3, 2020, as the *sole* day for choosing presidential electors. 3 U.S.C. § 1. This provision "mandates holding all elections for…the presidency on a single day throughout the Union." *Foster*, 522 U.S. at 69–70.

There is no "presumption against preemption" in cases under the Election Day Clause or its cousin the Elections Clause. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 13 (2013). When Congress exercises this authority "it *necessarily* displaces some element of a pre-existing legal regime erected by the States," *id.* at 14, not to mention non-pre-existing regimes contrived by state executive officials. "[T]here is no compelling reason not to read Elections Clause [or Election Day Clause] legislation simply to mean what it says." *Id.* at 15. Here, 3 U.S.C. § 1, which provides that electors "shall be appointed…on the Tuesday next after the first Monday in November," preempts the Secretary's policy of counting votes received *seven days* after Election Day in two respects.

1. The Secretary's policy changes Election Day. The term "the election" in the federal statute "plainly refer[s] to the combined actions of voters *and officials* meant to make a final selection of an officeholder." *Foster*, 522 U.S. at 71 (emphasis added). That is what makes Election Day, unlike other days, the

"consummation" of the voting process. *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001); *see also Millsaps v. Thompson*, 259 F.3d 535, 547 (6th Cir. 2001) (holding that this "combined action…to make a final selection" must occur on Election Day); *Lamone v. Capozzi*, 912 A.2d 674, 692 (Md. 2006) ("the 'combined actions' must occur, [and] voting must end, on federal election day"); *Maddox v. Bd. of State Canvassers*, 149 P.2d 112, 114 (Mont. 1944) ("Nothing short of the delivery of the ballot to the election officials for deposit in the ballot box constitutes casting the ballot….").

Yet, under the Secretary's policy, election officials will not even have all the ballots, and the election will not be consummated, until a full week after the federal Election Day. This conflicts with federal law and is preempted. The Secretary and Intervenors erroneously treat the ballot *mailing* as the consummation of the voting process, but the mailing alone does not effectuate "combined actions of voters *and officials*." *Foster*, 522 U.S. at 71 (emphasis added). State election officials can take *no action* on Election Day with respect to a ballot they have not yet received. *Compare id*. at 73 (finding conflict where state law "require[d] no further act" by officials on the federal Election Day). The Secretary and Intervenors have no serious argument to the contrary, nor could they. Instead, they contended that treating Election Day as the receipt deadline would interfere with officials' ability to *count* ballots after Election Day. But this is a false dichotomy. A ballot is timely cast when state election officials receive it, not when it is counted.

2. Even if timeliness under federal law were judged by a ballot's mailing, rather than receipt, the Secretary's policy does not require that ballots be mailed by November 3. The Secretary's policy permits voters to mail ballots after the federal Election Day so long as they are received before November 10 and do not affirmatively evidence their late mailing. This plan to count untimely ballots extends the Election Day and "fundamentally alters the nature of the election." *Republican Nat'l Comm.*, 140 S. Ct. at 1207.

The Secretary and Intervenors insist that they are not permitting the counting of untimely mailed ballots because the Secretary has established only a "presumption" that ballots received within seven days of Election Day were mailed by Election Day. But there is no circumstance under which election officials could ever have a basis to suspect that an un-postmarked ballot received on (say) November 8 was mailed after Election Day because an unpostmarked ballot, but its very nature, does not evidence its mailing date. This is no hypothetical scenario: ballots may be "stuck together and one is cancelled out while the other is not," IAPP.397, and *Gallagher v. New York State Board of Elections*, No. 20-CV-5504 (AT) 2020 WL 4496849 (SDNY Aug. 3, 2020), found that "thousands" of mail-in ballots in New York City went un-postmarked in the last primary election. *Id.* at *5; *see also Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 5627186, at *7 (W.D. Wis. Sept. 21, 2020) (finding that "many ballots arrived with no postmarks, two postmarks or unclear postmarks.").

It is therefore incorrect to argue (as the Intervenors have) that, because Congress has not codified a postmark presumption, there is no conflict. Congress *has* codified an Election Day, and altering Election Day through the contrivance of a "presumption" is no less a conflict than doing so by any other label. Courts have repeatedly rejected "creative" interpretations designed to thwart the preemptive impact of federal election laws. *Gonzalez v. Arizona*, 677 F.3d 383, 398 (9th Cir. 2012), *aff'd sub nom. Inter Tribal Council of Ariz., Inc.*, 570 U.S. at 1; *see also Foster*, 522 U.S. at 72–73 (rejecting Louisiana interpretation of law contrary to 2 U.S.C. § 7 as "merely wordplay" and reading it "straightforwardly").

By the Intervenors' logic, the Secretary could keep ballot drop boxes open a week after Election Day and "presume" that every ballot envelope retrieved at the end of the week was actually deposited on November 3. For the same reason, it is entirely illogical to claim (as the Intervenors have) that the postmark presumption "effectuates" a requirement that ballots be postmarked on Election Day. It is the opposite: to presume that a ballot bearing *no postmark* is in fact "postmarked on Election Day" is to suspend reality. This is not a standard to assist officials in enforcing a mailing deadline, but the abdication of a standard. The way to "effectuate" a postmarked-by-Election-Day requirement is to require a postmark showing that the ballot was mailed on or before Election Day.

