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IN THE SUPREME COURT OF IOWA

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE and IOWA DEMOCRATIC PARTY, Petitioners-Appellees,	)	Supreme Court No. 20-1281 No. CVCV060641 No. CVCV060642
	)	PETITIONERS' RESISTANCE TO RESPONDENT'S APPLICATION FOR INTERLOCUTORY APPEAL AND MOTION FOR EMERGENCY STAY
v.	)	
IOWA SECRETARY OF STATE PAUL PATE, in his official capacity, Respondent-Appellant.	)	**Expedited Review Requested** **Date on which absentee ballot requests must be received: October 24, 2020**

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The relief that Secretary of State Paul Pate (the "Secretary") seeks here is highly disfavored. Moreover, granting the Secretary's motion for emergency stay leaves thousands of lawful, registered Iowa voters at risk of not receiving their absentee ballot in the midst of a global pandemic. To the extent there is voter confusion, it is the result of the Secretary's unauthorized and unsupportable July 17, 2020 emergency election directive that forbids county auditors from sending absentee ballot request forms to lawful, active, registered Iowa voters, and the efforts of the Republican Party in other cases to have tens of thousands of forms sent by county auditors unceremoniously invalidated—including thousands that had already been reviewed, signed and submitted by voters back to county auditors. The Secretary's contention, therefore, that the district court's orders in this case, which found that the portion of the July directive that forbid auditors from sending pre-filled ballot request forms was unlawful and suspends its operation does "nothing to maximize voter participation or to make absentee voting easier or more widely available," and his speculation that "it may have the opposite effect," (10/06/2020

Application ¶ 11), is not well-founded. It is also not a legal basis for granting the Secretary's application for an interlocutory appeal or the extraordinary remedy of an emergency stay. For reasons articulated below, the district court did not abuse its discretion in when it issued its orders, and so review does not promote sound and efficient judicial administration. Petitioners respectfully request the Court deny the Secretary's application and lift the stay of the orders.

I. Statement of the Case

On July 17, 2020, the Secretary issued an emergency election directive, Section 2 of which is at issue in this case.[1] In that Directive, the Secretary purported to order county auditors to distribute to voters "only the blank Official State of Iowa Absentee Ballot Request Form . . . that is promulgated by the Secretary of State's Office pursuant [to] Iowa Code § 53.2(2)(a)" for the upcoming general election.[2]

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[1] References in this brief to the "Directive," refer specifically to Section 2 of the Directive, the only portion of it that is in dispute in this litigation and on appeal.

[2] (09/03/2020 CVCV060641 Memo. Mot. Temp Inj. at 28–30 (Beane Decl., Ex. 1) (attached as Exhibit 1).)

The Secretary, however, lacked authority under the Iowa Administrative Code to order county auditors to send only blank request forms because—among other reasons—the Directive relies on statutes that do not authorize this order, the Secretary's emergency powers do not authorize this order, the order to send only blank request forms conflicts with several state statutes, and the order unconstitutionally impedes auditors' home rule authority to manage elections in their counties. Accordingly, Petitioners sought an emergency agency action seeking to stay and enjoin the Secretary from enforcing the Directive. (09/03/2020 CVCV060641 Mot. to Stay.) Petitioners also challenged its constitutionality in a separate action. (09/03/2020 CVCV06042 Pet.)

Over two weeks *before* the Secretary issued the Directive, Linn County Auditor Joel Miller and Johnson County Auditor Travis Weipert announced their intention to send pre-filled ballot request forms to active voters in their counties in accordance with Iowa constitutional "home rule" principles and Iowa law to facilitate voting and reduce the administrative burden on their offices. (09/03/2020 CVCV060641 Memo. Mot. Stay at 9 n.7

(attached as Exhibit 1).) Woodbury County auditor Patrick Gill subsequently joined their effort. (*Id.* at 9 n.8.) The three auditors collectively sent more than 200,000 pre-filled request forms to their counties' active voters, and as of the date Petitioners filed for an emergency stay, they had collectively received more than 65,000 signed request forms from active Iowa voters in return. (*Id.* at 3.)

