No. 20-3139

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH Circuit

James Carson and Eric Lucero,

Plaintiffs-Appellants,

vs.

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

BRIEF FOR DEFENDANT-APPELLEE MINNESOTA SECRETARY OF STATE

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SUMMARY OF THE CASE

Appellants are asking for an extraordinary injunction to change the existing rule on ballot timeliness for the presidential election in Minnesota, just days from election day. On August 3, a state court judge approved a consent decree establishing that, for the 2020 general election, absentee ballots are timely if they are postmarked by election day, instead of received by election day. The Republican Party of Minnesota and Republican National Committee appealed to the Minnesota Supreme Court, but quickly dropped their appeal. They, along with the campaign for President Trump (Donald J. Trump for President, Inc.), expressly waived their rights to challenge the consent decree in any judicial forum.

Voting in Minnesota began on September 18. As of October 23, nearly 1.2 million Minnesota voters have returned absentee ballots. More than 500,000 additional voters have requested absentee ballots that have not yet been returned and accepted. These ballots come with instructions explaining the postmark rule in place for this election. Nearly two months after entry of the consent decree, Appellants brought this lawsuit, claiming it is unconstitutional for Minnesota to apply the postmark rule in the consent decree to the presidential election. Mere days from election day, they seek an emergency injunction that would potentially disenfranchise thousands of voters relying on their ballot instructions. The district court denied an injunction because Appellants lack standing.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

STATE REGULATIONS

OTHER AUTHORITIES

LEGAL ISSUES

1. Whether Appellants lack Article III and prudential standing to bring their Electors Clause and federal statutory claims?

   Republican National Committee v. Common Cause of Rhode Island, Sup. Ct. Docket 20A28, 591 U.S. __ (Aug. 13, 2020 order in pending case)

2. Whether Appellants can obtain an injunction to change Minnesota's rule on ballot timeliness days before the election, despite the *Purcell* principle and equitable doctrine of laches?

   Purcell v. Gonzalez, 549 U.S. 1 (2006)
   Monaghen v. Simon, 888 N.W.2d 324 (Minn. 2016)

3. Whether this Court should abstain from considering this collateral attack on a state court judgment under *Pennzoil*?

   Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987)

4. Whether Appellants' Article II Electors Clause claim and statutory claim are likely to succeed on the merits?

   Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. 787 (2015)
   Federalist No. 68
   3 U.S.C. § 1

5. Whether the balance of harms weighs against an injunction, when Minnesota has stated its interest in orderly elections and minimizing voter confusion?

   Carlson v. Simon, 888 N.W.2d 467 (Minn. 2016)
   Hippert v. Ritchie, 813 N.W.2d 374 (Minn. 2012)

STATEMENT OF THE CASE

I. MINNESOTA'S ABSENTEE VOTING SYSTEM AND CERTIFICATION OF RESULTS.

A. Minnesota's Election Day Receipt Rule.

Early and absentee voting begins 46 days before election day in Minnesota, which was September 18, 2020, for the November 3 general election. Minn. Stat. § 203B.081, subd. 1. While a voter may apply for an absentee ballot up to one day before the election, Minnesota law states that absentee ballots must be received either by 3:00 p.m. (if hand-delivered) or 8:00 p.m. (if delivered by mail) on election day. Minn. Stat. § 203B.08 subd. 3; Minn. R. 8210.2200 subp. 1 (the "election day receipt rule"). Ballots received after these times are marked late and not counted.

B. The Counting of Absentee Ballots.

County ballot boards determine whether absentee ballots have been properly cast. Minn. Stat. § 203B.121. After the polls close on election day, the boards tally the accepted ballots, which are added to the in-person votes. *Id.*, subd. 5. The totals are reported to a county canvassing board. Minn. Stat. §§ 204C.19, 204C.31, subd. 3. The county canvassing boards meet to certify county results between three and ten days after the election. Minn. Stat. § 204C.33, subd. 1. The county boards transmit their certified results to the Secretary of State. *Id*. On the third

Tuesday following election day, the State Canvassing Board meets to certify the official statewide results and declare the winners. *Id.*, subd. 3.

C. The Presidential Electors and the "Safe Harbor" Date.

In a presidential election, the official statewide results determine the state's electors for the Electoral College. Minn. Stat. §§ 208.02-.05. The electors chosen by the party that receives the most votes must cast their electoral votes for their party's presidential nominee. Minn. Stat. § 208.43. Congress generally must accept the votes of a state's electors, if they are certified at least six days before the meeting of the Electoral College, often called the "safe harbor" date. 3 U.S.C. § 5. This year, the safe harbor date is December 8.

D. The Secretary of State's Authority.

The Secretary of State is a constitutional officer and Minnesota's chief elections officer. Minn. Const. art. VII, § 8; *Clark v. Pawlenty*, 755 N.W.2d 293, 299 (Minn. 2008). He has the authority to prescribe rules for the receipt of absentee ballots, in addition to those set by the legislature. Minn. Stat. § 203B.08, subd. 4. When provisions of Minnesota's election laws cannot be implemented "as a result of an order of a state or federal court," the Minnesota legislature has directed that the Secretary "shall adopt alternative election procedures to permit the administration of any election affected by the order. The procedures may include

the voting and handling of ballots cast after 8:00 p.m. as a result of a state or federal court order." Minn. Stat. § 204B.47.

