UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JAMES CARSON & ERIC LUCERO,

Plaintiffs,

v.

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

Defendant.

and

ROBERT LAROSE, TERESA MAPLES, MARY SANSOM, GARY SEVERSON, & MINNESOTA ALLIANCE FOR RETIRED AMERICANS EDUCATIONAL FUND,

Intervenor-Defendants.

Case No. 0:20-cv-02030-NEB-TNL

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR INJUNCTION PENDING APPEAL

The Court should issue an injunction pending Plaintiffs' appeal from the denial of their motion for a preliminary injunction. An injunction pending appeal would preserve the *status quo* to allow the Eighth Circuit to review the novel questions of law raised in this case. For every presidential election in memory, Minnesota election officials complied with state and federal law requiring voters to vote on or before Election Day, and that law included a requirement that mail-in ballots be received by 8:00 p.m. on Election Day. The Secretary of State concluded only in July 2020 that Election Day is unconstitutional and made the remarkable decision to depart from the plain text of Minnesota law and of the Electors Clause of the United States Constitution, which binds the Secretary to administer the law enacted by "the Legislature" rather

than to write his own elections code from scratch. "[T]he last uncontested status preceding the pending controversy," *First-Citizens Bank & Tr. Co. of N. Carolina v. Outsource Servs. Mgmt.*, No. CIV. 12-1734 ADM/FLN, 2012 WL 3136924, at *1 (D. Minn. Aug. 1, 2012), is one in which the enacted law of Congress and the Minnesota Legislature applies. The Court should enforce that *status quo* pending appeal through an injunction.

The Court's application of standing doctrine is highly restrictive and at odds with how standing principles have been applied in election litigation for generations—indeed, more than a century. Candidates have a concrete and particularized interest in the rules governing elections, and the Court's ruling that no election uncertainty will result from the Secretary's unlawful actions assumes that Plaintiffs will lose on the merits, when the standing inquiry necessarily assumes that Plaintiffs will win. Likewise, the Court's ruling on vote dilution cuts against decades of voting-rights law empowering voters to assert the value of their votes, no matter what effect the challenged state action has on the value of other votes.

Meanwhile, the Court's prudential-standing ruling signals the implausible result that only Congress has the prerogative to sue under preemption doctrine—which is not the law. And the Court's reading of *Bond v. United States*, 564 U.S. 211 (2011), sucks all the life out of its reasoning that constitutional allocations of power exist for private benefit, not for the engrossment of state power. Plaintiffs assert their own interests, not those of the Minnesota Legislature or Congress.

For these reasons, and because Plaintiffs' federal-law claims are meritorious and the Secretary's and Intervenors' smorgasbord of objections to this suit and are unmeritorious, the Court should issue an injunction pending appeal. In all events, it should issue a prompt ruling to allow Plaintiffs to renew their motion, if necessary, in the Eighth Circuit.

BACKGROUND

The facts and issues of this case are known to this Court. Article II of the Constitution delegates to Congress and "the Legislature" of each state the authority to enact the law governing the appointment of presidential electors. Article II, § 1, cl. 2; Article II, § 1, cl. 4. Pursuant to its authority, Congress established a single Election Day, which is November 3 this year. 3 U.S.C. § 1. Pursuant to its share of authority, the Minnesota Legislature established a deadline of 8:00 p.m. on Election Day for ballots to be received at polling places. Minn. Stat. § 203B.08 subd. 3.

The Secretary is neither Congress nor the Minnesota Legislature, and the Secretary has no part to play in "the State's prescriptions for lawmaking." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015). Yet the Secretary established a new deadline for mail-in ballots to arrive at polling places—November 10—and the Secretary established a new policy for counting late-received ballots not even postmarked by November 3. This choice was based on the Secretary's determination that these longstanding statutes violate the Minnesota Constitution and his desire to settle a lawsuit. Although a state-court judge determined that the settlement was "reasonable," Foix Decl. ECF No. 14, Ex. C at 21, Preliminary Injunction Order (the "Order"), ECF No. 59 at 14, no court has adjudged that these provisions violate the U.S. Constitution or Minnesota Constitution. Nor could a Minnesota court lawfully determine that an Act of Congress is void as violative of the Minnesota Constitution.

Plaintiffs are registered Minnesota voters and candidates to serve as electors in the Electoral College. Their votes will be diluted, and their interests as candidates directed injured, by the Secretary's choice to count unlawfully cast ballots, and their opportunity to participate in the Electoral College will be jeopardized by the Secretary's choice not to conduct the presidential election under "laws enacted prior to the

day fixed for the appointment of electors," a necessary condition for Minnesota to qualify for the congressional "safe harbor." 3 U.S.C. § 5; *see Bush v. Gore*, 531 U.S. 98, 110–11 (2000). They filed this action on September 22, 2020, and a preliminary-injunction motion on September 24. The Court conducted a hearing on that motion on October 2 and issued an order denying the motion on Sunday, October 12, 2020. Plaintiffs filed a notice of appeal that same day.