Intervenors also relied on "guidance" from the Postal Service that it may take up to a week for ballots to be delivered. But that is not a basis to *presume* that a ballot received by November 10 was mailed on or before November 3.

The Postal Service guidance tells voters when to mail a ballot to avoid a risk that it may arrive after a certain date, but does not reveal when a given ballot was mailed. Simply because *some* ballots may take a week to arrive does not mean one can presume that a ballot arriving at a polling place must have been sent at least seven days earlier. Indeed, Minnesota court rules presume that postal mail is generally received in three days, not a week. Minn. R. Civ. P. 6.01(e).

II. Defendants' Various Justiciability Arguments Are Meritless

The Secretary and Intervenors seek to avoid federal-court scrutiny of the merits of the Secretary's policy, but the myriad justiciability barriers they asserted below to that end have no grounding in law. Plaintiffs have Article III standing because the Secretary's policy injures them as both candidates for office and voters. The district court's holding to the contrary was incorrect, as was its derivative prudential standing holding that Plaintiffs' claims seek relief for injuries accruing to the Minnesota Legislature and Congress, rather than Plaintiffs themselves. The Secretary's argument below for abstention under *Younger*, 401 U.S. at 37, conflicts with the Supreme Court's cabining of that doctrine to exclude ordinary state-court civil actions of the kind at issue here. Likewise, Intervenors' argument below that Plaintiffs are somehow bound by state-court litigation in which they played no role and that did not even involve their claims finds no support in Minnesota law.

A. Plaintiffs Have Article III Standing

"Article III standing requires (1) an 'injury in fact,' (2) a causal relationship between the injury and the challenged conduct, and (3) that the

injury likely will be redressed by a favorable decision." *Dalton v. JJSC Properties, LLC*, 967 F.3d 909, 912 (8th Cir. 2020) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Plaintiffs' standing as voters and candidates is well established by governing precedent.

1. The Secretary's Policy Injures Plaintiffs as Candidates

Plaintiffs have standing as candidates for the office of elector. *See* Minn. Stat. § 208.03 (providing for the election of "Presidential electors"). As candidates, Plaintiffs have a direct and personal stake in the conduct of their election consistent with governing federal law. In particular, candidates have a cognizable "interest…in ensuring that the final vote tally accurately reflects the votes cast" so as to avoid the myriad injuries—uncertainty over their own election's results, post-election litigation, legal expense, etc.—that would inevitably flow from a contested count. *Gallagher*, 2020 WL 4496849, at *9; *Jones v. U.S. Postal Serv.*, No. 20-cv-6516 (VM), 2020 WL 5627002, at *13 (S.D.N.Y. Sept. 21, 2020) (same); *Hunter v. Hamilton Cty. Bd. of Elections*, 850 F.Supp.2d 795, 803 (S.D. Ohio 2012) (holding that candidates have "a concrete, private interest in the outcome" of challenges to the "treatment of [] disputed ballots").

And their interest in the rules by which their own election will be conducted, and obtaining clarity of those rules, is substantial. That explains why practically every major case enforcing the Electors Clause has been brought by candidates. That includes the Supreme Court's seminal decision in *McPherson*, 146 U.S. at 1, a pre-election suit by elector candidates challenging a state's manner of appointing electors as inconsistent with the Electors Clause. More recently, the Supreme Court adjudicated similar claims by candidates in *Palm*

Beach, 531 U.S. at 76, and then *Bush*, 531 U.S. at 103. As in those latter cases, Plaintiffs will be injured by the tallying of votes in violation of federal law.

The district court's rejection of candidate standing was wrong. It dismissed *McPherson* as irrelevant, suggesting that the Supreme Court ought not to have decided it at all for want of standing. A104–105. And it gave no consideration whatsoever to Plaintiffs' direct and palpable interest in determining the rules that govern the counting of votes in *their own election*, as well as the injuries that will accrue if those rules remain unsettled until after Election Day. Instead, it assumed the *merits* of Plaintiffs' claims against them, concluding that the Secretary has "provided" "certainty" by extending the ballot-receipt deadline, that Plaintiffs "are in danger of creating confusion rather avoiding it," and that the "record is replete with information provided to Minnesota voters about the Postmark Deadline." App97–99. But, "[i]n assessing a plaintiff's Article III standing, [courts] must assume that on the merits the plaintiffs would be successful in their claims." *Am. Farm Bur. Found. v. E.P.A*, 836 F.3d 963, 968 (8th Cir. 2016) (quotation marks omitted). The required assumption here is that the Secretary's challenged policy is invalid, which would necessarily result in the injuries identified by Plaintiffs, up to and including threatening the election's validity. *See infra* Argument § II.A.3.

