IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-1276

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LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA and TAYLOR BLAIR,
Plaintiff-Appellee,

vs.

IOWA SECRETARY OF STATE PAUL PATE,
Defendant-Appellant.

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APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE KAREN A. ROMANO, JUDGE

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# APPELLANT'S BRIEF

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## STATEMENT OF THE CASE

### Nature of the Case

This is an interlocutory appeal from an order granting a temporary injunction. The district court, the Honorable Karen A. Romano, enjoined Iowa Code sections 53.2(4), 53.2(5), 53.8, 53.10, 53.11, and 53.18(3). It also enjoined Defendant-Appellant Iowa Secretary of State Paul Pate (herein "the Secretary") from including language on the absentee ballot application indicating that a voter verification number is required and from disseminating materials with the Voter Ready Iowa graphic, or language indicating that Iowa voters will be asked to show identification to vote in 2018, without a clear statement that identification is not required.

### Course of Proceedings

The Iowa legislature passed House File 516 in April of 2017. Governor Terry Branstad signed the bill into law on May 5, 2017. The relevant portions of the law took effect on January 1, 2018. Plaintiff-Appellees League of United Latin American Citizens and Taylor Blair (herein "LULAC") filed a lawsuit challenging portions of the law on May 30, 2018. The lawsuit alleges that various provisions of the new law violate the Iowa Constitution. Petition 05/30/18 (Polk County

No. CVCV056403). LULAC also sought judicial review of an agency rule that it challenged under the Iowa Administrative Procedure Act.

The Secretary filed a motion to dismiss on June 11, 2018, on the ground that the Petition improperly invoked both the original and appellate jurisdiction of the district court. Motion to Dismiss 06/11/18 (Polk County No. CVCV056403). LULAC responded with a motion to sever the judicial review action from the declaratory judgment action. Motion to Sever 06/21/18 (Polk County No. CVCV056403). The Secretary did not resist the motion, and the district court ordered LULAC to file a petition for judicial review under a separate case number. Order Granting Motion to Sever 07/06/18 (Polk County No. CVCV056403).

On June 27, 2018, LULAC filed a motion seeking to temporarily enjoin several provisions of Iowa's absentee voting process challenged in the original Petition, including a request to stay the administrative rule. Motion for Temporary Injunction 06/27/18 (Polk County No. CVCV056403). The Secretary resisted the motion and the parties appeared for a hearing in the Iowa District Court for Polk County on July 6, 2018. The district court granted LULAC's motion for a temporary injunction in an order filed in the afternoon on July 24,

2018. Order Granting Injunction 07/24/18 (Polk County No. CVCV056403). Counsel for the Secretary were not served via EDMS until the morning of July 25. The Secretary sought interlocutory appeal on July 26. Application for Interlocutory Appeal 07/26/18 (Sup. Ct. No. 18-1276).

**Facts**

In an effort to prevent voter fraud, ensure the fairness of Iowa elections, and modernize the absentee voting process, the legislature made a number of changes in House File 516. *See* Williams Aff. ¶ 6 (Polk County No. CVCV056403). Relevant to this litigation are changes to the length of the absentee voting period, so-called "signature matching" provisions, language on the absentee ballot application, and Defendant-Appellant's public information campaign.

Iowa is a nationwide leader in opportunities for early absentee voting. At least thirteen states do not allow any early voting and require an excuse to vote absentee. *See* National Conference of State Legislatures Report, Absentee and Early Voting (August 17, 2017), http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx. Of the thirty-seven states that allow early

voting, only ten have a period of 29 or more days. *Id.* Only twenty-seven states allow absentee voting without excuse. *Id.*

The percentage of Iowa voters who cast absentee ballots has increased steadily in recent decades. *See* Marshall Aff. Exhibit F, P.25 (Figure 2a) (Polk County No. CVCV056403). In 1988, only 6.5 percent of ballots were cast absentee. *See* Marshall Aff. Exhibit F, P.21 (Polk County No. CVCV056403). In 2004, the first presidential election since the 40-day absentee period went into effect, absentee voters accounted for 30 percent of the total votes cast. *See* Report of Voters Registered and Voting, 2004 General Election, Iowa Secretary of State, *available at* https://sos.iowa.gov/elections/pdf/2004/general/2004StatewideStats.pdf. In 2016, the percentage of absentee voters increased to almost 42 percent. *See* Report of Voters Registered and Voting, 2016 General Election, Iowa Secretary of State, *available at* https://sos.iowa.gov/elections/pdf/2016/general/statestats.pdf.