To date the Secretary has not taken any legal action to stop the auditors from mailing pre-filled forms, (*id.* at 4 n.13), despite pressure from the Republican National Committee, which sent the Secretary a letter on July 27, 2020 urging him to take action against the auditors.[3] Moreover, his publicly stated legal rationale for why only blank request forms can be sent has changed repeatedly.[4]

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[3] Letter from Republican National Committee to Secretary (Jul. 27, 2020), https://prod-cdn-static.gop.com/media/documents/RNC_Ltr_to_SOS_Pate_re_prepopulated_ab_applications2_1595858422.pdf?utm_medium=email&utm_source=pu_48&utm_campaign=20200727_131168_&utm_content=.

[4] *Compare* Joel Miller, Linn County Auditor puts Iowa Secretary of State on notice, BLOG (July 11, 2020), https://lcauditor.wordpress.com/ (Secretary purported to forbid auditors from sending pre-filled request forms because the Voter ID field "is considered a confidential record per Iowa Code §22.7.72–73[,]" *with* (09/03/2020 CVCV060641 Memo. Mot. Temp

After waiting nearly a month, during which time tens of thousands of lawful, registered voters received, reviewed, signed and returned the pre-filled absentee ballot request forms they had received from their auditors, the Republican National Committee and other Republican plaintiffs took matters into their own hands and filed lawsuits in district court against the Linn County and Johnson County auditors on August 10, 2020 and the Woodbury County auditor on August 14, 2020. In each case, they sought a temporary injunction ordering each auditor to follow the Directive and other "immediate remedial measures," stating that the "sole relevant concern" was the State of Iowa's ability to have its officials enforce the Directive.

The Secretary did not intervene, and Petitioners DCCC and DSCC were also denied intervention in the Linn and Johnson County actions (other parties were granted partial intervention in the Woodbury action). The district courts granted Republicans'

Inj. at 28–30 (Beane Decl., Ex. 1) (Directive abandoned the "confidential record" legal justification and relied on ostensible need "[t]o ensure uniformity and to provide voters with consistent guidance on the absentee ballot application process.") (attached as Exhibit 1).)

injunctions in all three cases against the county auditors, but there has been no final judgment in any of the actions. Order, *Republican National Committee, et al. v. Miller*, Linn County No. EQCV095986 (Iowa D. Ct. Aug. 27, 2020); Order, *Republican National Committee, et al. v. Weipert*, Johnson County No. EQCV081957 (Iowa D. Ct. Sept. 12, 2020); Order, *Republican National Committee, et al. v. Gill*, Woodbury County No. EQCV193154 (Iowa D. Ct. Aug. 28, 2020). Each injunction required the county auditor to (1) block any further efforts to distribute pre-filled request forms; (2) contact the senders of any pre-filled request forms received by the auditors in writing; and (3) *claw back and invalidate* all pre-filled request forms that have already been reviewed, signed, and returned to the auditors' offices by tens of thousands of lawful Iowa voters. Given the procedural hurdles involved in contacting 65,000 voters—plus any others who may use the pre-filled absentee ballot requests—thousands of lawful, registered voters were suddenly at risk of not receiving their absentee ballot in the middle of an ongoing pandemic, and potentially unable to vote at all in light of health risks or other factors.

Petitioners then squarely challenged Section 2, bringing claims directly against the Secretary that had not been previously raised, including under the Iowa Administrative Procedure Act and procedural due process protections (art. I, sec. 9 and art. II, sec. 1) and the Equal Protection and Privileges and Immunities Clauses of the Iowa Constitution (art. I, sec. 6 and art. II, sec. 1). (08/31/2020 CVCV060642 Pet.; 09/03/2020 CVCV060641 Pet.) Petitioners subsequently filed an Emergency Motion to Stay Agency Action and a Motion for Temporary Injunctive Relief (09/03/2020 CVCV06041 Mot. Temp. Inj.; 09/03/2020 CVCV060642 Mot. Stay.)

The district court held that Petitioners were likely to succeed on the merits and granted both motions (the "Orders"). (10/5/2020 CVCV060641 Rul. Mot. Temp. Inj.; 10/5/2020 CVCV0606042 Rul. Mot. Stay.) In the district court's words:

> The seemingly contradictory limitations and restrictions reflected in Section 2 of Secretary Pate's Directive, with no apparent evidence of any fraud or other issues with the primary election process, represents a complete 'about face' by Secretary Pate and is more than perplexing to this Court. Section 2 of the Directive appears to be, as is sometimes said, a solution in search of a problem.