As for *Bush* and *Palm Beach*, the district court acknowledged that they support resolution of Plaintiffs' claims in "post-election litigation," but found them inapplicable to this *pre*-election challenge on the view that candidate Al Gore, the plaintiff in that case, was injured by the fact that "Florida canvassing

boards had certified the election results and declared George W. Bush the winner." A105. But it was *Bush* who was required to possess Article III standing to obtain relief from the Supreme Court, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *Asarco Inc. v. Kadish*, 490 U.S. 605, 619 (1989), and Bush had no way to know that Gore's preferred recount rules would have resulted "in diminished likelihood of" his winning the contest, A105.[5] Candidates in election contests litigate over the rules first, and then those rules are applied to ballots during counting. For example, another suit brought by Bush challenged the exclusion of certain mail-in ballots that Bush could not possibly have known whether they favored him or Gore, because they had not been opened and counted. *Bush v. Hillsborough Cty. Canvassing Bd.*, 123 F.Supp.2d 1305 (N.D. Fla. 2000). Indeed, the law of every state, including Minnesota, requires challenges to the eligibility of particular ballots *before they are opened and counted*, when no one could know which candidate they favor. *See* Minn. Stat. § 204C.13 subd.6. What difference could it possibly make for standing purposes whether Plaintiffs bring their claims now or on Election Day, given that every party here recognizes that thousands of late-received ballots will be cast in Plaintiffs' own election and therefore will be subject to challenge?

Finally, there is no serious dispute that, if Plaintiffs' injuries as candidates are cognizable, they arise from the Secretary's unlawful policy and would be

[5] That fact question has never been definitively resolved. *See, e.g.*, Ford Fessenden & John M. Broder, Examining the Vote: the Overview; Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote, N. Y. Times, Nov. 12, 2001, at A1.

remedied by Plaintiffs' requested injunction. Every injury here is the direct result of the Secretary's determination to count ballots that federal law holds to be ineligible, such that enjoining that policy would provide complete relief.

2. The Secretary's Policy Injures Plaintiffs as Voters

Plaintiffs have standing as voters facing the dilution of their votes by ballots cast and counted in violation of federal law. "The right to vote is individual and personal in nature, and voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916, 1920 (2018) (quotation marks and citations omitted). The Secretary's policy requires counting thousands of additional ballots that federal law holds to be ineligible, and that will necessarily dilute Plaintiffs' lawfully cast votes.

Since at least *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court has recognized that vote dilution is an injury sufficient to support standing. *Id.* at 207–09. "A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a *stuffing of the ballot box*." *Id.* at 208 (citations omitted) (emphasis added); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." (citations omitted)). The Secretary's policy dilutes Plaintiffs' votes, and thereby injures them, no differently than in cases of ballot-box stuffing—in each instance, the counting of

legally invalid votes increases to the total vote-pool and thereby diminishes the weight of those lawfully cast.

Without disputing that premise, the district court nonetheless rejected vote-dilution standing, deeming Plaintiffs' injury a "generalized grievance" because "such dilution affects all Minnesota voters equally." App94. That was wrong twice over. First, the Secretary's policy does not injure all Minnesota voters equally. To the contrary, those whose votes are received after the statutory deadline *benefit* at the *expense* of those whose votes are timely: only the latter suffer dilution. This is no different from districting schemes that "pack" some voters into over-populated districts and others into under-populated districts: those in the under-populated districts receive an unfair advantage at the expense of those in over-populated districts, and it is well-recognized that any voter from an over-populated district has standing to bring suit. *See Baker*, 369 U.S. at 207–08 ("The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties.").

Second, the district court's view that sheer numerosity of the injured makes a "generalized grievance" is rejected by governing precedent. "The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 n.7 (2016); *see also Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) ("Often the fact that an interest is abstract and the fact that it is

widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'… This conclusion seems particularly obvious where (to use a hypothetical example)…large numbers of voters suffer interference with voting rights conferred by law."); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449–50 (1989). Indeed, the D.C. Circuit upheld voters' standing to challenge a congressional rule change that diluted the votes of *all voters in all states*. *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994). "That all voters in the states suffer this injury, along with the appellants, does not make it an 'abstract' one." *Id.*

The irrelevance of numerosity necessarily follows from "the understanding that the injuries giving rise to [vote-dilution] claims [are] 'individual and personal in nature.'" *Gill*, 138 S. Ct. at 1930 (quoting *Reynolds*, 377 U.S. at 561). In other words, vote dilution is measured at the individual level, not population-wide. And the uncontroverted evidence here is that thousands of late-received ballots will be accepted under the Secretary's policy, App84, which conclusively proves the injury to Plaintiffs as individual voters casting timely ballots—no matter that others will be similarly injured.[6]

Also mistaken was the district court's reliance on several recent decisions holding claims of vote dilution through the potential for future voter fraud to be