In response to the growing number of absentee ballots cast, the legislature decided to update the process through House File 516. Courts have recognized that the privilege of absentee voting carries with it unique risks to election integrity. *See, e.g., Matter of Election*

*Contest*, 462 N.W.2d 185, 193 (S.D. 1990) (The privilege of absentee voting "opens the door to the risk of fraud, and places on absentee voters the affirmative duty to comply strictly with mandatory procedures designed to discourage fraud."); *Dombkowski v. Messier*, 319 A.2d 373, 375-76 ("The court does, however, recognize that there is considerable room for fraud in absentee voting...").

Section 51 of House File 516 amended Iowa Code section 53.8 to provide that the county auditor must mail an absentee ballot upon receiving the request as soon as the absentee ballots are printed, but no more than 29 days prior to an election. Section 52 amended Iowa Code section 53.10 to reduce the period of in-person absentee voting at the county auditor's office from a maximum of 40 days to a maximum of 29 days. Section 53 amended Iowa Code section 53.11 to allow for the creation of satellite absentee voting stations not more than 29 days prior to an election.

Section 30 of House File 516 added a new subsection to Iowa Code section 53.2 that reads as follows:

> The commissioner may dispute an application if it appears to the commissioner that the signature on the application has been signed by someone other than the registered voter, in comparing the signature on the application to the signature on record of the registered voter

> named on the application. If the commissioner disputes a registered voter's application under this subsection, the commissioner shall notify the registered voter and the registered voter may submit a new application and signature or update the registered voter's signature on record, as provided by rule adopted by the state commissioner.

Section 31 of House File 516 amended Iowa Code section 53.18 to clarify that a return envelope marked with an affidavit is defective "if it appears to the commissioner that the signature on the envelope has been signed by someone other than the registered voter, in comparing the signature on the envelope to the signature on record of the registered voter named on the envelope." These two changes are referred to herein as the "signature matching requirements."

Section 6 of House File 516 extends the period during which a voter may apply for an absentee ballot from 70 days to 120 days. It also requires that the application contain the registered voter's voter verification number. The voter verification number means the registered voter's driver license or non-operator identification number, or the identification number assigned to the voter pursuant to Iowa Code section 47.7(2).

## ARGUMENT

### I. The District Court Abused Its Discretion When It Granted LULAC's Motion for Temporary Injunction.

#### Preservation of Error

The Secretary resisted the motion for temporary injunction on the ground that LULAC could not prove irreparable harm or likelihood of success and that the balance of harm favored the Secretary. *See* Resistance to Motion for Temporary Injunction 07/06/18 (Polk County No. CVCV056403). Error is preserved.

In resisting the Secretary's application for interlocutory appeal, LULAC argued that the Secretary did not preserve a challenge to the breadth of the injunction because he did not file a rule 1.904(2) motion. This is not accurate. The Secretary was not required to set forth all the possible ways the district court might exceed its authority in order to challenge such excess on appeal, nor was he required first to seek relief under rule 1.904(2). *See, e.g.*, *In re Marriage of Neddermeyer*, No. 07-1261, 2008 WL 375256, at *3 (Iowa Ct. App. Feb. 13, 2008) (citing *West Branch State Bank v. Gates*, 477 N.W.2d 848, 852 (Iowa 1991)) ("A rule 1.904(2) motion is a precondition to an appeal only if the district court failed to resolve an issue that had been properly submitted.").

**Standard of Review**

The grant of a temporary injunction will not be overturned absent a "clearly erroneous factual determination, an error of law, or an abuse of discretion." *Mid-America Real Estate Co. v. Iowa Realty Co., Inc.*, 406 F.3d 969, 972 (8th Cir. 2005) (quoting *Taylor Corp. v. Four Seasons Greetings, LLC*, 315 F.3d 1039, 1041 (8th Cir. 2003). An injunction cannot issue if there is no chance of success on the merits, or if the district court's findings of fact do not support the conclusion that there is a threat of irreparable harm. *Id.*

**Merits**

An injunction is an "extraordinary remedy" that should not be granted unless "clearly required to avoid irreparable damage." *Planned Parenthood of Mid-Iowa v. Maki*¸ 478 N.W.2d 637, 639 (Iowa 1991). The court must "carefully weigh the relative hardship which would be incurred by the parties upon the award of injunctive relief." *Maki*, 478 N.W.2d at 639 (citing *Green v. Advance Homes, Inc.*, 293 N.W.2d 204, 208 (Iowa 1980)). This Court has "repeatedly emphasized that the issuance or refusal of a temporary injunction is a delicate matter—an exercise of judicial power which requires great caution, deliberation, and sound discretion." *Kleman v. Charles City*

*Police Dept.*, 373 N.W.2d 90, 96 (Iowa 1985). Perhaps most important, "[a]n injunction will not issue where the right of the complainant, which it is designed to protect, depends upon a disputed question of law about which there may be doubt, which has not been settled by the law of this state." *Iowa State Dept. of Health v. Hertko*, 282 N.W.2d 744, 751 (Iowa 1979) (quoting *Kent Products v. Hoeph*, 61 N.W.2d 711, 714-15 (Iowa 1953)).

