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

Reply in Support of Emergency Motion for Injunction Pending Appeal and Expedited Consideration

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Introduction

This case presents vital federal-law questions that will have to be answered either now or after Election Day. Both the Secretary and Intervenors say their aim is to avoid disenfranchisement of Minnesota voters, but disenfranchisement is what the policies they defend will do. When voters rely on those policies to cast 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 policies 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.

I. Plaintiffs' Claims Are Likely To Succeed

A. The Electors Clause

Because Article II "leaves it to the legislature exclusively to define the method" of appointing electors, *McPherson v. Blacker*, 146 U.S. 1, 27 (1892), neither the Secretary nor a state court may alter bright-line statutory deadlines.

1. The Secretary is incorrect (at 15-16) that *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (2020), supports his actions. The decision had no occasion to address the Electors Clause because (1) the *primary* election at issue did not select electors for the Electoral College and (2) the lower court's extension of the ballot-receipt deadline—which the

Secretary cites as relevant here—was not even before the Supreme Court. *Id.* at 1206. The Eleventh Circuit rejected the Secretary's reading of *RNC* on that basis. *New Georgia Project v. Raffensperger*, --F.3d--, 2020 WL 5877588, at *3 (11th Cir. Oct. 2, 2020).

2. The Secretary is mistaken to claim (at 16) authority to abandon statutes he believes "would violate Minnesota's Constitution." The Electors Clause power vested in state legislatures "'cannot be taken from them or modified by their state constitutions.'" *McPherson*, 146 U.S. at 35. The Clause thereby establishes "a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Id.* at 25. Following *McPherson*, 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, *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 76 (2000), laid it to rest. The Secretary's claim (at 16) that *Republican National Committee v. Common Cause of Rhode Island* holds otherwise is incorrect, as the case involved no Electors Clause issue. *See Common Cause Rhode Island v. Gorbea*, 970 F.3d 11 (1st Cir. 2020).

3. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), and *Smiley v. Holm*, 285 U.S. 355 (1932), do not aid the Secretary. To the extent these *Elections* Clause cases are relevant at all,[1] they interpret "Legislature" to refer to the "lawmaking process" established by a state constitution. 576 U.S. at 804 (emphasis added); *see also* 285 U.S. at 368. While that may include things like "initiatives adopted by the people themselves," 576 U.S. at 793, the Minnesota Constitution confers no role in its lawmaking process on the Secretary or state courts. Instead, laws are enacted when the Legislature presents a bill to the Governor and the Governor signs it, Minn. Const. Art. IV, § 23, as the ballot-deadline statute was.

4. Minnesota Statutes § 204B.47 could not and does not delegate legislative authority to the Secretary. The Secretary and Intervenors have no answer to Appellants' arguments that *Bush* rejected reliance on a similar statute, 531 U.S. at 110-11, and that Section 204B.47 assumes a *valid* order, not a consent decree aimed at circumventing state law by violating the Electors Clause.

Further, they have no persuasive response to Appellants' argument that the Secretary's departure from state law is not the "result" of a state-court order, as Section 204B.47 requires, but of the *Secretary's* asking a state court to

[1] *Arizona* declares that the term "Legislature" in the Constitution "'differs according to the connection in which it is employed'" and, on that basis, rejected Chief Justice Roberts's view in dissent that the term bears the same meaning in both the Elections and Electors Clauses. 576 U.S. at 808. By the majority's lights, while the Elections Clause involves a "lawmaking" function that may involve actors other than the legislature, provisions like the Electors Clause that concern the power to "appoint" do not. *Id*. at 507-08.

rubberstamp the *Secretary's* policy. Intervenors say (at 16) that the state court considered itself "empowered" to issue the same relief, but that portion of the decision concerns an election law not at issue in this case. ECF 14, Ex. C, at 23-25.