[6] Intervenors previously cited *Lance v. Coffman*, 549 U.S. 437 (2007), on this point, but it supports standing here. It rejected standing for a claim by voters that a state constitutional provision "depriv[ed] the state legislature of its responsibility to draw congressional districts," but it juxtaposed that "generalized grievance" against the concrete injury of vote dilution. *Id.* at 441–42 (citing *Baker*, 369 U.S. at 186).

generalized grievances or speculative. App95–96 (discussing *Paher v. Cegavske*, No. 3:20-cv-00243MMD-WGC, 2020 WL 2748301 (D. Nev. May 27, 2020)). That conflates the questionable possibility of fraud in those cases—which necessary depends on third parties breaking the law—with the certainty here that ballots will be counted in alleged violation of federal law. While the claim that a state is not adequately enforcing laws like those against vote fraud is a classic generalized grievance, *Lujan*, 504 U.S. at 573–74, a challenge to an unlawful policy that directly impairs an individual's voting rights through dilution is anything but that. Indeed, the entire basis for altering the ballot-receipt deadline was that large numbers of ballots will be received after Election Day. App84. The Secretary intends to count them and thereby markedly increase the pool of votes counted, necessarily diluting Plaintiffs' votes. That injury is concrete, it accrues to Plaintiffs individually, and it is caused by the Secretary's policy of counting votes that federal law holds to be ineligible. Accordingly, it is neither generalized nor speculative, but a concrete injury and firm basis for standing. *See Lance*, 549 U.S. at 441–42 (citing *Baker*, 369 U.S. at 186).

3. Statewide Disenfranchisement

Finally, the Secretary's policy jeopardizes Minnesota's participation in the Electoral College and Plaintiffs' ability to serve as electors, injuring them as both voters and elector candidates. The Secretary's attempt to override the Legislature violates the "safe harbor" provision of 3 U.S.C. § 5 because it is not a "*law[] enacted* prior to the day fixed for the appointment of the electors." This injury arises by operation of law: if the Secretary's policy is invalid—as Plaintiffs

allege—then Minnesota will be ineligible for the safe harbor. It was to avoid *that precise result* that the Supreme Court terminated Florida's 2000 recount, and Plaintiffs' interest here as candidates is identical. *Bush*, 531 U.S. at 110.

The district court's standing analysis improperly assumed that this argument fails on the merits. It recognized that Minnesota could forfeit its safe-harbor protection if it were to "change the procedures it uses to appoint electors after Election Day," A100, but found Plaintiffs' position "speculative," on the view that Minnesota has not yet changed procedures "after Election Day," A101. But the problem is that application of the Secretary's policy violate the safe harbor because it departs from the "laws enacted" by the Minnesota Legislature. 3 U.S.C. § 5. The court was therefore bound to assume for standing purposes that this is correct on the merits, *Am. Farm Bur. Foundation*, 836 F.3d at 968, and so was bound to accept that Minnesota's safe-harbor status will be forfeited.

Contrary to the district court, A101–02, the risk of serious injury to the state, its voters, and Plaintiffs specifically should that happen is more than sufficient to support standing. *Bush* recognized the risk of forfeiting safe-harbor status to be sufficiently grave to override comity concerns, reject "any construction of [state law] that Congress might deem to be a change in the law," and terminate recounts. *Bush*, 531 U.S. at 114 (quoting *Palm Beach*, 531 U.S. at 78); *see also Stein v. Thomas*, 222 F.Supp.3d 539, 542 (E.D. Mich.) (granting injunction to speed recount because safe-harbor failure could leave presidential vote "ultimately [to] be decided by Congress, rather than conclusively

determined by Michigan."), *aff'd*, 672 Fed. App'x 565 (6th Cir. 2016). Without safe-harbor status, Minnesota also faces the prospect of "endless litigation over election results," *Rios v. Blackwell*, 433 F.Supp.2d 851, 852 (N.D. Ohio 2006), and all the attendant harms of that, up to and including potential disenfranchisement. *See infra* § III.B (discussing the litigation over Minnesota's 2008 senatorial election that dragged on for months past the Electoral College vote). Even if it is not a certainty that Minnesota would be completely disenfranchised in the presidential election, it is enough for standing purposes that loss of safe-harbor status presents an "increased risk of…harm" that stems from the Secretary's policy. *Mo. Coal. for Env't v. F.E.R.C.*, 544 F.3d 955, 957 (8th Cir. 2008); *see also Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 573–74 (6th Cir. 2005).

B. Plaintiffs Have Prudential Standing

The district court also found that Plaintiffs lack prudential standing on the basis that "the Minnesota Legislature and Congress suffered the injury" for which Plaintiffs seek relief. A108. That determination was effectively derivative of the court's Article III holding that Plaintiffs failed to demonstrate any personal injury, and so the two should rise or fall together, as the district court's denial of an injunction pending appeal appears to recognize. A125.