LEGAL STANDARD

Rule 62(d) empowers the Court to "grant an injunction" pending an appeal from the denial of an injunction. Fed. R. Civ. P. 62(d). "In ruling on a request for an injunction pending appeal, the court must engage in the same inquiry as when it reviews the grant or denial of a preliminary injunction." *Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982). "The Court must consider four factors…: (1) the probability that the moving party will succeed on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance of harms as between the parties; and (4) the public interest." *Mgmt. Registry, Inc. v. A.W. Companies, Inc.*, 2018 WL 461132, at *3 (D. Minn. Jan. 16, 2018), *aff'd*, 920 F.3d 1181 (8th Cir. 2019).

ARGUMENT

I. Plaintiffs Are Likely To Succeed on Appeal

At a bare minimum, Plaintiffs raise "substantial questions of law which remain to be resolved." *Walker*, 678 F.2d at 71 (issuing an injunction pending appeal in these circumstances).

A. Article III Standing

1. Candidate Standing

The Court's treatment of candidate standing is unlikely to withstand appellate scrutiny. The issues raised in this case are precisely the issues raised by candidates for

office in cases like *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70 (2000), *Bush v. Gore*, 531 U.S. 98 (2000), and *McPherson v. Blacker*, 146 U.S. 1 (1892). The Court's position that *McPherson*—one of the Supreme Court's leading Article II precedents—was wrongly decided or upended by subsequent doctrinal developments, Order 31–32, will certainly draw close scrutiny on appeal, and the fact that the Court's analysis calls into question virtually all election-related challenges by candidates is equally suspect.

a. The Court's order concedes that Plaintiffs' claims are appropriate for consideration in "post-election litigation with tangible, concrete harms," Order 32, but this contention—which concerns *ripeness*, not standing—does not identify a material difference between this case and the *Bush* litigation with respect to either standing or ripeness.

First, as the Court recounted, Candidate Gore in that litigation contended that the vote totals "included illegal votes and omitted legal votes," Order 33, but it was equally true in that case as here that there was "no reason to infer, much less conclude, that the challenged…ballots would tend to favor one candidate or the other," Order 33 n.20. That is because candidates in election contests must litigate over the rules *first* and *then* accept the outcomes of the application of those rules when the votes are counted. Candidate Gore could not have proven that the votes he wanted counted were votes for him and that the votes he did not want counted were votes for Candidate Bush. No one seriously believed that was the standing requirement. In this case, candidates for office are obligated to raise challenges like those Plaintiffs raise before ostensibly unlawful ballots are counted and not wait to determine whether they *like* the choices of voters. Indeed, Plaintiffs are unaware of any case holding that candidates for office lack standing to challenge the validity under law of not-yet-counted ballots cast in their own election; such challenges are, of course, routine.

Second, the Court's order erroneously assumes that standing was only relevant in the *Bush v. Gore* litigation insofar as Candidate Gore sought the jurisdiction of the lower courts to review the counting practices. Order 32–34. But Article III standing applied in full force to Candidate Bush's invocation of the U.S. Supreme Court's jurisdiction on appeal. *See Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (reiterating that a party "seeking to invoke [the Supreme] Court's jurisdiction" must establish Article III standing). Candidate Bush also did not know, and could not have proved, that the position he took would have resulted "in diminished likelihood of" winning the contest. Order 33. For all Candidate Bush could prove through competent evidence, he might have won the race under Candidate Gore's proposed rules or vice-versa. Indeed, pundits have continued to debate whether Candidate Bush would have prevailed had the recount proceeded under the process the Florida Supreme Court ordered. *See* 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 ("Mr. Bush would have retained a slender margin over Mr. Gore if the Florida court's order to recount more than 43,000 ballots had not been reversed by the United States Supreme Court."). Instead, *Bush* and other cases recognize that candidates have standing to challenge ballot-counting rules, including the rules of ballot validity, in their own election.

b. The Court's order discounts the interests candidates to office have in a lawfully conducted contest, free from uncertainty and confusion. The Court's ruling on election "uncertainty" improperly makes assumptions about the *merits* during the *standing* inquiry. "The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim." *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007),

aff'd sub nom. District of Columbia v. Heller, 554 U.S. 570 (2008); *Warth v. Seldin*, 422 U.S. 490, 502 (1975). That being so, the Court was obligated to assume in assessing standing that the Minnesota Secretary of State unlawfully directed ballot boards to count late ballots—i.e., that the Secretary's challenged actions are invalid.

From the correct starting point, the Order's standing analysis is untenable. First, it is not true that "the Electors are in danger of creating confusion rather avoiding" it. Order 24. The Court is obligated to assume that the *Secretary* has disseminated incorrect instructions about what votes must be lawfully counted and what votes will not be lawfully counted. Blaming the Electors for raising the presumptively correct interpretation of federal law and Article II incorrectly makes an assumption on the merits and blames the messenger.

Second, it does not help that "record is replete with information provided to Minnesota voters about the Postmark Deadline." Order 25. The Court must assume that this information is wrong. That the "record is replete" with allegedly incorrect information only proves that the injury of uncertainty is itself a certainty, not "speculative." Order 24.

Third, it is for the same reason unhelpful that, "to the extent the Electors seek certainty, they have it" because "Secretary Simon" supposedly provided it. Order 26. The point of this suit is that the Secretary is *wrong*. Bad information that is likely to result in chaos and disenfranchisement does not cause certainty; it causes uncertainty.