(10/5/2020 CVCV060641 Order at 17; 10/5/2020 CVCV0606042 Order at 16.)

The district court recognized the ongoing harm to voters who had returned pre-filled ballot requests and had not yet submitted a second application (one not using the pre-filled form) and were perhaps totally unaware of what they needed to. The district court correctly noted that "tens of thousands of voters" who had submitted pre-filled ballot requests "will likely be confused upon being informed" that they would not receive their absentee ballots without submitting a new request form, despite having already done everything they thought necessary to receive it. (10/05/2020 CVCV06064242 Order at 10.) It also rightfully observed that some of these voters might be disenfranchised as a result. (*Id.* ("Indeed, some may give up and not vote at all, particularly if voting involves forgoing the relative safety of voting by mail and going to the polls on election day.").) And, as noted, the district court found that there was no evidence that any increase in absentee voting as a result of staying Section 2 of the Directive would pose fraud or security concerns. (*Id.* at 16.)

The district court further recognized that the Orders did not automatically undo the injunctions in the other counties but suggested the county auditors could use the Orders to seek dissolution of the temporary injunctions. (*Id.* at 11–12 , 13.)

The Secretary now applies for interlocutory appeal and a stay of the district court's order in the agency action (the "Agency Order"). This Court granted a stay of the Agency Order on October 6, 2020 pending further order of the Court. (10/06/2020 Order at 1.)

II. Standard of Review

The Supreme Court grants interlocutory appeals only in "exceptional situations," and such applications are generally disfavored. *Banco Mortg. Co. v. Steil*, 351 N.W.2d 784, 787 (Iowa 1984). "[T]he main factor in determining whether such an interlocutory appeal should be granted is whether the consideration of the issues would serve the 'interest of sound and efficient judicial administration.'" *Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735–736 (Iowa 2008) (quoting *Hammer v. Branstad*, 463 N.W.2d 86, 89 (Iowa 1990)); Iowa R. App. P. 6.104(1)(d).

An appellate court may overturn a district court's decision to grant or deny a stay or temporary injunction only for abuse of discretion. *Grinnell Coll. v. Osborn*, 751 N.W.2d 396, 398 (Iowa 2008); *Homan v. Branstad*, 864 N.W.2d 321, 327 (Iowa 2015).

III. Argument

The Secretary's Application for Interlocutory Appeal is supported by a single sentence: "Interlocutory appeal is appropriate and necessary because the district court's order does nothing to maximize voter participation or to make absentee voting easier or more widely available. In fact, it may have the opposite effect." (10/06/2020 Application ¶ 11.) The Secretary's conclusory statement does not support interlocutory review. It does nothing more than state the Secretary's disagreement with the district court's conclusions to the contrary, which were broadly supported by evidence. As such, it falls far from showing abuse of discretion. If it were sufficient, then any litigant could trigger interlocutory appeal based on nothing more than their ipse dixit that a court's factual and legal findings were wrong. In this case, moreover, the Secretary does not cite to evidence in the record that would support

finding the district court's conclusions were wrong, and for good reason: there is none. The record established that the Court's Orders would *protect* voters and facilitate absentee voting during a pandemic, while at the same time causing no cognizable harm to the Secretary or other interested parties. (10/05/2020 CVCV060642 Rul. Mot. Stay at 14-16.) *Accord Snap-On Tools Corp. v. Schadendorf*, 757 N.W.2d 339, 342 (Iowa 2008) (affirming district court's stay decision because appellant failed to "provide a record showing why the court abused its discretion").

A. The district court did not abuse its discretion when it granted the stay in the administrative action.

In the proceedings below and in his Application for Interlocutory Appeal and Motion for Emergency Stay, the Secretary did not disagree that his issuance of the Directive constituted an agency action. (09/17/2020 CVCV060642 Resistance (disputing nowhere that Section 2 constitutes an agency action); 10/06/2020 Application (same).) Under Iowa Code § 17A.19(5), a district court may stay an agency action if a petitioner satisfies a four-factor balancing test. That test considers the extent to which: (1) the applicant is likely to prevail when the court finally disposes of the

matter; (2) the applicant will suffer irreparable injury if relief is not granted; (3) the grant of relief to the applicant will substantially harm other parties to the proceedings; and (4) the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances. *Snap-On Tools Corp.*, 757 N.W.2d at 342 (citations omitted).