In any instance, contrary to the district court, a plaintiff claiming injury from state action that conflicts with federal law does not "assert claims of injury that…Congress suffered." A107. If that were so, only Congress could assert preemption. That is obviously not the law. *See, e.g.*, *Springfield Television, Inc. v.*

City of Springfield, Mo., 462 F.2d 21, 23 (8th Cir. 1972) (finding that television franchisor had standing to assert preemption under FEC regulations). Instead, the rule is that "private parties can litigate the constitutionality or validity of state statutes, with or without the state's participation, so long as each party has a sufficient personal stake in the outcome of the controversy." *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 430 (6th Cir. 2008); *see, e.g., Bryant v. Yellen*, 447 U.S. 352, 367–68 (1980). To do so is not to rely on a third party's injury, but to assert the plaintiff's "own constitutional interests." *Bond*, 564 U.S. at 220.

To the extent that the "zone of interests" limitation applies at all here—*Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014), holds that it does not[7]—it is easily satisfied. With respect to Count I, the Electors Clause is among the Constitution's federalism provisions that serve to "protect[] the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond*, 564 U.S. at 222. Thus, individuals "can assert injury from governmental action taken in excess of the authority that federalism defines." *Id.* at 220. An individual's "rights in that regard do not belong to a State," *id.*, a point that carries the day equally under Article III and "prudential standing rules," *id.* at 225.[8]

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[7] *See also Sierra Club v. Trump*, 929 F.3d 670, 702 (9th Cir. 2019) (explaining that *Lexmark* undermines the proposition).

[8] *Corman v. Torres*, 287 F.Supp.3d 558, 571 (M.D. Pa. 2018), which Intervenors cited below, is not to the contrary; it opines only that individual state legislators *in their official capacity as such*, as opposed to the legislature as a whole, lacked standing to enforce the Electors Clause.

The district court opined that *Bond* is limited to constitutional provisions involving the residual sovereignty of the states, as opposed to powers conferred directly by the Constitution. A109–10. But *Bond* expressly rejected all such gerrymandering, 564 U.S. at 335, in favor of broadly recognizing "standing to object to a violation of a constitutional principle that allocates power within government," *id*. at 222, as the Electors Clause does. In any instance, the district court's arbitrary limitation is irreconcilable with numerous Supreme Court decisions permitting parties to challenge violations of the separation of powers directly established by the Constitution. *See, e.g., Free Enter. Fund v. Pub. Co. Acctg. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (rejecting essentially the same argument with respect to the Appointments Clause).

As for Count II and 3 U.S.C. § 1, Congress's principal aims in setting a nationwide Election Day were to promote uniformity, prevent undue influence based on vote-tallies being completed at different times, combat fraud, ensure that states actually participate in the selection of federal officers, and ultimately to ensure fairness in the selection of electors and the President. *See generally Millsaps*, 259 F.3d at 541; *Foster*, 522 U.S. at 73–74; The Federalist No. 68 at 459 (Cooke ed., 1961) (A. Hamilton) (explaining that the Election Day Clause protects the selection of the President from "cabal, intrigue, and corruption"). Plaintiffs, as elector candidates and voters, are plainly within the zone of interests. No one could seriously dispute their standing if, for example, Minnesota sought to delay the election by a month or cancel it altogether; that the Secretary intends merely to extend it by a week does not eject Plaintiffs from

the "class of persons" who "ha[ve] a right to sue under this substantive statute." *Lexmark*, 572 U.S. at 127 (cleaned up); see also *Foster*, 522 U.S. at 70 (entertaining voters' suit challenging violation of federal Election Day statutes).

C. There Is No Basis To Abstain

The Secretary and Intervenors argued below for *Younger* abstention, but the state-court proceeding for which they seek deference "does not fall within any of the three exceptional categories" to which *Younger* applies, *Sprint Communications, Inc*, 571 U.S. at 79. It is not an "ongoing state criminal prosecution," a "civil enforcement proceeding[]," or (as in *Pennzoil v. Texaco, Inc.*, 481 U.S. 1 (1987)) a "pending civil proceeding involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint*, 571 U.S. at 78 (cleaned up). That last category includes things like a "civil contempt order" or "requirement for posting bond pending appeal." *Id*. at 79. It does not reach ordinary civil proceedings as here, which are subject instead to the general rule that "a federal court's obligation to hear and decide a case is virtually unflagging" and that "[p]arallel state-court proceedings do not detract from that obligation." *Id*. at 77 (quotation marks omitted). In that respect, this case is indistinguishable from *Sprint*, which reversed this Court's application of *Younger* in deference to state proceedings outside of the "three 'exceptional' categories….that define *Younger*'s scope." *Id*. at 78.