B. The Election Day Clause

Acts of Congress establishing the nationwide Election Day require that the "consummation" of voting occur on that date. *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001). Intervenors are thus wrong (at 17) that Congress has not established the "timeliness" of "mail ballots"; *all* ballots must be cast on or before Election Day, which means "the combined actions of voters *and officials* meant to make a final selection[.]" *Foster v. Love*, 522 U.S. 67, 71 (1997) (emphasis added). When the election officials receive ballots *after* Election Day, that "combined action" is untimely, and counting such ballots conflicts with Congress's "objectives," Int's Br. 18, by deviating from the single nationwide Election Day. *See Foster*, 522 U.S. at 73-74. Intervenors conflate (at 18) efforts "to confirm or verify the results" of *timely* ballots—which can occur after Election Day—with accepting *late-received* ballots, which amount to votes after Election Day.

In addition, the "postmark presumption" does not "effectuate" a requirement that ballots be mailed by Election Day because it allows ballots mailed after Election Day to be counted. Intervenors (at 3) call non-postmarked ballots "rare," but they are common. *Gallagher v. N. Y. State Bd. of Elections*, 2020 WL 4496849 (S.D.N.Y. Aug. 3, 2020). That is why Intervenors and the

Secretary adopted their counterintuitive "presumption" for un-postmarked ballots.

II. Plaintiffs Have Standing

Plaintiffs' standing, as both candidates and voters, is secure.

A. Intervenors apparently concede (at 9) Plaintiffs' standing as candidates to seek the same relief on or after Election Day. The notion that everything changes on Election Day ignores that candidates must challenge ballot-eligibility rules before the count is complete, without knowing whether particular ballots were cast for or against them or their definitive vote-totals. *See, e.g.*, *Bush v. Hillsborough County Canvassing Bd.*, 123 F.Supp.2d 1305 (2000) (challenge to absentee-ballot procedures); Minn. Stats. § 204C.13 subd.6 (requiring challenges to ballots *before* counting). While ripeness could be an issue elsewhere, every party here recognizes that the Secretary's actions will require counting thousands of late-received ballots in Plaintiffs' own election. As for Intervenors' claim (at 9) that candidates cannot mount pre-election challenges to the rules of the game, the law is otherwise. *See, e.g., Gallagher v. N.Y. State Bd. of Elections*, --F.Supp.3d--, 2020 WL 4496849, at *9 (S.D.N.Y. Aug. 3, 2020) (recognizing candidate standing because "[c]andidates have an interest…in ensuring that the final vote tally accurately reflects the votes cast"); *Jones v. U.S. Postal Serv.*, --F.3d--, 2020 WL 5627002, at *13 (S.D.N.Y. Sept. 21, 2020) (same).

B. Intervenors label (at 10) Plaintiffs' vote-dilution injury "speculative," but do not dispute the fact that the Secretary's actions will increase total vote-pool by thousands, which necessarily dilutes Plaintiffs' votes.

This does not "affect *all* Minnesota voters" equally: those who cast late-received ballots that federal law holds ineligible benefit at the expense of voters like Plaintiffs casting eligible ballots, whose resulting injury is no different than in cases of "ballot-box stuffing," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). *Lance v. Coffman*, 549 U.S. 437 (2007), actually 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 v. Carr*, 369 U.S. 186 (1962)).

C. Contrary to Intervenors (at 12), there is nothing "speculative" about the harm that would befall Plaintiffs should Minnesota fail to satisfy 3 U.S.C. § 5's "safe harbor." Because the Secretary's actions were not lawfully "enacted prior to [Election Day]," Minnesota will *by operation of law* forfeit safe-harbor status, a risk *Bush* found 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 v. Gore*, 531 U.S. 98, 114 (2000) (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), that threatens to disenfranchise the state.

D. Intervenors' prudential-standing argument concerning Count I (at 13) fails because Plaintiffs assert their own rights. "[P]rivate 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). In requesting relief from injuries to their rights as candidates and voters caused by the Secretary's violation of the Electors Clause, Plaintiffs are no more seeking to enforce the State Legislature's rights than Bush was in *Bush* or *Palm Beach*. In any event, *Bond v. United States* holds that individuals "can assert injury from governmental action taken in excess of the authority that federalism defines," as here. 564 U.S. 211, 220 (2011). An individual's "rights in that regard do not belong to a State," *id*., a point applicable to Article III and "prudential standing rules," *id*. at 225. While Intervenors would limit *Bond* to constitutional provisions involving the "residual sovereignty of the States," the decision rejected all such gerrymandering, *id*., 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.[2]

[2] *Corman v. Torres*, 287 F.Supp.3d 558, 571 (M.D. Pa. 2018), is not to the contrary; in context, the line cited by Intervenors 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.