2. Voter Standing

The Court's ruling on standing ushers in a new doctrine holding the dilution of individual votes as insufficient to confer even an Article III injury in fact. It is unlikely to withstand review.

a. Since *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court has consistently recognized that plausible allegations of vote dilution confer standing. *Id.* at 207–09. The Court explained that "[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). The Court's landmark decision *Reynolds v Sims*, 377 U.S. 533 (1964), repeated this observation. *Id.* at 555 ("The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." (citations omitted)).

Standing in these cases is "premised on the understanding that the injuries giving rise to those claims were 'individual and personal in nature.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (quoting *Reynolds*, 377 U.S. at 561). But it does not follow that vote dilution inflicted on a widespread basis and impacting many or all voters is insufficiently particularized to confer standing. "The fact that other citizens or groups of citizens might make the same complaint…does not lessen [the] asserted injury" experienced by some. *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449–50 (1989). Under this principle, the D.C. Circuit recognized standing of voters to challenge the expansion of representation on a certain congressional committee to representatives from the District of Columbia and United States territories, even though "the degree of voter dilution in this case is theoretically the same no matter in which state a voter resides." *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.*

b. The Court's ruling directly conflicts with the D.C. Circuit's ruling (and *Baker* and *Reynolds*) and would cast a shadow on voting rights in the United States by calling into question even individual voters' right to challenge vote dilution.

First, the Court cited no authority for its holding that "vote dilution is a paradigmatic generalized grievance that cannot support standing." Order 21.[1] That proposition was foreclosed in *Baker* and many cases since. The Court's citation of several recent cases alleging vote dilution through the potential for future voter fraud conflates the questionable possibility of fraud connected to voting procedures with the *assurance* of improperly counted votes in this case. Order 22 (citing cases). The Court's own order finds, based on Intervenors' expert report in the *LaRose* case, that "tens of thousands" of votes are likely to arrive late. Order 11. If the Secretary's policies are followed and those late-arriving votes are counted, that will necessarily dilute Plaintiffs' votes.

The difference between this case, where many late votes will be counted, and those cases, where fraud is not certain to occur, is a matter of *probability* rather than the fact that both "types of unlawful ballots would dilute votes." Order 23. It is true that both would unlawfully dilute votes, but, here, that unlawful dilution is a certainty and is recognized on the face of the Court's own order. *Id.* at 11. Meanwhile, the Court's attribution of a theory of fraud to Plaintiffs, *id.* at 22–23 n.12, cites a portion of Plaintiffs' brief concerning the balancing of the public interest, Reply, ECF No. 44

[1] The Court's principal authority is *United States v. Hays*, 515 U.S. 737 (1995), which is not a vote-dilution case. *Hays* involved racial gerrymandering due to the use of "racial classifications" in redistricting. *Id.* at 745. The Supreme Court has repeatedly held that a racial-gerrymandering claim is "analytically distinct" from a vote-dilution claim and involves alleged harms of "impermissible racial stereotypes." *Shaw v. Reno*, 509 U.S. 630, 647, 652 (1993); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) ("*Shaw* recognized a claim 'analytically distinct' from a vote dilution claim."). It is simply not true that a person allegedly residing in a racially gerrymandered district "therefore had his or her vote diluted." Order 21.

at 20–21; Plaintiffs have not relied on a theory of likely fraud in asserting *standing*. (As to the public interest, it is clearly established law that states have a "compelling interest in preventing voter fraud." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).)

Second, the Court is incorrect that the dilution alleged here "is a generalized grievance, affecting all Minnesota voters in the same way." Order 23. Quite the opposite, those whose votes are received after the statutory deadline *benefit* from the Secretary's policy 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."). The Court of Appeals is unlikely to enforce a theory that so greatly departs from governing precedent.

3. Disenfranchisement of the State's Electors

The Court's ruling on the statutory safe harbor also misconstrued Plaintiffs' claim or else improperly assumes that it fails on the merits. The Court concluded that Minnesota could forfeit its safe-harbor protection if it were to "change the procedures it uses to appoint electors after Election Day." Order 27. But that Court mistakes Plaintiffs' contention about what this means: the statute, 3 U.S.C. § 5, provides that Minnesota's right to the safe harbor turns on "*laws enacted* prior to the day fixed for the appointment of the electors" (emphasis added). The Court's order concludes that "Secretary Simon's actions under the Consent Decree are designed to ensure that the

necessary deadlines are met," Order 28, but it fails to appreciate that "Secretary Simon's actions" are not *laws enacted by the Minnesota Legislature*. Plaintiffs' theory is that, because Secretary Simon's actions are not "enacted" "laws Minnesota will be deemed to have *changed the procedures it uses to appoint electors after Election Day* and therefore disqualified from the safe harbor. Compl. ¶ 70 ("The consent decree is not an enacted law but an executive policy in flat contradiction to State law."). Because the Court is bound to assume, in the standing inquiry, that this theory is correct, it is bound to accept for standing purposes that Minnesota's safe-harbor status will be forfeited if the Secretary's "actions" govern the election, full stop.