II. PROCEDURAL HISTORY.

A. *LaRose v. Simon*

On May 13, 2020, a group of plaintiffs filed suit against Secretary Simon in state court. They sought to enjoin enforcement of two Minnesota election laws: Minnesota's election day receipt rule and the requirement that a witness certify an absentee ballot. *LaRose v. Simon*, No. 62-CV-20-3149, Minn. 2d Judicial Cir., County of Ramsey. The plaintiffs challenged these laws generally and as applied during the Covid-19 pandemic.

After arms-length negotiations, the plaintiffs and the Secretary entered into a consent decree for the August 11 primary. App. 58-71. It provided that the witness requirement is unenforceable and, most relevantly, established a postmark rule, under which ballots are timely if postmarked by election day. *Id.* Judge Grewing signed the consent decree on June 17. *Id.* Local election officials implemented the required changes, and the primary election was held with no significant problems, despite record-level turnout. *See* Tim Harlow, *More than 100,000 voters cast ballots in primary in Minneapolis*, Star Trib. (Aug. 12, 2020).

After plaintiffs filed for an injunction as to the November 3 general election, the parties again negotiated a consent decree, which they filed on July 17. App.

73-88. Similar to the primary election, this consent decree provides that the witness requirement is suspended for the general election and that ballots postmarked by election day, and received within seven days, are timely.

As to the election day receipt rule, the consent decree establishes:

> For the November General Election Defendant 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. 8210.2200 subp. 1, and 8210.3000, that ballots be received by 8:00 p.m. on Election Day if delivered by mail. Instead, the deadline set forth in paragraph VI.D below shall govern.
>
> . . .
>
> Defendant shall 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). For the purposes of this Stipulation and Partial Consent Decree, postmark shall refer to any type of imprint applied by the United States Postal Service to indicate the location and date the Postal Service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks. Where 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.

App. 81-82.

The consent decree contains undisputed stipulated facts justifying these changes. *Id.* at 75-76 (a surge in absentee voting due to the pandemic "threaten[s] to slow down the process of mailing and returning absentee ballots" and "[m]ail deliveries could be delayed by a day or more" due to Covid-19).

The district court heard argument on the consent decree on July 31. By that time, the Republican Party of Minnesota, the Republican National Committee, and the National Republican Congressional Committee had moved to intervene, and the court allowed them to participate in the arguments. On August 3, the court signed the consent decree and entered an accompanying order explaining the decision and why plaintiffs were likely to succeed on the merits. App. 90-114. The court found that the requirements of the Minnesota Constitution will be carried out by the implementation of the decree. App. 78.

On August 10, the intervening parties appealed directly to the Minnesota Supreme Court, which granted their petition for accelerated review. *LaRose v. Simon*, A20-1040, Minn. Sup. Ct. (Aug. 12, 2020 PFR Grant). On August 13, the U.S. Supreme Court issued an order rejecting a challenge to a similar consent decree in Rhode Island. *Republican National Committee v. Common Cause of Rhode Island*, Sup. Ct. Docket 20A28, 591 U.S. __ (Aug. 13, 2020 order in pending case); App. 125. The Republican Party of Minnesota, the Republican National Committee, and the National Republican Congressional Committee responded by voluntarily dismissing their appeal of the Minnesota consent decree and waiving their rights to challenge it in any other forum. App. 116-121. This waiver of rights also applies to Donald J. Trump for President, the Trump

campaign, which was party to a consolidated case at the Minnesota Supreme Court and joined in waiving its rights to challenge the consent decree. *Id.*

The Minnesota Supreme Court dismissed the appeal, on August 18, based on this stipulation of dismissal. App. 122-123.

On August 28, the Secretary of State's Office, pursuant to the consent decree, sent absentee ballot instructions to local election officials. In large letters, these instructions inform voters: "Your returned ballot must be postmarked **on or before** Election day (November 3, 2020) & received by your Absentee Voting Office within 7 days of the election . . . to be counted." App. 126, 139-140. Voters began receiving ballots with these instructions on September 18, when absentee and early voting began in Minnesota. App. 126, ¶ 3. The Secretary's Office also posted information about the postmark rule on its website.[1]

As of Friday, October 23, over 1.7 million mail or absentee ballots have been requested.[2] Almost 1.2 million ballots have been returned and accepted. However, more than 500,000 absentee ballots have been requested but not yet

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[1] *See* Office of the Minnesota Secretary of State, Vote Early by Mail, https://www.sos.state.mn.us/elections-voting/other-ways-to-vote/vote-early-by-mail/.