The likelihood of success factor is not determinative but must instead be balanced against the other factors. Thus, the degree of likelihood of success required to obtain a stay will necessarily vary based on the strength or weakness of the other three factors. *Mohammed v. Reno*, 309 F.3d 95, 101 (3d Cir. 2002). A stay may be granted "where the likelihood of success is not high but the balance of hardships favors the applicant." *Id.* Because the district court largely focused on the balance of harms, Petitioners start their analysis there.

1. The district court did not abuse its discretion when it found that Petitioners face irreparable harm.

The district court properly found that the Directive would cause substantial and irreparable harm to Petitioners. That

conclusion was not an abuse of discretion. To the contrary, it was well supported by ample evidence in the record. Among other things, the district court properly found that the Directive will require Petitioners to divert significant resources to educating voters who believe they have already done everything necessary to obtain an absentee ballot in order to ensure that they are not disenfranchised as a result of the clawing back and invalidation of the forms sent to them by the Secretary, as well as to voters who are confused about which form will be given effect if they submit it to the auditors to request an absentee ballot. (10/05/2020 CVCV060642 Order at 10.) It also recognized that many voters will be confused, that some may "give up and not vote at all," especially if to do so they must vote in person and risk exposure to COVID-19, and that decreased turnout, especially of younger and minority voters, harms Petitioners by diminishing the prospect of electoral victory for their candidates. *Id.* The Directive will therefore force Petitioners to divert resources to additional get-out-the-vote campaigns. *Id.*

These "programmatic" harms satisfy the requisite showing of irreparable harm. *League of Women Voters of United States v. Newby*, 838 F.3d 1, 9, 13 (D.C. Cir. 2016) (finding proof-of-citizenship requirement on voter registration forms caused irreparable harm to voting rights organizations because it would "likely impair their efforts to register voters," imposing "programmatic injury" through increased "expenditures" to combat the harms the requirement caused to individual voters); *N.C. State Conference of the NAACP v. State Bd. of Elections*, 2016 WL 6581284, at *9 (M.D.N.C. Nov. 4, 2016) (finding organization's diversion of resources in response to a state's federal election law violations "perceptibly impair[ed] [its] ability to mobilize, educate and protect voters before and during the general election," satisfying a showing of irreparable harm) (citations and quotation marks omitted). The Secretary has made no showing (nor could he) that any of these conclusions were an abuse of discretion. Thus, there is no basis upon which this Court could find that the district court abused its discretion in finding that this factor weighs in Petitioners' favor.

2. The district court did not abuse its discretion in finding that staying Section 2 will not harm the Secretary.

The district court also did not abuse its discretion when it found that staying the Directive will not harm the Secretary. (10/05/2020 CVCV060642 Order at 14–15.) The district court appropriately rejected the Secretary's suggestion that a stay would burden administration of the election, noting that the Secretary could not identify any way in which staying the Directive would harm him *at all* (*Id.* ("[The Secretary] contends only that the stay will substantially harm him because managing a general election in the midst of a global pandemic will be a 'heavy lift' . . . and that the instant litigation would 'do little to ease that burden.' However, at no point does [the Secretary] assert that this litigation increases that burden.").) The district court did not abuse its discretion in rejecting an argument utterly unsupported by the Secretary. *See Snap-On Tools Corp.*, 757 N.W.2d at 342 (affirming district court's stay decision because the appellant failed to "provide a record showing why the court abused its discretion").

3. The district court appropriately found that the public interest is best served by staying Section 2 of the Directive to ensure widespread voter participation and access to absentee ballot voting.

Similarly, the district court properly found that staying the Directive would serve the public interest. This conclusion, too, was not an abuse of discretion. Notably, in the proceedings below, the Secretary attempted to argue that the Directive "facilitate[s] widespread absentee voting during the pandemic" and "ensure[s] a fair and uniform absentee ballot application process." (10/05/20 CVCV060642 Order at 15.) The district court was appropriately skeptical about these purposes, noting that Section 2 of the Directive does not appear to promote fairness and uniformity in the absentee ballot application process at all. *Id.* The district court further found that, if the Directive remained in effect, thousands of voters in Linn, Johnson, and Woodbury counties would remain at risk of not receiving their absentee ballots in the midst of a global pandemic because of Section 2. (10/05/2020 CVCV060642 Order at 10) ("[T]ens of thousands of voters who are under the impression that they have already done all that was necessary to request an absentee ballot – by verifying and returning the prefilled request