There is then no speculation: the loss of safe-harbor status is a direct and necessary consequence of Plaintiffs' theory of what 2 U.S.C. § 5 states in hard, black print—a theory the Court must assume correct for standing purposes. The Court's analysis depends largely on the contention that Plaintiffs must show that the December 8 safe-harbor deadline will not be met in this case, Order 28–29, but that is only a secondary theory Plaintiffs advance, *see* Compl. ¶ 72. Plaintiffs' lead theory is sufficient to confer standing, regardless of the injury in fact established as to that secondary position.

The Court also suggests that loss of safe-harbor status would not necessarily prove fatal to the Minnesota popular vote, Order 29, but safe-harbor status is a substantial state benefit that exists to eliminate risk. *See Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. at 77–78. Standing is triggered not only where future harm is certain but also where there "is increased risk" of a harm. *Missouri Coal. for Env't v. F.E.R.C.*, 544 F.3d 955, 957 (8th Cir. 2008); *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 573–74 (6th Cir. 2005) ("The courts have long recognized that an increased risk of harm…is an injury-in-fact."). The total and automatic loss of safe-harbor status marks the dramatic increased risk that Minnesota's electors will not be recognized, a risk Plaintiffs

face as voters and candidates. The Court's contrary conclusion effectively treats the safe harbor as a non-factor in presidential elections, but that was not the Supreme Court's view in *Bush*, which recognized the loss of safe-harbor status as a sufficiently great injury to require terminating a recount. 531 U.S. at 110.

B. Prudential Standing

The Court's prudential-standing ruling is also untenable and would lead to the remarkable result that *no preemption claim can be brought in federal court*. This position is unlikely to survive scrutiny on appeal.

1. The prudential-standing ruling is particularly mistaken as to Count II, which is a preemption claim. A plaintiff claiming that state law conflicts with federal law does not "assert claims of injury that…Congress suffered." Order 34. If that were true, only Congress would have standing to assert preemption arguments. That is simply 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, even though the franchisor was not Congress and did not establish a basis to assert the rights of Congress); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 488 (9th Cir. 1996) (operator of gold-processing facility had prudential standing to claim that the National Labor Relations Act preempted state law, even though the gold-processing facility was not Congress and did not establish to assert the rights of Congress).

What matters here is that Plaintiffs fall within the zone of interests Congress intended to protect in setting uniform election dates and rules governing presidential elections, and the Court did not find otherwise. Nor could it have. The entire point of Congress's regulation in this arena is to establish fair rules, certainty, and correct

counting of votes, and Plaintiffs, as voters and elector candidates are plainly within the zone of those interests.

2. Also untenable is the Court's ruling that Plaintiffs, as voters and electors, lack prudential standing to litigate the constitutionality of state law under Article II. In addition to the preemption point, which applies equally to Count I, it is also well established 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). Again, this is not a question of asserting the rights of others, like the Minnesota legislature, but of asserting *Plaintiffs' interests* as described above.

The Court's reading of *Bond v. United States*, 564 U.S. 211 (2011), is highly restrictive and is unlikely to carry the day. *Bond* describes this case:

> In *amicus*'[2] view, to argue that the National Government has interfered with state sovereignty in violation of the Tenth Amendment is to assert the legal rights and interests of States and States alone. That, however, is not so. As explained below, Bond seeks to vindicate her own constitutional interests. The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State.

564 U.S. at 220. That is this case: Plaintiffs assert the balance of powers Congress established in Article II, not to vindicate the Minnesota Legislature's interests, but to challenge governmental action that harms Plaintiffs and was taken in excess of the authority that Article II defines. In that respect, this is no different than *Bush v. Palm*

[2] Notably, the position of the lower courts in *Bond* that prudential standing principles bar litigants from asserting interests under the Tenth Amendment was so wayward that the United States Solicitor General confessed error and sided with the petitioner. 564 U.S. at 215–16.

Beach Cty. Canvassing Bd., where the Supreme Court vindicated Candidate Bush's interests as a candidate by vacating state action that appeared to exceed the delegation of Article II. 531 U.S. 70, 77–78 (2000).

It is not a material distinction that Plaintiffs "do not allege a violation of the principles of federalism" set forth in the Tenth Amendment, Order 36, because Plaintiffs *do* allege a violation of the balance of state and federal power as set forth in Article II. Just as "[f]ederalism is more than an exercise in setting the boundary between different institutions of government for their own integrity," 564 U.S. at 221, Article II does not establish state and federal roles in election-rule promulgation only for their *own* benefit, but for the benefit of all participants in the electoral system. The balance of powers was established, among other things, to establish "as little opportunity as possible to tumult and disorder" and to ensure that the "process of election affords a moral certainty." The Federalist No. 68 at 460 (Hamilton) (Cooke ed., 1961). These purposes, no less than those established under the Tenth Amendment, are for the protection of voters and candidates and all other stakeholders. The Court's contrary conclusion is, Plaintiffs respectfully submit, unlikely to be affirmed.