[2] *See* Office of the Minnesota Secretary of State, Absentee Data, https://www.sos.state.mn.us/election-administration-campaigns/data-maps/absentee-data/.

returned and accepted.[3] To put these numbers in perspective, in the 2016 general election in Minnesota, the total number of ballots cast – including all those cast absentee or by mail, early, and in-person on election day – was about 2.9 million.[4]

B. *Carson v. Simon*

Nearly two months after state court approval of the consent decree, Appellants brought this challenge to the consent decree. They claim it violates the Electors Clause of Article II and 3 U.S.C. §1 for the state court to approve and order a postmark rule for a presidential election. They do not challenge the consent decree as it is applied to state elections on this year's ballot or to federal congressional and senate elections.

On September 24, Appellants moved for a preliminary injunction. On October 12, after full briefing and a hearing, the district court judge issued a 38-page order denying the motion because Appellants lack standing. That same day, Appellants appealed and filed a motion for an injunction pending appeal with the district court. On October 15, Appellants filed an emergency motion for an injunction pending appeal with this Court. On October 16, the district court issued

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[3] *Id.*

[4] *See* Office of Minnesota Secretary of State, 2016 Election Statistics, https://www.sos.state.mn.us/elections-voting/election-results/2016/2016-general-election-results/2016-election-statistics/.

a 16-page order denying the motion pending appeal. On October 23, this Court requested briefing on the merits of the appeal and set a hearing for October 27.

SUMMARY OF ARGUMENT

This appeal fails for five reasons. First, Appellants lack standing, as the district court explained in its two thorough orders below. Second, under the *Purcell* principle and laches doctrine, Appellants waited too long and brought this lawsuit too close to the election. Third, this Court should abstain from interfering with the state court judgment. Fourth, Appellants' claims are meritless. Fifth, the balance of harms weighs heavily against Appellants.

ARGUMENT

I. LEGAL STANDARD

Appellants must clear multiple hurdles before the Court addresses the merits of their appeal. Even if Appellants clear those hurdles, injunctive relief is an extraordinary remedy. This Court "will reverse a decision to deny a preliminary injunction only if the district court has abused its discretion." *Mgmt. Registry, Inc. v. A.W. Companies, Inc.*, 920 F.3d 1181, 1183 (8th Cir. 2019). The Court considers four factors: (1) the threat of irreparable harm to the movant, (2) the balance of harm among the parties, (3) the probability of success on the merits, and (4) the public interest. *Id.* The probability of success is the predominant factor, but a failure to demonstrate irreparable harm is also an independently sufficient ground to deny relief. *Id.*

II. APPELLANTS LACK STANDING.

The district court issued two thorough orders, explaining why it found Appellants lack Article III and prudential standing. Appellants are making the same standing arguments the district court rejected in its combined 54 pages of discussion, analysis, and conclusions. For all the reasons in the district court's orders, Appellants lack Article III and prudential standing. In addition, they lack standing to attack the consent decree and challenge the status quo in Minnesota, under the Supreme Court's order in *Republican National Committee v. Common Cause of Rhode Island*, Sup. Ct. Docket 20A28, 591 U.S. __ (Aug. 13, 2020 order in pending case); App. 125.

A. Appellants Lack Article III Standing.

Appellants lack standing to sue under Article III, either in their capacity as individual voters or as electors.

To the extent Appellants are suing in their capacity as voters, their asserted injuries are too generalized to support standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992). Appellants suggest that they, as Minnesota voters, are injured by "vote dilution." Appellants essentially argue that their votes will have less impact because more Minnesotans will be able to cast valid ballots in the November 3 election with the extension of the deadline for receiving and counting ballots.

The fundamental problem with this type of injury is that it does not differentiate Appellants from anyone else in the public at large. *Lujan*, 504 U.S. at 573–74 (1992); *see also Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485, (1982) ("The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries."). This theory is "precisely the kind of undifferentiated, generalized grievance about the conduct of government" that fails to confer Article III standing. *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

Appellants have nowhere indicated how their interests in voting differs from the general interests of Minnesota voters. Without any sort of particularized injury on their voting rights by the consent decree, they cannot establish standing.

The district court correctly denied standing on these grounds and added its voice to the growing number of courts that have rejected this theory of vote dilution to confer standing. App. 21-22. (collecting cases). The district court also correctly rejected Appellants' attempt to gain standing on a generalized theory of voter confusion. App. 24.

To the extent Appellants are suing in their capacity as Republican Party electors, they also cannot establish standing.

As an initial matter, the Republican Party of Minnesota and Donald J. Trump for President, Inc., expressly waived their rights to challenge the consent decree in any judicial forum. App. 116-121. This waiver was a condition of the stipulation to dismiss the appeal challenging the consent decree in state court: "Appellants waive the right to challenge in any other judicial forum the August 3, 2020 Orders and the August 3, 2020 Stipulations and Partial Consent Decrees that formed the basis for the above-captioned consolidated appeals." *Id*. The Minnesota Supreme Court then entered an order dismissing these appeals, pursuant to the joint stipulation. App. 122-23.