forms . . . . will likely be confused upon being informed that . . . they will need to complete and return a new form in order to receive an absentee ballot. . . Some may give up and not vote at all . . . .").) The district court further found that Section 2 of the Directive is likely "to limit absentee ballot access rather than to promote it and to increase voter confusion rather than limit it." (*Id.* at 15.) All of these findings led the district court to properly conclude that the public interest would be better served by staying Section 2 of the Directive. (*Id.* at 15–16) ("The Court concludes that any concern [the Secretary] has about the fairness and uniformity of the absentee ballot application process is far outweighed by the public's interest in maximizing voter participation in the upcoming general election and, in particular, doing so by making absentee voting as easy and widely available as possible. [Section 2] of [the] Directive would clearly work counter to that interest.").) This conclusion, too, was not an abuse of discretion.

4. The district court did not abuse its discretion in finding that Petitioners showed a likelihood of success on the merits.

Finally, the district court found that the likelihood of success on the merits weighs "in favor of the grant of a stay of agency action." (*Id.* at 14.) Given the strong showing on the other three factors, the court would not have abused its discretion in granting the stay even upon a weak showing on the merits. *See Mohammed*, 309 F.3d at 101 (explaining a stay may be granted "where the likelihood of success is not high but the balance of hardships favors the applicant"). But in this case, the district court found that factor, too, favored Petitioners. Thus, for this reason as well, the Secretary has not and cannot show that the district court's order was an abuse of discretion.

a) The Secretary is required to follow the administrative rulemaking process.

The Secretary's interpretation of Section 47.1—that he can prescribe uniform election practices without rulemaking—is beyond strained. The language he cites, found in Section 47.1(1), provides:

> The state commissioner of elections shall prescribe uniform election practices and procedures, shall

> prescribe the necessary forms required for the conduct of elections, shall assign a number to each proposed constitutional amendment and statewide public measure for identification purposes, and *shall* adopt rules, pursuant to chapter 17A, *to carry out this section*.

(emphasis added). In other words, the Secretary must adopt rules in order to carry out any of the duties and obligations in Section 47.1, including the supervision of "the activities of the county commissioners of elections" and the prescription of "uniform election practices and procedures." The Secretary was required by statute to follow the administrative rulemaking process, but he did not. Section 2 of the Directive is invalid as a result.

To the extent the Secretary asserts that his authority is derived from his emergency powers, those powers must be exercised consistent with the regulations that define the scope of this emergency power. *See* Iowa Admin. Code § 721-21.1 (outlining the approved procedure for the Secretary to make emergency modifications to the conduct of elections). For reasons discussed below, they were not.

b) The Directive is not a valid exercise of the Secretary's emergency powers.

Petitioners do not contest that the pandemic is a serious national emergency. It obviously is. It is not the kind of emergency, however, that authorizes the Secretary to exercise emergency powers over an election under Iowa law, nor is the Directive the sort of agency action that the Secretary is authorized to exercise in certain emergencies. Both the text of Section 47.1(2) and the accompanying regulations grant the Secretary emergency powers during a natural or other disaster—the kind of disaster which impedes election day from occurring at all or voters from physically reaching the polls. Further, the Secretary's powers under this section are clearly to help *facilitate* voting in the midst of such an emergency, not to make it *more difficult* for voters to successfully cast ballots, or to achieve other policy goals unrelated to the emergency. Simply put, the COVID crisis does not trigger the Secretary's emergency powers but even if it did, those powers can only be used to address *that emergency* and to facilitate voting in light of *that emergency.*

During a natural or other disaster, Section 47.1(2) grants the Secretary narrow emergency powers relating to the location of the polls, the method of voting, and the number of election officials who must be present. Iowa Admin. Code r. 721-21.1(12). In addition, and as a part of this list the Secretary is empowered to make other "modifications" but *only* those "which will enable the election to be conducted on the date and during the hours required by law." *Id.* When general words follow more specific words in a list, the general words should be interpreted to be "similar to those enumerated." *Shatzer v. Globe Am. Cas. Co.*, 639 N.W.2d 1, 5 (Iowa 2001) (citing maxim of construction that "specific words following more general words restrict the application of the general term to thing that are similar to those enumerated"). Here, the power to make other "modifications" is limited to helping election day occur and voters reach the polls. Nothing in these rules allows the Secretary to enact new rules regarding absentee ballot request forms. Indeed, the suggestion is as startling as it is unsupported. And, certainly, nothing in the statute or regulations which are designed to facilitate voting during a natural disaster allows the Secretary to

make voting harder, which is exactly what Section 2 of the Directive does. The district court did not abuse its discretion in finding that Petitioners are likely to succeed on this claim.

c) The Directive violates Iowa Code §§ 53.2 and 53.7.