Younger's conditions are also unsatisfied. First, there is "no pending state proceeding" respecting the consent decree, as required for *Younger* to apply. *Banks v. Slay*, 789 F.3d 919, 923 (8th Cir. 2015). The consent decree has been

entered, is final, and will not be appealed. Second, Plaintiffs were not party to that proceeding, and their asserted interests are not "closely related" to the various Republican Party entities intervened to challenge the consent decree. *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 881–82 (8th Cir. 2002). While this Court has held that a state enforcement action against a parent corporation sufficed to subject its subsidiaries' federal-court claims to abstention, *id.*, Plaintiffs are aware of no authority so much as suggesting that a political party's participation in state-court litigation deprives its voters who had no participation in that litigation of the ability to vindicate their federal voting rights by challenging dilution of their votes in federal court. As for Plaintiffs' interests as elector candidates, it did not exist during the state-court proceedings because Plaintiffs were certified as electors only after those entities dropped their appeal of the consent decree. *See* Minn. Stat. § 208.03. In any instance, Plaintiffs have no "degree of ownership, management or control" of the party organizations that appeared in state court, and "neither the Supreme Court nor the other circuits have extended *Younger* abstention" based on membership in an organization absent such control. *Mass. Delivery Ass'n v. Coakley*, 671 F.3d 33, 45–46 (1st Cir. 2012). Third, as non-parties to the state proceedings, they had no "opportunity to raise [their] constitutional claims" there. *Pennzoil*, 481 U.S. at 16. Accordingly, even if this case were within *Younger*'s ambit, abstention would still be improper.

A final consideration is the overriding federal interest at stake. A "significant departure from [a State's] legislative scheme for appointing

presidential electors" "presents a federal constitutional question" that federal courts must answer. *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring). That is because a state legislature's authority to determine the manner of appointing electors is conferred directly by the federal Constitution, rather than arising from states' own sovereignty. As a result, "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest." *Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983).

D. Plaintiffs Are Not Party To the Consent Decree

Intervenors, but not the Secretary, argued below that Plaintiffs are bound by either their consent decree with the Secretary or the stipulation by which the Republican Party organizations dismissed their appeal of the decree and agreed to forgo further challenge to it. Intervenors' principal argument was that Plaintiffs were in privity with *the Secretary* because "the Secretary, in litigating the state court action and entering the Consent Decree, represented all Minnesotans." D.Ct.Dkt. 38 at 13. While several decisions recognize that a state may bind its citizens through litigation over "common public rights" like public fishing rights, *see Lance v. Davidson*, 379 F.Supp.2d 1117, 1125 (D. Colo. 2005), the principle has never been extended to matters of individual rights, where the interests of citizens and state officials regularly diverge, *see, e.g., Cleveland Cty. Ass'n for Gov't by People v. Cleveland Cty. Bd. of Comm'rs*, 142 F.3d 468, 474 (D.C. Cir. 1998) ("[V]oters' and representatives' interests in vote-dilution litigation do not align with the government's interest." (quotation marks omitted)). Were the law otherwise, state officials could immunize all their actions from

constitutional challenge through the contrivance of obtaining consent decrees. That is not how it works.

Plaintiffs are also not bound as a result of the party organizations' intervention the state proceedings. The Court "look[s] to Minnesota law to determine the preclusive effect of the judgment of the Minnesota state courts." *Lommen v. City of E. Grand Forks*, 97 F.3d 272, 274 (8th Cir. 1996). Under Minnesota law, "[a] consent judgment is based wholly on the consent of the parties and there is no judicial inquiry into the facts or the law applicable to the controversy" other than to guard against "fraud, mistake, or absence of real consent." *Hentschel v. Smith*, 153 N.W.2d 199, 206 (Minn. 1967). While a consent decree may be binding on those in privity with the parties to it, *id*. at 204, the Republican organizations were not parties to the consent decree here—only the Secretary and Intervenors were. In addition, the issues presented here were not "necessarily determined by the judgment," *id*. at 99—in fact, they went unmentioned by all parties and the court.

In any instance, Plaintiffs were not in privity with the party organizations because nothing in "the record demonstrates controlling participation and active self-interest in the litigation." *Brunsoman v. Seltz*, 414 N.W.2d 547, 550 (Minn. App. 1987). Plaintiffs played no role in and exercised no control at all. Moreover, as discussed above, Plaintiffs' interest as candidates did not exist when the party organizations stipulated to dismissal of their appeal, Plaintiffs' interests as voters are personal and independent of any political party, and the organizations did not even seek to advance their interests as voters in

maintaining the weight of their votes. *See* A53 (identifying asserted bases for intervention). All of this suggests why the Secretary does not join Intervenors' *res judicata* argument.

III. The Equities Weigh Heavily in Favor of an Injunction

An injunction is essential to protect Plaintiffs and all Minnesota voters from the irreparable harm caused by the Secretary's unlawful policy.

A. The *Purcell* Principle Counsels in Favor of an Injunction To Avoid Widespread Disenfranchisement

As an initial matter, *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), which requires a federal court to entertain "considerations specific to election cases and its own institutional procedures" before issuing an injunction impacting election procedures, *id.* at 4–5, is not a bar to an injunction. "[I]t is important to remember that the Supreme Court in *Purcell* did not set forth a per se prohibition against enjoining voting laws on the eve of an election." *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 368 (9th Cir. 2016). In this case, the *Purcell* considerations favor an injunction.