Appellants cannot claim standing as members and representatives of a group that has expressly waived any right to challenge the decree.

In addition, the district court correctly concluded that Appellants lack standing as electors because any harm is purely conjectural and hypothetical: "The Court cannot reasonably infer any nexus between the entry of the Consent Decree and a diminished likelihood of their service as presidential electors." App. 33. Appellants' assertion of harm based on the argument that Minnesota could miss certifying its electors by the "safe harbor" deadline is especially speculative. Nothing in the consent decree changes the timeline by which Minnesota certifies its statewide results and presidential electors. As for Appellants' argument that the consent decree could lead Congress to choose to reject Minnesota's electors, the

district court explained why this contorted argument fails to confer standing. When Congress receives a set of electoral votes from a state, Congress can only reject those votes in narrow circumstances. "To suppose that Congress would make such findings requires a good deal of speculation; to further suppose that Congress would make these findings because of Secretary Simon's actions here requires even more." App. 29.

B. Appellants Lack Standing to Challenge the Consent Decree and Status Quo in Minnesota under *Common Cause of Rhode Island*.

The U.S. Supreme Court recently rejected a challenge to a consent decree, approved for the general election in Rhode Island, on standing grounds that are applicable here.

The decree, between the Rhode Island Secretary of State and a group of plaintiffs, suspended enforcement of Rhode Island's requirement that a witness certify an absentee ballot, for the November 3 general election. A federal district court approved the consent decree. *See Common Cause of Rhode Island v. Gorbea*, 20-cv-318, 2020 WL 4365608 (D.R.I.) (July 30, 2020). Intervenors, the Rhode Island Republican Party and the Republican National Committee, unsuccessfully moved for a stay at the First Circuit Court of Appeals. *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11 (1st Cir. Aug. 7, 2020).

The intervenors applied to the U.S. Supreme Court for an emergency stay. *Republican National Committee v. Common Cause of Rhode Island*, Sup. Ct.

Docket 20A28, 591 U.S. __ (Aug. 13, 2020 order in pending case). On August 13, the Supreme Court denied the emergency stay request, because the intervenors lacked a cognizable interest and the witness requirement had been suspended in the previous Rhode Island election due to Covid-19:

> [H]ere the state election officials support the challenged decree, and no state official has expressed opposition. Under these circumstances, the applicants lack a cognizable interest in the State's ability to enforce its duly enacted laws. The status quo is one in which the challenged requirement has not been in effect, given the rules used in Rhode Island's last election, and many Rhode Island voters may well hold that belief.

Id. (citation and quotation omitted); App. 125.

The exact same reasoning applies here, with even greater force. The state election officials support the challenged consent decrees, and no state official has expressed opposition. The status quo for the last election in Minnesota, the August 11 primary, is one in which there was a postmark rule, pursuant to the June 17 consent decree in *LaRose*. Many Minnesota voters believe that this is the rule for the general election, because they have received instructions with their ballots telling them this is the rule.

C. Appellants Lack Prudential Standing.

The doctrine of standing imposes prudential limitations that require a plaintiff to "assert his own legal rights and interests," rather than resting "his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004). "By imposing prudential limitations on standing, the

judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to litigants best suited to assert a particular claim." *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth*., 342 F.3d 871, 880 (8th Cir. 2003). A plaintiff may run afoul of prudential standing limits "because the claim rests on the legal rights of third-parties." *Id*.

Appellants lack prudential standing because their claims assert injuries to third parties, rather than injuries to themselves. Appellants are two individuals. Both have been nominated by the Republican Party to be electors for Minnesota, and one is a member of the Minnesota House of Representatives. Compl. ¶¶ 7-8. Their claims assert injuries that are not personal to them.

Appellants' claims are based on laws that protect the Minnesota State Legislature and Congress. In Count I, Appellants alleged that the Secretary violated Article II of the Constitution by extending the receipt deadline because Article II "vests authority solely in the state legislature to modify the manner and time of elections." *Id*. ¶ 79. Similarly, in Count II, they alleged that the Secretary violated Article II because "Article II authorizes only Congress to set the date for presidential elections." *Id*. ¶ 85. They argue that the consent decree "usurps the power of Congress" and "also usurps the power of the Minnesota Legislature to set the manner of conducting elections." *Id*. ¶¶ 61-62.

Because usurpation of congressional or legislative power is an injury to those legislative bodies, not to Appellants themselves, Appellants lack prudential standing. *See Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty*., 115 F.3d 1372, 1381-82 (8th Cir. 1997) (plaintiffs lacked prudential standing where they were asserting the constitutional rights of third parties).

While Appellants' grievance is based on the Secretary allegedly usurping the power of Congress and the Legislature to make certain rules regarding elections, Appellants represent neither entity. They cannot rely on alleged injuries to those entities to establish standing. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019) (finding Virginia House of delegates lacked standing to challenge usurpation of authority over redistricting maps because "the Virginia constitutional provision the House cites allocates redistricting authority to the 'General Assembly,' of which the House constitutes only a part" and "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole").