The Secretary's argument regarding Section 53.2 similarly ignores key language in that Section. Section 53.2(2)(a) provides:

> The state commissioner shall prescribe a form for absentee ballot applications. However, *if a registered voter submits an application on a sheet of paper no smaller than three by five inches in size that includes all of the information required in this section, the prescribed form is not required.*

(emphases added). Section 53.2(2)(a) addresses not only the method by which voters may submit an absentee ballot request (as the Secretary contends), but also allows the Secretary to proscribe *a* form that can be used to request a ballot, not the *only* form.

Section 53.2(2)(a) makes it clear that *any* form is sufficient provided it meets certain size requirements and contains certain information. Yet, through the Directive, the Secretary purported to prescribe a single form to be sent by county auditors to voters and relying on that exact part of the Directive, the injunctions issued in Johnson, Linn and Woodbury counties required that auditors *reject*

applications from thousands of voters submitted on forms that had been provided to the voters by the county auditors that did not comport with Section 2—despite the fact that those forms comply with Section 53.2(2)(a)'s only requirements regarding size and contain the required information. Thus, the Secretary's issuance of Section 2 of the Directive is not supported by Section 53.2(2) of the election code, it conflicts with it. The Secretary asserted below that "[p]rohibiting county auditors from sending applications other than the official absentee ballot request form does not affect their ability to accept a different form sent by the registered voter," (09/17/2020 CVCV060642 Resistance at 7), but that was its entirely predictable (and ultimate) effect.

The fact that the Secretary may not dictate the only form to be used is further supported by other provisions of Iowa's election code. Section 53.2(2)(c) allows absentee ballot applications that are preaddressed with the voter's information. The Secretary asserts without explanation that "it does not," but the Secretary cannot simply wish away the Section's plain text. Nor does the Secretary explain how Section 2 of the Directive does not contravene an

auditor's ability to solicit a request for application for an absentee ballot under Section 53.7—and to make that request pre-filled. Moreover, HF 2643, referenced by the Secretary, does not prohibit a county auditor from sending a pre-filled application, and the Secretary does not seriously contend otherwise.

d) Section 2 of the Directive infringes on Home Rule authority.

Section 2 of the Directive unconstitutionally infringes on the county auditors' home rule authority to carry out their duty to conduct the elections within their counties. Iowa Const. art. III, § 39A.

County auditors are authorized to send request forms that are not blank so long as the practice does not offend state law, and, as discussed above, Iowa Code requires the Secretary to prescribe "a form for absentee ballot applications," but nothing in the statute permits him to prescribe *the only* form. Iowa Code § 53.2(2)(a). Statutes implementing Iowa's county home rule expressly designate the county auditor to serve as the county commissioner of elections and to conduct all elections held within the county. Iowa Code § 331.505(1) and (2). Iowa county auditors are thus

constitutionally empowered to take the steps they deem best in serving the voters of their counties, including by sending pre-filled absentee ballot request forms, so long as such steps do not conflict with any applicable state statutes.[5] *See City of Clinton v. Sheridan*, 530 N.W.2d 690, 695 (Iowa 1995). Mailing request forms that are not blank would not place county auditors in direct conflict, much less "irreconcilable conflict," with any applicable state statute and thus the Directive's ostensible ban on doing so is constitutionally invalid. In finding that Petitioners are likely to succeed on the merits of this claim, the district court did not abuse its discretion.