C. Other Issues

The Court did not reach any issues other than standing. Plaintiffs respectfully submit that they are likely to succeed on these issues as well. Plaintiffs' positions are set forth in their preliminary-injunction papers, and, because the Court did not address those issues, Plaintiffs stand on those matters as stated. To avoid any allegations of waiver or forfeiture, they briefly restate their positions here.

1. The Secretary's Policies Violate the Electors Clause

The Secretary is not the Minnesota Legislature and is not empowered to conduct a presidential election in a manner directly at odds with state legislation. 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), the Secretary may not alter bright-line statutory deadlines. Nor does the Secretary have the right to abandon statutes he believes would violate Minnesota's Constitution. The Electors Clause authorizes neither an executive actor nor a state court applying state constitutional law to abandon the "Manner…the Legislature" has "direct[ed]" for appointing electors. "This power 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*." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (quotation marks omitted) (emphasis added).

The Electors Clause therefore establishes "a limitation upon the State in respect of any attempt to circumscribe the legislative power." *Id.* at 25; *see also Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (same). This limitation operates on the Secretary and forecloses his argument that state constitutional officers and judges may, consistent with Article II, rewrite the law. *See Bush v. Gore*, 531 U.S. 98, 111–12 (2000) (Rehnquist, J., concurring)). 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" and that it is therefore "unnecessary…to consider whether or not there is a conflict between the method of appointment of presidential electors directed by the Legislature and the state constitutional provision." *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).

The two decisions the Secretary cited for his contrary view, *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787 (2015), and *Smiley v. Holm*, 285 U.S. 355 (1932), both undermine his position. Their holding that the Elections Clause of Article I 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 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 simply "present[ed] a judge with a consent decree implementing such relief" as he deemed appropriate and obtained an order approving it. Secretary Br., ECF No. 35 at 27. Laws are enacted in Minnesota when the Legislature presents a bill to the Governor and the Governor signs it, not when the Secretary presents a proposed order to a judge and the judge approves it.

Even if *Smiley* and *Arizona* somehow prescribed a limited role for "the Legislature" in setting the "Times, Places, and Manner" of congressional elections under the

Elections Clause of Article I, § 4, that could be circumscribed by executive officials and courts, that would not reach the Electors Clause. *Arizona* distinguished various functions the Constitution assigns state legislatures, holding that, when the Constitution assigns the legislature an "electoral" function rather than a "lawmaking" function, the legislature must "perform that function to the exclusion of other participants." 576 U.S. at 2667–68. The Electors Clause function of state legislatures 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). It is more akin to the "'ratifying' function for 'proposed amendments to the Constitution under Article V,'" *Arizona*, 576 U.S. at 806–07 (citations omitted), than to the lawmaking function assigned by the Elections Clause of Article I.

Even if the Minnesota Constitution could "circumscrib[e] the legislature's authority under Art. II, § 1, cl. 2," *Palm Beach*, 531 U.S. at 475, the Secretary's position still fails because he lacks the authority to declare Minnesota law unconstitutional. It is the Minnesota judiciary's duty, not the Secretary's, to determine "whether the Legislature has violated its constitutional duty," *Cruz-Guzman v. State*, 916 N.W.2d 1, 9 (Minn. 2018), and that never happened here.

Finally, there is no merit to the position that Minnesota Statutes § 204B.47 cures the Article II defect. Section 204B.47 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…." Here, it is not the case that the receipt deadline "*cannot* be implemented as a *result*" of a state-court order. Instead, the *Secretary* decided that the deadline should not be implemented and asked a state court to rubberstamp that determination. Had the Secretary not requested this, there would be no impediment to implementing the Election Day deadline.

2. The Secretary's Policies Violate the Election Day Clause

The Secretary's policy of counting votes received *seven days* after November 3 changes the date of the election and is preempted by federal law.

First, it is the arrival of the ballot, not its mailing, that marks the "'consummation' of the process of selecting an official." *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001). Voters do not "appoint[]" electors by handing paper to a postal worker, but by casting a ballot at a polling place. 3 U.S.C. § 1; *Foster*, 522 U.S. at 71 (holding that "Election Day" requires the combination of actions by voters *and election officials*). The Minnesota Legislature and the Secretary understand this: the State's law and regulations are unequivocal that it is the arrival that counts, not the mailing. Minn. Stat. § 204D.03 Subd. 2; Minn. R. 8210.2500, 8210.2200.

Second, even if the federal deadline was to mail a ballot by November 3, the Secretary has agreed to count ballots mailed after that date. It is not true that a ballot must be mailed by election day under his policy. The Secretary has agreed to count ballots if they are received within seven days and there is no evidence showing they were mailed after election day. Ballots mailed after November 3 will be counted under this policy. This "fundamentally alters the nature of the election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

It does not help the Secretary or Intervenors to call this policy a "presumption." They identify no circumstance under which any poll worker could ever have a basis to suspect that a ballot received on (say) November 8 was mailed after Election Day. That being so, the policy treats late-mailed ballots as mailed on November 3 by operation of law, so long as they are received by 8:00 p.m. on November 10th. Importantly, the U.S. Postal Service's policy is that it does not postmark mail bearing prepaid

postage, which includes all Minnesota absentee ballots, and so at least some ballots will bear no postmark and no evidence one way or the other of the true mailing date.