First, the issue of which ballots are validly cast can be, and often is, litigated *after* the election. *See Bush*, 531 U.S. at 106–11; *Hillsborough Cty. Canvassing Bd.*, 123 F.Supp.2d at 1305. Indeed, the district court faulted Plaintiffs for *not* waiting until Election Day to bring this case. This case does not involve something like a redistricting plan, a voter-identification law, or the candidates included on the ballot. Challenges to those features of an election concern what happens *before* the election, but this challenge concerns what happens *after* it—

i.e., which ballots will be counted. And it would be far better for voters to know *now* what the rules are then to find out after they voted when their ballots may be disqualified. This is a case where concerns related to "voter confusion," *Purcell*, 549 U.S. at 4–5, weigh in favor of an injunction rather than against it.

Second, the *Purcell* principle limits courts' discretion "to grant an injunction to alter a State's *established* election procedures," *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (emphasis added), but there is nothing established about the Secretary's policy of counting ballots received and even mailed after Election Day. *Feldman*, 843 F.3d at 368 ("[T]he concern in *Purcell* and *Southwest Voter* was that a federal court injunction would disrupt long standing state procedures."). Minnesota statutory law has never followed that policy, and the established policy is the one Plaintiffs ask to be applied. *Compare id.* at 369 ("Here, the injunction preserves the status quo" as "[e]very other election cycle in Arizona has permitted the collection of legitimate ballots by third parties to election officials.").

Third, the Secretary favored a last-minute alteration to election procedure by entering into an agreement with private parties. Having done so, the Secretary cannot credibly contend that review of that alteration is too disruptive. Further, the alteration the Secretary favored was not merely the suspension of a state-law requirement, as in *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 13 (1st Cir. 2020) (suspension of required witness signatures for absentee ballots), but a newly invented election regime, complete with a new "Election Day."

Fourth, Plaintiffs did not delay in bringing this action, which was filed less than a month after they were certified as elector candidates.[9] *Feldman*, 843 F.3d at 369 (finding no delay where plaintiffs filed the action "less than six weeks" after their claims became ripe). Further, Plaintiffs "have pursued expedited consideration of their claims at every stage of the litigation." *Id.*

B. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction

Unless this Court intervenes, the Secretary's agreement to violate state and federal law will inflict irreparable harm on Plaintiffs, their supporters, and the entire electorate of Minnesota. The Secretary's newfangled policy of counting invalid votes is certain to dilute the value of Plaintiffs' votes, and the district court recognized that thousands of late-received ballots are certain to be counted under the Secretary's policy. App84. The "principal issue[]" here is "whether the votes that have been ordered to be counted are, under a reasonable interpretation of [Minnesota] law, legally cast votes," and the "counting of votes that are of questionable legality…threaten[s] irreparable harm." *Bush*, 531 U.S. at 1047 (Scalia, J., concurring in order issuing stay pending appeal).

By increasing the pool of counted votes to include those cast after Election Day, the Secretary will dilute the votes of voters like Plaintiffs who dutifully comply with Minnesota statutory law and submit their ballots by Election Day, a paradigmatic irreparable harm. *Montano v. Suffolk Cty. Legislature*, 268

[9] This also defeats the Secretary's laches defense asserted in his injunction-stage papers in this Court. In addition, the Secretary did not raise laches below. Because laches is "within the sound discretion of the district court," *Brown-Mitchell v. Kansas City Power & Light Co.*, 267 F.3d 825, 827 (8th Cir. 2001), it cannot be asserted here in the first instance.

F.Supp.2d 243, 260 (E.D.N.Y. 2003) ("An abridgement or dilution of the right to vote constitutes irreparable harm."); *Patino v. City of Pasadena*, 229 F.Supp.3d 582, 590 (S.D. Tex. 2017) (similar); *Day v. Robinwood W. Cmty. Improvement Dist.*, No. 4:08-cv-01888-ERW, 2009 WL 1161655, at *3 (E.D. Mo. Apr. 29, 2009) (similar); *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). This is a severe injury to Plaintiffs' interests not only as voters but as candidates. Because "the rights of voters and the rights of candidates do not lend themselves to neat separation," *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (quotation marks omitted), "laws that affect candidates always have at least some theoretical, correlative effect on voters" and vice versa. *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *cf. Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973).

In addition, the legal infirmity of the Secretary's policy has created a significant uncertainty about the rules governing the November election and whether *any Minnesota citizens* will have their votes counted in the presidential race. A procedure for resolving election contests (which the vote-counting process qualifies as) will not satisfy the statutory "safe harbor" unless it is resolved "by *laws enacted* prior to the day fixed for the appointment of electors." 3 U.S.C. § 5 (emphasis added); *see Bush*, 531 U.S. at 111. The Secretary's policies are not "laws enacted" by the Minnesota Legislature but, rather, contradict those laws. The implementation of these policies over and against Minnesota's "enacted" laws creates a clear and present danger that Minnesota's election results will not be accepted under the safe harbor law and may not be accepted

by the United States Congress in determining the winner of the presidential election.