For these reasons, the district court correctly determined that Appellants lack prudential standing. *See also Corman v. Torres*, 287 F. Supp. 3d 558 (M.D. Pa. 2018) (plaintiffs lacked prudential standing to bring a claim under the Elections Clause of Article I because they "are neither the Pennsylvania General Assembly

nor a group to which Pennsylvania has delegated the Commonwealth's lawmaking power").

III. APPELLANTS CANNOT GET THE RELIEF THEY SEEK UNDER THE *PURCELL* PRINCIPLE AND LACHES DOCTRINE.

Appellants filed this lawsuit after voting began in Minnesota for the general election and nearly two months after entry of the consent decree. Nearly two million voters have already received ballots with instructions notifying them of the postmark rule. Election day is days away. Any injunction now would certainly mean that some voters will not be able to get their ballots in on time. The *Purcell* principle and equitable doctrine of laches bar the relief Appellants seek at this late date.

Last-minute changes deprive election officials of the time they need to implement changes and notify voters. Orderly election administration requires knowing the rules for the election well in advance of voting. Ideally, any changes to those rules should come with plenty of lead time, so election officials can implement the changes and notify voters. Highlighting these concerns, the Supreme Court, in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), announced a presumption against last-minute interventions in the electoral process: "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 7.

The *Purcell* principle is a sufficient basis to deny injunctive relief. *See id.* at 5. In the *Purcell* case itself, the Supreme Court vacated a lower court's injunction because it changed an election rule too close to an election. *Id.* at 8.; *see also Short v. Brown*, 893 F.3d 671, 680 (9th Cir. 2018) ("[E]ven if the merits question were close, the district court did not abuse its discretion [by denying a preliminary injunction on *Purcell* grounds]").

In this case, Appellants waited nearly two months to seek an injunction against the consent decree. They wish to change the rules for ballot timeliness in Minnesota mere days from election day. Their decision to wait until so close to election day is fatal under *Purcell*.

Laches, like *Purcell*, requires denial of an injunction. Courts apply the equitable doctrine of laches to "prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay." *Monaghen v. Simon*, 888 N.W.2d 324, 328–29 (Minn. 2016). The Minnesota Supreme Court has repeatedly denied election challenges due to laches. *See Clark v. Reddick*, 791 N.W.2d 292, 294–96 (Minn. 2010); *Clark v. Pawlenty*, 755 N.W.2d 293, 303 (Minn. 2008); *Marsh v. Holm*, 55 N.W.2d 302, 304 (Minn. 1952). The reason is that the "very nature of matters implicating election laws and proceedings routinely requires expeditious consideration and disposition by courts

facing considerable time constraints imposed by the ballot preparation and distribution process." *Peterson v. Stafford*, 490 N.W.2d 418, 419 (Minn.1992).

Laches requires dismissal when "there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for." *Monaghen*, 888 N.W.2d at 328-29. Here, Appellants sat on their rights for nearly two months before suing. If they had sued in August, this issue could have been resolved before voting began on September 18 and voters received their absentee ballots and instructions. Now, the Secretary of State would obviously be prejudiced by a last-minute injunction that could create chaos for Minnesota's election. By sitting on their rights as the election neared, Appellants forfeited their rights.

IV. THIS COURT MUST ABSTAIN UNDER *PENNZOIL*.

In *Pennzoil Co. v. Texaco, Inc*., 481 U.S. 1 (1987), after Texaco lost in state court, it filed a federal lawsuit to enjoin enforcement of the state court judgment, alleging violations of the U.S. Constitution. *Id*. at 13. The Supreme Court held that the federal district court could not entertain the suit because "federal injunctions" may not be used to "interfere with the execution of state judgments," particularly where the federal claim could have been raised in the state court action. *Id*. at 13-16. The purpose of *Pennzoil* is to preserve the state's interest in

protecting "the authority of the judicial system, so that its orders and judgments are not rendered nugatory." *Id.* at 14 n.12.

Pennzoil forbids the relief Appellants seek here, because Appellants seek a federal injunction that would render the state court's judgment nugatory. *Pennzoil* applies even though Appellants were not parties in state court. *Pennzoil* is a form of *Younger* abstention, which bars claims from federal plaintiffs whose interests are inextricably intertwined with, or essentially derivative of, parties to a state court action. *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 881 (8th Cir. 2002) (abstention applies when federal plaintiff's interests are "intertwined" with state court parties); *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 82-84 (2d Cir. 2003) (abstention applies when federal plaintiff's claims are "derivative" of state court party's). Appellants' interests are clearly intertwined with, and essentially derivative of, the interests of the Republican Party of Minnesota and Donald J. Trump for President, two entities that expressly waived their right to challenge the consent decree in any judicial forum. App. 116-121. Appellants claim that they are members of the Republican Party and the party's nominees to serve as electors for the Republican nominee in this presidential election. Compl. ¶¶ 7-8, 73 (ECF No. 1). Appellants cannot credibly claim that their interests are distinct from the Republican Party's or the Trump Campaign's on these issues.