3. The *Purcell* Principle

Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam), is inapplicable here. *Purcell* 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. "[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. Arizona Sec'y of State's Office*, 843 F.3d 366, 368 (9th Cir. 2016). In this case, those considerations favor an injunction.

First, the question here, relating to which ballots are validly cast, can be, and often is, litigated *after* the election. That type of issue was litigated in 2000 until December 12, a full five weeks after Election Day. *See Bush v. Gore*, 531 U.S. at 106–11. In fact, a case related to *Bush v. Gore* concerning the timeliness of absentee ballots and rules governing postmarking was decided on December 8. *See Bush v. Hillsborough Cty. Canvassing Bd.*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000). It cannot be too *late* to raise these issues, when they will otherwise be raised weeks from now. It would be far better for voters to know *now* what the rules are then 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, this is not a case involving 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. Other than announce

that Minnesota law means what it *already says*, the Secretary will not need to change any element of the election process.

Third, 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.").

Fourth, 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* regime, complete with a new "Election Day."

Fifth, "[a] state official unhappy with the lawful decisions of the state legislature should not be able to round up an agreeable plaintiff who then uses collusive litigation to 'force' the state to do what the official wants." *Common Cause Rhode Island*, 970 F.3d at 17. Here, the Secretary disagrees with the Minnesota Legislature's judgment, and he leveraged a state-court suit to manufacture a workaround. Unfortunately, the First

Circuit's warning that its *Common Cause Rhode Island* decision should not be "relied upon to open any floodgates," *id.*, is being relied upon to open floodgates.

Sixth, Plaintiffs did not delay in bringing this action, which was filed less than a month after they were certified as elector candidates. *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.*, and will continue to do so. The Secretary's refrain that the suit was filed "four days after voting began," *see, e.g.*, Secretary Br., ECF No. 35 at 22, identifies no prejudice: voters who send their ballots in *now* are complying with Minnesota law as written and will benefit from an injunction, rather than suffer harm.

As in *Common Cause Rhode Island*, "[b]ecause of the unusual—indeed in several instances unique—characteristics of this case, the *Purcell* concerns that would normally support a stay are largely inapplicable, and arguably militate against it." 970 F.3d at 17. The doctrine does not bar an injunction.

4. Abstention

Abstention is unwarranted. "Abstention from the exercise of federal jurisdiction is the exception, not the rule," *Col. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 813 (1976), and "[c]ases involving questions of civil rights are the least likely candidates for abstention," *Assoc. for Retarded Citizens of North Dakota v. Olson*, 713 F.3d 1384, 1391 (8th Cir. 1983). In *Sprint Communications v. Jacobs*, 571 U.S. 69 (2013), the Court "restate[d] [its] *Younger* jurisprudence," holding that *Younger* does not apply outside "three 'exceptional' categories": (1) "ongoing state criminal prosecutions," (2) "certain civil enforcement proceedings," and (3) "pending civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their

judicial functions." *Id.* at 591, 594. The Court cited the *Pennzoil* decision, which the Secretary and Intervenors have cited, for that third category. *Id.* at 591. It is inapplicable here for multiple reasons.

First, this abstention doctrine is triggered only in cases between the "same parties and 'substantially identical' claims, raising 'nearly identical allegations and issues.'" *Yang v. Tsui*, 416 F.3d 199, 204 n. 5 (3rd Cir. 2005); *Friends of Lake View Sch. Dist. Incorp. No. 25 v. Beebe*, 578 F.3d 753, 757 (8th Cir. 2009) (applying *Younger* when identical parties raised "the same issues as the state-court proceedings"); *Bates v. Van Buren Tp.*, 122 Fed. Appx. 803, 805 (6th Cir. 2004) (*Younger* requires "a parallel case between the same parties"). Plaintiffs were not parties to the state proceeding, and their affiliation with the Republican Party does not make them parties. A person's mere affiliation with a political party, as a voter, party member, or candidate for office, does not render that person bound to the judgments that bind the party. *See Womens Services, P.C. v.* Douglas, 654 F.2d 355 (9th Cir. 1981). Nor are the issues the same: neither merits argument here was raised in state court.

Second, there is *no* "pending case in a state court—or even a pending administrative proceeding or any type of proceeding," so "abstention would be inappropriate." *Fantasysrus 2, L.L.C. v. City of E. Grand Forks, Minn.*, 881 F.Supp.2d 1024, 1029 (D. Minn. 2012) (distinguishing *Cedar Rapids Cellular*). The consent decree that the Secretary and Intervenors claim has preemptive force has been entered and is final and will not be appealed.

Third, the concluded state-court proceeding did not "involve[] certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint*, 572 U.S. at 591. The Minnesota court only acted because the Secretary asked it to do so, and there is no circumstance like in *Pennzoil* where the federal plaintiff was

seeking to enjoin a state court from enforcing its judgment. *See Pennzoil Co. v. Texaco, Inc*, 481 U.S. 1, 13–14 (1987). This case is not the "extraordinary" exception to the Court's duty to exercise its jurisdiction.