B. The district court did not abuse its discretion in granting the temporary injunction in the constitutional action.

The Iowa Constitution expressly protects the right to vote as a fundamental right. Iowa Const. art. II, § 1; *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 848 (Iowa 2014). Because "[v]oting is a

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[5] The Secretary elsewhere hints that HF 2643, which changed the way auditors can obtain information missing from a returned absentee ballot requests, somehow prohibits county auditors from sending pre-filled absentee ballot requests, but he does not explicitly or seriously make this argument, nor could he—nothing in HF 2643 does so.

fundamental right in Iowa," the Iowa Supreme Court has been unequivocal that any regulatory measures that abridge that right "must be carefully and meticulously scrutinized," *Id.* A burden or abridgement of a fundamental right, such as the right to vote, is subject to strict scrutiny. *See State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002) ("If the asserted right is fundamental, we apply strict scrutiny analysis.").

When restrictions on voting by absentee ballot are challenged under the federal constitution, they receive strict scrutiny if they will prevent a significant number of voters from voting at all. *Obama for America v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012) ("The *McDonald* plaintiffs failed to make out a claim for heightened scrutiny because they had presented no evidence to support their allegation that they were being prevented from voting."); *see also Thomas v. Andino*, Civil Action No. 3:20-cv-01552-JMC, Civil Action No. 3:20-cv-01730-JMC, 2020 WL 2617329, at *17 n.20 (D.S.C. May 25, 2020) ("[D]uring this pandemic absentee voting is the safest tool through which voters can use *to effectuate* their fundamental right to vote. To the extent that access to that tool is

unduly burdened, then no matter the label, 'denial of the absentee ballot is effectively an absolute denial of the franchise [and the fundamental right to vote].'") (quoting *O'Brien v. Skinner*, 414 U.S. 524, 533 (1974) (Marshall, J., concurring)). Under the federal constitution, lesser burdens on the right to vote are subject to a sliding scale of scrutiny: the more significant the burden on voting rights, the more demanding the level of scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (noting that "the rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens" voting rights). But in any case, the court must "weigh the character and magnitude" of the burden against the "precise interests put forward by the State as justifications for the burden," taking into account the "legitimacy and strength" of those interest and "the extent to which those interests make it necessary to burden" plaintiffs' rights. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Section 2 should be evaluated under strict scrutiny, but for the reasons discussed below, it does not survive any level of scrutiny.

1. Section 2 of the Directive places a burden on the right to vote.

Section 2 of the Directive will significantly delay the processing of absentee ballot request forms, resulting in disenfranchisement of qualified voters and creating additional, unjustifiable burdens even on those who are able to vote. Section 2 will prevent county auditors from efficiently processing and sending absentee ballots. It will prevent some qualified voters from obtaining an absentee ballot at all, either because they believe they have already done everything necessary to receive their ballot, (*see* 10/05/2020 CVCV060642 Order at 10), or because they do not know the information that the county auditors had pre-filled in for them on their first request form. It will require voters to take additional steps to receive their ballots, even though they already fulfilled the legal requirements for requesting an absentee ballot. (*Id.*) And it will create substantial confusion among voters. (*Id.*; 09/03/2020 CVCV060641 Memo. Mot. Temp Inj. at 81 (Declaration of Jacqueline Newman ¶ 10), 84 (Declaration of Mark Smith ¶ 10), at 88 (Declaration of Sara Schaumburg ¶ 9) (attached as Exhibit 1).) All of this places significant burdens on the right to vote.

The Secretary did not even attempt to dispute this evidence below, much less weigh this burden against the state's interest. In fact, the Secretary did not identify the state interest purportedly served by Section 2 beyond noting that it "ensures that the forms sent by the counties . . . are uniform." (09/17/2020 CVCV060641 Resistance Pls.' Mot. Temp. Inj. at 9.) But "'uniformity, standing alone' is not an interest important enough to significantly burden [the] ability to vote." *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 549 (6th Cir. 2014 (quoting *Ohio N.A.A.C.P. v. Husted*, 43 F. Supp. 3d 808, 846 (S.D. Ohio 2012)); *see also Obama for Am.*, 697 F.3d at 442 (White, J., concurring) ("[U]niformity without some underlying reason for the chosen rule is not a justification in and of itself."); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp 3d. 896, 934 (W.D. Wis. 2016) (rejecting "superficial" uniformity justification that limited every municipality to just one early voting location).

Accordingly, the burdens imposed by Section 2 of the Directive are not justified by any adequate government interest. Section 2 violates the due process protections of the Iowa Constitution, and

the district court did not abuse its discretion in finding that Petitioners are likely to succeed on the merits of this claim.