V. APPELLANTS' ARTICLE II CLAIM FAILS ON THE MERITS.

Even if Appellants' claims are justiciable, they are not likely to succeed on the merits. Appellants' claim under the Electors Clause of Article II fails because their constitutional theory has no grounding in the clause's text, purpose, or history. Even if the Electors Clause requires a legislative enactment to authorize the Secretary to implement the relief in the consent decree, Minnesota has such a statute.

A. Nothing in Article II Prevents a State from Finding that Its Election Laws Violate Its Constitution.

Appellants claim that the Minnesota court ran afoul of the U.S. Constitution's Electors Clause when it implemented Minnesota's Constitution in reviewing Minnesota's election laws on ballot timeliness. Appellants' reading has no grounding in the clause's text, history, or purpose.

The Electors Clause provides: "Each State shall appoint, 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." Art. II, § 1, cl. 2.

The text empowers state legislatures to set the "manner" for how electors are "appoint[ed]." *Id.* In Minnesota, the legislature has established that electors are "chosen at the state general election." Minn. Stat. § 208.02. While Article II grants authority to state legislatures, nothing in Article II precludes state court

judges from reviewing the election procedures that state legislatures establish. There is no textual basis to support Appellants' theory that Article II strips state courts of their normal judicial review authority.

Supreme Court precedent also suggests that the clause should not be read to prevent a state court from reviewing and ordering changes to state election procedures under the state constitution. A body of Supreme Court case law makes this point regarding the conceptually similar Elections Clause of Article I, which grants state legislature's authority to set time, place, and manner rules for U.S. congressional elections. Art. I, § 4, cl. 1. While the Electors Clause of Article II addresses presidential elections, the Elections Clause of Article I addresses congressional elections. Both clauses grant authority to state legislatures.

The Supreme Court has repeatedly held that nothing in the Elections Clause alters a state court's authority to review state election laws and provide relief from them. In another case arising out of Minnesota, *Smiley v. Holm*, 285 U.S. 355 (1932), the Court held that the Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws" and does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id*. at 365, 368.

More recently, the Supreme Court has explained: "Nothing in that [Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 817-18 (2015).

Historically, Appellants' reading of Article II also finds no support. Alexander Hamilton, writing in the Federalist Papers, emphasized that the primary purpose of the electoral process established by Article II was to minimize "cabal, intrigue, and corruption" in the selection of the President. THE FEDERALIST NO. 68 (Alexander Hamilton). The Article II process ensured that electors could not be bribed because their identities would not be known in advance. Most importantly for Hamilton, separating the meetings of the electors by state made these individuals less susceptible to a mob mentality: "And as the electors, chosen in each state, are to assemble and vote in the state, in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place." *Id*.

This basic purpose is not implicated in this case at all. By changing Minnesota's election day receipt rule to a postmark rule for the 2020 election due

to Covid-19, the consent decree does not increase the opportunity for corruption that the Electors Clause in Article II was designed to guard against.

Appellants' reading of the Electors Clause also conflicts with centuries of federalism precedent. Federalism takes it as "fundamental . . . that state courts be left free and unfettered by [federal courts] in interpreting their state constitutions." *Florida v. Powell*, 559 U.S. 50, 56 (2010) (quoting *Minnesota v. Nat'l Tea Co*., 309 U.S. 551, 557 (1940)). The Supreme Court has repeatedly held that "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Whether an issue is "decided well or otherwise by the State court, [federal courts] have no authority to inquire." *Murdock v. City of Memphis*, 87 U.S. 590, 638 (1874). This precedent applies here, because the consent decree and August 3 order approving it were grounded in the Minnesota Constitution. App. 78.

Appellants advance a reading of the Constitution completely contrary to these federalism principles. They would leave no room for state courts to review the constitutionality of state election laws, at least as those laws would apply to federal elections. Appellants are unlikely to succeed on this unprecedented reading of the U.S. Constitution.

B. Even If Article II Requires a Legislative Enactment Authorizing Changes to Election Procedures, Minnesota Has Such a Statute.

Even if Article II requires a legislative enactment to authorize the Secretary to implement the relief in the consent decree, Minnesota has such a statute. Section 204B.47 provides: "When a provision of the Minnesota Election Law cannot be implemented as a result of an order of a state or federal court, the secretary of state shall adopt alternative election procedures to permit the administration of any election affected by the order." Minn. Stat. § 204B.47. This authority specifically includes procedures for "the voting and handling of ballots cast after 8:00 p.m. as a result of a state or federal court order." *Id.*

The consent decree and accompanying order are a judgment and order from a state court establishing that the election day receipt rule cannot be implemented in 2020. *See Hentschel v. Smith*, 153 N.W.2d 199, 206 (Minn. 1967) (consent decrees have the force of a court judgment). By implementing this court judgment, the Secretary is acting pursuant to this express legislative enactment.