5. Res Judicata

There is no Full Faith and Credit Clause bar on Plaintiffs' claim. The Clause requires federal courts to apply "the preclusion rules of the state from which the judgment originated." *Lommen v. City of E. Grand Forks*, 97 F.3d 272, 274 (8th Cir. 1996). Minnesota preclusion doctrine does not reach Plaintiffs because they were not parties to the state-court litigation, nor in privity with any parties.

"Privity expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties." *Rucker v. Schmidt*, 794 N.W.2d 114, 118 (Minn. 2011) (quotation marks omitted). "[C]ourts will find privity to exist for those who control an action although not parties to it, those whose interests are represented by a party to the action, and successors in interest to those having derivative claims." *Id.* (quotation marks omitted). Outside of those narrow circumstances, privity will only be attributed to a party "so identified in interest with another that he represents the same legal right." *Id.*

First, Plaintiffs are plainly not in privity with the Secretary, whom they are suing here. The right to vote is personal to Plaintiffs; it does not exist at the grace of the Secretary. Even for purposes of *intervention*, courts have repeatedly recognized that voter interests are not represented by state officials. As the D.C. Circuit explained in *Cleveland Cty. Ass'n for Gov't by People v. Cleveland Cty. Bd. of Comm'rs*, voters' and representatives' interests in vote-dilution litigation do not align with the government's interest because "intervenors [seek] to advance their own interests in achieving the

greatest possible participation in the political process," whereas the government, "on the other hand, was required to balance a range of interests likely to diverge from those of the intervenors." 142 F.3d 468, 474 (D.C. Cir. 1998 (quoting *Meek v. Metro. Dade Cty., Fla.*, 985 F.2d 1471, 1478 (11th Cir. 1993)); *see also King v. Illinois State Bd. of Elections*, 410 F.3d 404, 409 (7th Cir. 2005) (awarding attorneys' fees to intervenors in vote-dilution case); *Clark v. Putnam Cty.*, 168 F.3d 458, 461–62 (11th Cir. 1999).

Second, Plaintiffs are also not in privity with the political party organizations that intervened in the state-court litigation. The mere affiliation with a political party as voters or candidates does not render an individual "so identified in interest with another that he represents the same legal right." *Rucker*, 794 N.W.2d at 118. Those parties did not represent Plaintiffs' interests or even raise the same arguments Plaintiffs raise here. "[T]he application of collateral estoppel is…inequitable" at best. *Reil v. Benjamin*, 584 N.W.2d 442, 445 (Minn. Ct. App. 1998). The Minnesota Supreme Court has long stated that consent decrees "constitute[] only the agreement of the parties," *Hentschel v. Smith*, 153 N.W.2d at 208 (citations omitted), and cannot expand to include the rights of those not party to the agreement. Minnesota law bars courts from finding privity when one of the parties is a "stranger" to a contractual agreement, *Gen. Elec. Co. v. Jordan*, 162 N.W. 1061, 1062 (1917), as Plaintiffs are here. They had no involvement with the Secretary's agreement, and were only certified as elector candidates after the intervenors consented to dismissal.

Further, those intervenors were "not legally responsible for" nor "in any way accountable to" Mr. Carson or Mr. Lucero. *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 762 (1st Cir. 1994) (finding no privity in such a situation). And the Secretary's Agreement did not "conclusively determine" whether Plaintiffs have viable claims under federal law. *See Bunge v. Yager*, 52 N.W.2d 446, 450 (Minn. 1952) (finding no privity

when party's claims had not been adjudicated). Minnesota courts have only found privity where there is far greater control over the litigation. *See, e.g.*, *Balasuriya v. Bemel*, 617 N.W.2d 596, 600 (Minn. Ct. App. 2000) (president of a corporation was in privity with corporation because he controlled the prior litigation). Without being "so connected" to the proceedings, *id.*, the Plaintiffs cannot be in privity with the State Intervenors.

II. Plaintiffs Will Suffer Irreparable Harm Without an Injunction

An injunction is essential to preserve the *status quo* and protect Plaintiffs (and all Minnesota voters) from the irreparable harm that is sure to follow from the Secretary's unlawful policy. The status quo "refers not simply to any situation before the filing of a lawsuit," *Cmty. of Christ Copyright Corp. v. Devon Park Restoration Branch of Jesus Christ's Church*, 613 F. Supp. 2d 1140, 1145 (W.D. Mo. 2009), but rather refers to "the last uncontested status preceding the pending controversy." *First-Citizens Bank & Tr. Co. of N. Carolina v. Outsource Servs. Mgmt.*, No. CIV. 12-1734 ADM/FLN, 2012 WL 3136924, at *1 (D. Minn. Aug. 1, 2012); *Lieving v. Cutter Assocs., Inc.*, No. CIV. 09-2938 JNE/JJG, 2010 WL 428800, at *4 (D. Minn. Feb. 1, 2010). Here, the last uncontested status before the instant controversy was the state of Minnesota law as enacted by its Legislature. The *status quo* includes the 8:00 p.m. receipt deadline and the standard principles governing Election Day, which the Secretary jettisoned. *See Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1207 (1971) (Douglas, J., in chambers).