III. There Is No Basis To Abstain

Younger abstention is unavailable because the state-court proceeding here "does not fall within any of the three exceptional categories" to which *Younger* applies, *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 79 (2013). It is not an "ongoing state criminal prosecution," a "civil enforcement proceeding[]," or (as in *Pennzoil*) a "pending civil proceeding involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id*. 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 civil proceedings that involve run-of-the-mill injunction orders, which instead 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). *Younger*'s conditions are also unsatisfied because there is "no pending state proceeding" respecting the consent decree, *Banks v. Slay*, 789 F.3d 919, 923 (8th Cir. 2015), and because Plaintiffs, as non-parties to the state proceedings, had no "opportunity to raise [their] constitutional claims" there, *Pennzoil v. Texaco, Inc.*, 481 U.S. 1, 16 (1987). While Republican Party entities were participants, Plaintiffs were certified as electors only after the state-court appeal was dropped, Minn. Stat. § 208.03, and no authority recognizes that a political

party's participation in state-court litigation undermines its voters' ability to bring federal-court claims challenging dilution of their votes.

Intervenors' "collateral attack" argument (at 6) fails for the same reasons, and also because Plaintiffs had no "controlling participation and active self-interest in the [state-court] litigation." *Brunsoman v. Seltz*, 414 N.W.2d 547, 550 (Minn. 1987).

IV. *Purcell* and Laches Do Not Bar Relief

The Secretary relies (at 10-13) on the *Purcell* principle but has no response to Appellants' argument (at 17) that the issues raised here could as easily be litigated after as before the election. *See Bush v. Hillsborough Cty. Canvassing Bd.*, 123 F.Supp.2d 1305 (N.D. Fla. 2000). This action cannot be too late when Intervenors (at 9) and the district court criticize it as too *early*.

The charge of belatedness—whether styled as *Purcell* or laches—is misplaced. Appellants did not delay, but filed suit less than a month after they were certified as elector candidates. *Feldman v. Arizona Sec'y of State's Office*, 843 F.3d 366, 369 (9th Cir. 2016) (finding no delay where plaintiffs filed the action "less than six weeks" after their claims became ripe). And the Secretary did not even 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.

V. The Equities Favor an Injunction

The equities favor an injunction because "absentee ballots in voters' hands—right now—promise that their ballot will be counted if postmarked on

or before Election Day and received within 7 days of the election." Int's Br. 5 (quotation marks omitted). The Secretary cannot deliver on that promise. By virtue of federal law, the operative deadline remains 8:00 p.m. on Election Day. When candidates challenge ballots received after that time, they will not 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.

The harm of allowing this policy to proceed cannot be overstated. Without an injunction, untold numbers of Minnesota voters will cast ballots in reliance on the Secretary's unlawful guidance and see their ballots disqualified. The result: complete disenfranchisement. The public interest is to avoid that result, and Appellants, as candidates, share that interest. *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

No countervailing interest cuts against injunction. The Secretary has no interest in misleading voters, and Intervenors' purported interests hinge on the assumption that the Secretary can deliver promises that are beyond his authority to keep.

The Secretary's actions threaten an election meltdown: widespread disenfranchisement, drawn-out litigation over ballot-eligibility, abandonment of safe-harbor status, and all-out chaos in the manner of Florida's 2000 recount further exacerbated by the record-numbers of mail-in ballots to be counted and the counting delay inherent in the Secretary's policy. The die is cast for disaster.

CONCLUSION

The motion should be granted.

Date: October 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. 27(a) because it is 2,600 words. It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Calisto MT font, a proportionally spaced face with serifs. I further certify that the forgoing is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2020, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and will be served via electronic filing upon all counsel of record.

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