VI. APPELLANTS' STATUTORY CLAIM FAILS ON THE MERITS BECAUSE THE CONSENT DECREE DOES NOT CHANGE THE DATE OF THE ELECTION.

Appellants' second claim is unlikely to succeed because the consent decree does not change the date of the election.

Appellants rely on a single sentence in the decree: "Where 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." App. 82.

Appellants twist this language to claim that it changes the date of the election. It does no such thing. It does not alter the rule that a ballot must be mailed by election day. It just establishes a presumption to ensure that voters are not disenfranchised when they timely submit their ballots but, for no fault of their own, the Postal Service inadvertently does not postmark their ballots.

When a ballot lacks a postmark, due to inadvertence or negligence by the Postal Service, it can lead to post-election litigation over whether to count the ballot. *See, e.g., Gallagher v. New York State Bd. of Elections*, No. 20 CIV. 5504, 2020 WL 4496849 (S.D.N.Y. Aug. 3, 2020). Unfortunately, this kind of post-election litigation about the validity of ballots cast for particular candidates "threatens to undermine voter confidence in the electoral process and potentially to undermine confidence in the judiciary as well." Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 Stan. L. Rev. 1, 5 (2007).

To avoid this post-election problem, the consent decree establishes a presumption that ballots without postmarks are timely, if they are received within seven days and there is no evidence, such as other markings or dates, showing they were mailed after election day. This presumption is based on the Postal Service's own guidance regarding how long it takes for a ballot to go through the postal

system and be delivered to election officials. *See* State And Local Election Mail—User's Guide, United States Postal Service, January 2020; Office of Inspector General, U.S.P.S., Rpt. No. 20-235-R20, Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Center Service Area 6-7 (2020);[5] App. 75-76 (citing postal service guidance and reports on ballot delivery times).

Recent reports have found that "postal districts across the country are missing by wide margins the agency's own goals for on-time delivery, raising the possibility that scores of mailed ballots could miss deadlines for reaching local election offices if voters wait too long." Anthony Izaguirre and Pia Deshpande, *Records: Mail delivery lags behind targets as election nears*, Star Trib. (Sept. 24, 2020). In light of these reports, it is even more important that voters have protections to ensure they are not disenfranchised if, through no fault of their own, the Postal Service fails to postmark their ballot.

Most importantly, though, the presumption in the consent decree does not change the date of the election. It simply establishes an evidentiary presumption for determining whether a ballot was mailed on election day. Under the consent decree, election day remains November 3.

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[5] The guidance document is available at https://about.usps.com/publications/pub632.pdf. The report is available at https://www.uspsoig.gov/sites/default/files/document-library-files/2020/20-235-R20.pdf.

Federal law does not address what methods states may or may not use to determine whether a ballot was cast on election day. While the relevant statute sets the day for holding federal elections, it says nothing about procedures for determining whether a mail ballot was properly cast. 3 U.S.C. § 1. Congress could regulate these procedures but has chosen not to. Several states have enacted or adopted rebuttable presumptions, just like the one in the consent decree.[6] These rebuttable presumptions do not conflict with anything in the statute, because Congress has chosen not to regulate these types of procedures. Instead, Congress has left the issue to the states.

Recently, the Pennsylvania Supreme Court issued nearly identical relief to the consent decree at issue here. It ordered that, because of delays in mail service due to Covid-19, absentee ballots are timely if they are postmarked by election day, instead of received by election day. *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020). Also, as with the consent decree, the court established that ballots "will be presumed to have been mailed by Election Day unless a preponderance of the evidence

[6] *See, e.g.,* Nev. Rev. Stat. AB 4, § 20(2) ("If a mail ballot is received by mail not later than 5 p.m. on the third day following the election and the date of the postmark cannot be determined, the mail ballot shall be deemed to have been postmarked on or before the day of the election."); N.J. Stat. Ann. § 19:63-31(m) (adopting a similar standard as long as the ballot arrives within two days of Election Day).

demonstrates that it was mailed after Election Day." *Id.* at *31. On October 19, on direct review of the state court order, the U.S. Supreme Court denied an emergency motion to stay the order. *Republican Party of Pennsylvania v. Boockvar*, 20A54, 592 U.S. __ (Oct. 19, 2020 order in pending case); *Scarnati v. Boockvar*, 20A53, 592 U.S. __ (Oct. 19, 2020 order in pending case).

There is no precedent that supports Appellants' claim that Congress intended to prevent states from establishing the kind of presumption that several states, including Minnesota in the consent decree, have set for ballot timeliness.

To the extent Appellants are arguing that it violates federal law for any state to have a postmark rule because it pushes the completion of the election administration process past election day, their position is absurd. They are challenging the legality of the laws in as many as nineteen states, where there is some kind of postmark rule for ballot timeliness.[7] Even if Appellants could advance a non-frivolous argument, an emergency motion on the eve of a presidential election is no time to call into question the postmark laws that exist in so many states.

[7] For a list of these states, see National Conference of State Legislatures, Receipt and Postmark Deadlines for Absentee Ballots, https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx.