Plaintiffs will suffer irreparable harm if this *status quo* is not preserved by an injunction. Under the Court's order, votes cast in violation of Minnesota law will be counted in connection with the November 3 election. Minnesota law only permits the counting of votes received by the Election Day receipt deadline, and the Defendants and Intervenors agree that ballots will arrive after that. *See*, *e.g.*, Foix Decl. Ex. A, State

Court Complaint, ¶¶ 7, 42 (noting that over 3,500 ballots in Minnesota "arrived after the Election Day Receipt Deadline" in 2018). Vote dilution is a paradigmatic irreparable harm. *See Montano v. Suffolk Cty. Legislature*, 268 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) ("The irreparable harm to the plaintiffs' fundamental right to vote weighs heavily against a stay."); *Day v. Robinwood W. Cmty. Improvement Dist.*, 2009 WL 1161655, at *3 (E.D. Mo. Apr. 29, 2009) ("These Plaintiffs are threatened with an irreparable harm because, absent a preliminary injunction, their votes will be diluted in the upcoming June 9, 2009 election."); *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 2016 WL 6584915, at *17 (D.N.J. Nov. 5, 2016) (collecting cases). *See also Bush v. Gore*, 531 U.S. at 1047 (Scalia, J., concurring in order issuing stay pending appeal) (the "counting of votes that are of questionable legality…threaten[s] irreparable harm"). This imposes a special injury on Plaintiffs, who are not only voters, but also candidates for office. *Burdick v. Takushi*, 504 U.S. 428, 438 (1992); *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973).

In addition, the legal infirmity of the Secretary's novel policy has created a significant uncertainty about the rules governing the November election and whether *any* Minnesota citizens will have their votes counted. The policies the Secretary will implement in the November 3 election will not satisfy the safe harbor of 3 U.S.C. § 5 because they are not "laws enacted prior to the day fixed for the appointment of electors." *See Bush v. Gore*, 531 U.S. at 111. As a result, 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 therefore will not be accepted by the United States Congress in determining the winner of

the presidential election. A further harm is that 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. Election officials will not even have all the ballots in hand for at least eight days after Election Day, and any contest over the ultimate result may well extend past the safe-harbor deadline or even the vote of the Electoral College. There is a substantial risk that Plaintiffs' votes will be completely meaningless, if either Minnesota loses its representation in the Electoral College or its asserted results do not qualify for the safe harbor.

III. The Balance of Equities and Public Interest Favor an Injunction

The balance of equities weighs decidedly in favor of a stay. "[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). The Secretary has no interest in setting rules that the Constitution does not allow him to set. And the Secretary's interest in settling a meritless lawsuit—contending nonsensically that Election Day is unconstitutional—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 the valid 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) (recognizing a "State's interest in enforcing its laws").

The public interest emphatically supports a preliminary 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),[3] and the right to vote of each Minnesota citizen hangs in the balance and is directly threatened by the Secretary's unlawful agreement. The policies Congress implemented in setting an Election Day well over 100 years ago, and the policies of the Minnesota Legislature honor that date with a clear received-by deadline. An injunction will vindicate the public's interest in the integrity of presidential elections and in a clear set of rules—that have proven fair over generations of practice—for voters to follow in casting their votes.

Indeed, the Secretary's unlawful agreement is of momentous concern to the entire State and the country "by casting a cloud upon…the legitimacy of the election." *Bush*, 531 U.S. at 1047 (Scalia, J., concurring in order granting a stay pending appeal). The question at issue in this motion is, put simply, whether Minnesota voters will be instructed that they should comply with Minnesota law enacted by the Legislature or whether they will be instructed that they should violate it, as the Secretary is actively advising them to do. It is clearly better for them to be told the truth or, at a minimum, to be given the more conservative instruction to allow them to take appropriate precautions and consider the myriad of alternatives to mailing their ballots close to the statutory Election Day deadline. *Cf. Greater Birmingham Ministries v. Secretary of State for Alabama*, 966 F.3D 1202, 1223 (11th Cir. 2020) (explaining how alternatives to one form of voting can mitigate the burdens that form would otherwise place on the right to vote).

If the Secretary's view is vindicated on appeal, those voters who follow that instruction and cast ballots received by 8:00 p.m. on Election Day will suffer no harm:

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

their votes will be counted in all events, as will the votes of those who whose ballots are received after Election Day. For this reason, the Secretary's and Intervenor's efforts to find irreparable harm in an injunction fail. The Secretary cannot create clarity for voters by misstating the law. If anything, an injunction better achieves the government's goal of minimizing voter confusion. An injunction provides clarity that the deadline is the same as it has always been, 8:00 p.m. on Election Day. It would inform voters of the deadline under which their votes will *certainly* be counted.

On the other hand, if the Secretary's position ultimately fails (whether on appeal, in litigation challenging ballots, by the judgment of Congress, or otherwise), then his instruction to voters will have proven false, to the detriment of an untold number of voters who relied on it. Because they relied on the Secretary's unlawful policies, they will be disenfranchised. The Secretary's choice to depart from the rule of law is what created this problem, and sustaining it is not in the public interest.

CONCLUSION

The motion should be granted.

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Respectfully submitted,

/s/ Danyll W. Foix

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*admitted *pro hac vice*
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