A further harm results from the Secretary's election deadlines risk placing the resolution of the contest past dates Congress has set for both the safe harbor and the actual vote of the Electoral College. The safe harbor uniquely guards against "endless litigation over election results," *Rios*, 433 F.Supp.2d at 852, and that is not uncharted territory for Minnesota: driven largely by disputes over absentee ballots, the 2008 senatorial election recount was only certified on January 5—62 days after the election—and the contest litigation took another six months.[10] Given the far larger numbers of absentee ballots expected this year than in past elections, the Secretary's policy (which already delays the count by a week) will only exacerbate the already serious problem of timely certification of the vote, pushing it past the safe-harbor deadline of December 8 or even the vote of the Electoral College on December 14. There is a substantial risk that Plaintiffs' votes will be completely meaningless and they will be denied the opportunity to participate as electors.

C. The Balance of Equities Is One-Sided

Here, there is no contest on the balance of equities because the Secretary has no interest in misleading voters into disenfranchisement by making promises he cannot deliver, and Plaintiffs (and the public) have every interest in the enforcement of the federally endorsed bright-line rules that will govern voting in

[10] *See generally* Kevin Duchschereand & Jim Kern, "Senate Election Timeline," Star Tribune, June 30, 2009.

Minnesota in all events. "[I]t is always in the public interest to protect constitutional rights," and "[t]he balance of equities generally favors…constitutionally-protected freedom[s]." *Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019) (cleaned up).

On the other side of the scale, no compelling (or even rational) justification is offered. The Secretary has no interest in establishing the "Manner" of presidential elections in contravention of the Constitution. And the Secretary's interest in settling a meritless lawsuit—challenging the age-old rule requiring votes to be in on Election Day—carries zero weight. *Cf. Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (holding that a state has "no…interest in avoiding meritless lawsuits"). Further, even if the Secretary is (somehow) vindicated by the final resolution of this case, the harm of an erroneous ruling at this stage would be non-existent: the Secretary would simply be compelled to conduct this election the way every Minnesota Secretary of State has conducted elections for generations. And the state's interest is for "its laws" enacted by its Legislature to be enforced. *See, e.g.*, *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1144 (8th Cir. 2005).

The Secretary's response below on this point was to blame *Plaintiffs* for calling out the *Secretary's* violation of law, which the Secretary effectively contends would have gone unnoticed otherwise and benefited voters with more lenient election rules. Even assuming the perplexing premise that the balance-of-equities test favors unlawful acts so long as a state official deems them beneficial, the Secretary's violation will not go unnoticed. This is among the

most contentious elections in memory, and candidates and other stakeholders on both sides of the aisle have every incentive to raise challenges to ballots cast in violation of federal law. By virtue of federal law, the operative deadline remains 8:00 p.m. on Election Day. When candidates challenge ballots received after that time, the ballots will be held ineligible. The Secretary's instruction to vote in violation of federal law is no more to voters' benefit than telling ticketholders that the ballgame begins at 8 p.m. when first pitch is at noon.

D. The Public Interest Requires an Injunction

For all these reasons, the public interest demands an injunction. "[I]t is always in the public interest to protect constitutional rights," *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), and the right to vote of each Minnesota citizen hangs in the balance and is directly threatened by the Secretary's unlawful policy.

In addition to potential disenfranchisement of the State's voters through losing their say in the Electoral College and selection of the President, the Secretary's policy threatens widespread disenfranchisement of individual voters. If Plaintiffs are right that the Secretary's policy is unlawful, then voters who rely on it to cast late-received ballots face the prospect that their votes will be tossed out through challenges on and after Election Day. By contrast, an injunction would define the rules of the election in advance so that voters can act accordingly and avoid total loss of their votes. In this way, an injunction best serves the Secretary's stated goal of minimizing voter confusion. And, even if the Secretary's view of the merits were ultimately to prevail, an injunction at this

stage would cause no harm to the public interest, as the only effect would be to encourage voters to ensure that their ballots are received by 8:00 p.m. on Election Day—something that they can achieve through slightly earlier mail-in voting, in-person early or Election Day voting, or using a drop-box. In this respect, the public interest is one-sided, favoring the protection of Minnesota's voters against the Secretary's reckless disregard of federal law.

CONCLUSION

The Court should reverse the decision of the district court denying Plaintiffs' motion for a preliminary injunction.

Date: October 26, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the following requirements:

1. It complies with the type volume limitations of Rule 32(a)(7) because it contains 12,942 words, excluding the parts of the brief exempted by Rule 32(f).

2. It complies with the typeface and typestyle requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in 14-point Calisto MT font, a proportionally spaced font with serifs.

3. The files have been scanned for viruses and are virus free.

Dated: October 26, 2020

/s/ Andrew M. Grossman
ANDREW M. GROSSMAN

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2020, a true and correct copies of the Appellants' Brief and Addendum were filed via the Court's CM/ECF system and will be served via electronic filing upon all counsel of record who have appeared or will appear in this case.

Dated: October 26, 2020

/s/ Andrew M. Grossman
ANDREW M. GROSSMAN