In addition, Appellants' argument that the consent decree is problematic because it will cause Minnesota's election administration process to be completed after election day reflects their ignorance of how elections are administered in Minnesota under state law. Minnesota's election administration process is never completed by midnight on election night. Minnesota law expressly contemplates that the election administration process, including the initial tabulation of the votes cast on election day, can take more than 24 hours from the time the polls close – that is, they may not be complete even the day after election day. *See, e.g.,* Minn. Stat. § 204C.28, subd. 1 ("Every county auditor shall remain at the auditor's office to receive delivery of the returns, to permit public inspection of the summary statements, and to tabulate the votes until all have been tabulated and the results made known, or until 24 hours have elapsed since the end of the hours for voting, whichever occurs first."). The official county canvassing of results cannot even begin until three days after the election and doesn't need to be complete until 10 days after election day. *See* Minn. Stat. § 204C.33. There is no merit to Appellants' argument regarding the need to complete the election administration process on election day.

VII. THE BALANCE OF HARMS AND PUBLIC INTEREST WEIGH HEAVILY AGAINST AN INJUNCTION.

The state's strong interests in orderly elections and minimizing voter confusion cut heavily against an injunction. *See Carlson v. Simon*, 888 N.W.2d

467, 474 (Minn. 2016) (recognizing the "State's interest in the orderly administration of the election and electoral processes"); *Hippert v. Ritchie*, 813 N.W.2d 374, 381 (Minn. 2012) (recognizing the state interest in minimizing "voter confusion").

It is incredibly important that this presidential election, held during a once-in-a-century pandemic, goes as smoothly as possible. An order enjoining the postmark rule at this late date would cause confusion and interfere with orderly election administration. Since voting began on September 18, ballots have been mailed to voters with instructions notifying them that their ballots will be timely if they are postmarked by election day. App. 126. At this point, the postmark rule cannot be undone without causing massive confusion and disenfranchisement. The worst-case scenario would be that large numbers of ballots are not counted because voters, relying on their ballot instructions, mail their ballots on or shortly before election day. This disenfranchisement is a likely outcome if Appellants prevail.

Unquestionably, an injunction now would mean that some voters simply would not be able to cast ballots in time. Voters would be disenfranchised if they did not learn about the injunction. Voters would also be disenfranchised if they learned about the injunction but could not vote in-person, either because they are traveling outside the state, or because they want to stay away from crowded polling places for health reasons during the pandemic.

The risk of disenfranchisement is greatest for Minnesotans who live outside the Twin Cities metro area, because their mail must travel to far-away processing centers before delivery to the ultimate destination.[8] For example, mail from Mankato goes to a processing center in Minneapolis.[9] Mail from Duluth goes to a processing center in St. Paul.[10] This means that a ballot must travel to a Twin Cities processing center, before returning to the local elections office in the area. Obviously, this takes additional time and increases the risk that a ballot will arrive after election day, even if it is mailed days in advance.

The U.S. Postal Service "recommends that voters mail their marked return ballots at least 1 week before the due date." State And Local Election Mail—User's Guide, United States Postal Service, January 2020;[11] App. 76. If, at this late date, the Court issues an injunction altering the ballot receipt deadline set in the August 3 consent decree, voters with absentee ballots at their homes will not be

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[8] *See* U.S. Postal Service, *Five Minnesota Mail Processing Operations Moving* (Feb. 23, 2012), https://about.usps.com/news/state-releases/mn/2012/mn_2012_0223.htm.

[9] *See* U.S. Postal Service, *Streamlining Operations: Mankato* (Feb. 19, 2012), https://about.usps.com/streamlining-operations/mankato-final-redacted.pdf.

[10] *See* U.S. Postal Service, *Streamlining Operations: Duluth* (Feb. 16, 2012) https://about.usps.com/streamlining-operations/duluth-final-redacted.pdf.

[11] The guidance document is available at https://about.usps.com/publications/pub632.pdf.

able to comply with the Postal Service's own guidance for when to mail their ballots.

An injunction would also cause voter confusion and problems with election administration, because it would lead to different rules on ballot timeliness for the state, congressional, and presidential races on the ballot in Minnesota. The consent decree establishes a postmark rule for all three sets of races. This Court has no jurisdiction to enjoin the consent decree to the extent it applies Minnesota law to Minnesota state elections. And, Appellants have not brought any claims related to the federal elections for Congress and Senate that are on the ballot in Minnesota. An injunction would just apply to the presidential election. The result would be that Minnesota would have a postmark rule for most of the races on the ballot and an election day receipt rule for the presidential election. This would cause voter confusion and create difficulties in processing and tallying ballots.

In short, an injunction days before election day would cause disenfranchisement and confusion. Appellants come nowhere close to identifying an interest that outweighs the state interest in minimizing voter confusion and ensuring orderly election administration.

CONCLUSION

For these reasons, the Court should deny the motion.

Dated: October 26, 2020

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s/ Jason Marisam
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