2. Section 2 violates the equal protection clause.

The Directive suffers from an additional constitutional defect in that it disparately treats similarly situated voters and therefore offends the right of equal protection under Article I, Section 7. All Iowa voters have the statutory right to receive an absentee ballot if they have complied with Iowa Code § 53.2(2)(a)'s requirements, which simply require voters to return an adequately sized piece of paper containing the required information and their signature. The Directive's purported ban on pre-filled requests ultimately results in similarly situated voters being treated differently based on whether they receive and return pre-filled absentee ballot request forms. This means that voters in Linn, Johnson, and Woodbury Counties may have their statutorily compliant absentee ballot request rejected when voters in other counties face no such risk. There is no adequate basis for this distinction, and it violates the equal protection requirements of the Iowa Constitution. *See* Iowa Const. art. I, § 6.

Once it is determined that persons are similarly situated, the court determines the level of scrutiny depending on the type of legislative classification being challenged. *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 45 (Iowa 2012). As set forth above, both because voting is a fundamental right in Iowa, and because Section 2 imposes severe burdens on the right to vote (that is, potential disenfranchisement), the Court should again analyze Section 2 and its impact under strict scrutiny. Regardless, Section 2 cannot survive any level of scrutiny under the equal protection clause, because it subjects Iowa voters to arbitrary and disparate treatment regarding their Request Forms. Section 2 has the effect of arbitrarily and without notice denying certain voters from exercising their statutory right to request an absentee ballot by following the required procedures.

Courts have repeatedly held unconstitutional such arbitrary and disparate treatment that burdens the right to vote and violates equal protection. The Iowa Constitution requires like voters to be treated alike. *See Coggeshall v. City of Des Moines*, 117 N.W. 309, 313 (Iowa 1908) (noting "an arbitrary classification of voters will

not be tolerated . . . , and it is doubtful whether any substantial discrimination between electors with full suffrage may be upheld"). Instructive federal cases agree. In *Bush v. Gore*, the U.S. Supreme Court recognized that equal protection is required not only in the "initial allocation of the franchise," but also to "the manner of its exercise," and that "once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. 98, 104–05 (2000); *see also Wexler v. Anderson*, 452 F.3d 1226, 1231–32 (11th Cir. 2006) (finding a non-uniform voting practice that makes it "less likely" that a person in one county will "cast an effective vote" than a voter in another county is a question "of constitutional dimension"). Moreover, as described above, Section 2 is not adequately and narrowly tailored to protect any cognizable interest the state may have in uniformity and does not survive any level of scrutiny. Accordingly, the district court did not abuse its discretion in finding that Section 2 violates Article I, Section 6 of the Iowa Constitution.

IV. The stay of the district court's order should be lifted

On October 6, 2020, this Court issued a stay of the district court's Agency Order. (10/06/2020 Order at 1.) Petitioners respectfully request that this be lifted. The Agency Order does not create any chaos or confusion among voters—who would expect absentee ballot requests forms that they receive from their auditors, reviewed, signed, and returned to be processed—but it does create an opportunity for county auditors to dissolve injunctions that are prohibiting them from processing the absentee ballot requests from lawful, registered voters. Processing these ballots expeditiously is of the utmost importance as the election draws near, the pandemic continues, and mail delays are rampant.

V. Conclusion

This Court grants interlocutory appeals only in "exceptional situations." *Banco*, 351 N.W.2d at 787. It generally "disfavor[s]" granting such applications. *Id.* For the above-mentioned reasons, the Secretary has not met his burden to show that he is entitled to an interlocutory appeal of the district court's orders granting Petitioners' Motion for Stay of Agency Action and Motion for Temporary Injunction. Petitioners respectfully request that

application for interlocutory appeal be denied and that the Court lift the stay of the Orders.

RESPECTFULLY submitted this 8th day of October 2020.

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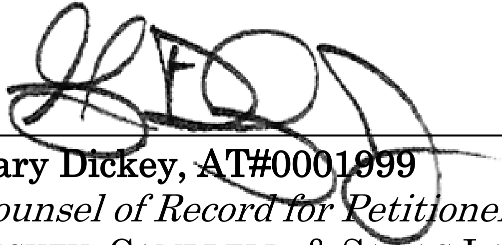
PROOF OF SERVICE & CERTIFICATE OF FILING

On October 8, 2020, I served this brief on all parties by electronic mail.

I further certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on October 8, 2020.



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