To prevail on its motion, LULAC was required to prove (1) that in the absence of an injunction it would suffer irreparable harm, (2) that it was likely to succeed on the merits, and (3) that injunctive relief was warranted considering the circumstances confronting the parties and "balance[ing] the harm that a temporary injunction may prevent against the harm that may result from its issuance." *Max 100 L.C. v. Iowa Realty Co., Inc.*¸ 621 N.W.2d 178, 181 (Iowa 2001). The showing that LULAC was required to make was especially onerous in this case, as a strong presumption of validity protects statutes from constitutional challenges. *Miller v. Iowa Real Estate Commission*¸ 274 N.W2.d 288, 291 (Iowa 1979); *State v. Robbins*, 257 N.W.2d 63, 67 (Iowa 1977); *City of Waterloo v. Selden*, 251 N.W.2d 506, 508 (Iowa 1977).

### A. The district court's factual findings do not support a conclusion that LULAC would be irreparably harmed absent an injunction.

In its order, the district court concluded that the shortened absentee voting period, signature-matching requirements, and voter identification number requirements would result in disenfranchisement of voters. Even if such disenfranchisement could constitute irreparable harm, the district court's findings were not sufficient to support its conclusion that the challenged provisions actually deny any Iowa voter the right to vote.

The procedural history of the case supports the Secretary's position that LULAC will not be irreparably harmed absent an injunction. LULAC did not seek a temporary injunction until June 27, 2018, more than one year after the challenged legislation was signed and more than six months after it took effect. Williams Aff. ¶ 7 (Polk County No. CVCV056403). Since the legislation took effect, special elections have been held in more than fifty Iowa counties and the statewide primary election took place on June 5, 2018. Williams Aff. ¶ 7-8 (Polk County No. CVCV056403). LULAC waited through all of these elections to seek temporary relief, and the results of the elections show that it will not be irreparably harmed without it. *See*

*Benisek v. Lamone*, 138 S.Ct. 1942, 1944 (2018) ("[A] party requesting a preliminary injunction must generally show reasonable diligence.").

Nearly 290,000 Iowans voted in the June 5 primary. Williams Aff. ¶ 8 (Polk County No. CVCV056403). Of those, 49,808 voted by absentee ballot. Williams Aff. ¶ 8 (Polk County No. CVCV056403). More absentee ballots were cast in the June 5 primary than in any primary election in the State's history. Williams Aff. ¶ 8 (Polk County No. CVCV056403). Turnout was particularly high for the democratic primary. A total of 182,736 Iowans voted in the democratic primary, including 34,000 absentee voters, also a state record. Williams Aff. ¶ 9 (Polk County No. CVCV056403). These results show that the new legislation does not meaningfully burden Iowans' ability to exercise the franchise—even by absentee ballot. LULAC failed to meet their burden to show that an injunction is "clearly required to avoid irreparable damage." *Matlock v. Weets*, 531 N.W.2d 118, 122 (Iowa 1995) (quoting *Maki*, 478 N.W.2d at 639).

The district court did not consider the data from the June 5 primary "persuasive [or] indicative" how absentee voters would be affected in a general election because of differences in the "voter

pool." Order Granting Injunction 07/24/18 P.6 (Polk County No. CVCV056403). The district court does not explain how the "voter pool" is different, except to say that voters must be registered with a party to vote in the primary. But even if primary voters are more determined or engaged than general election voters, LULAC's constitutional claims rely on its members being *prevented* from exercising their right to vote as a result of the changes in the law. Moreover, LULAC alleges that these changes are especially burdensome for Democratic Party voters, but Democrats saw a record absentee voter turnout in the June primary. Williams Aff. ¶ 9 (Polk County No. CVCV056403).

#### *1. The 29 day absentee voting period will not irreparably harm LULAC absent the injunction.*

The district court's findings were woefully inadequate to justify its conclusion that LULAC or its members will be "disenfranchised" by the 29-day absentee voting period. The district court relied solely on the fact that in the 2016 general election, 88,163 absentee ballots were received between the 40th and the 29th day prior. *See* Burden Aff. ¶ 48 (Polk County No. CVCV056403). That represents about 13 percent of the total absentee ballots received for the 2016 general

election. *See Absentee Ballot Statistics November 8, 2016 General Election*, https://sos.iowa.gov/elections/pdf/2016/general/absenteecongressional2016.pdf (accessed August 3, 2018).

The district court was apparently convinced by the affidavit of Barry C. Burden, a political science professor at the University of Wisconsin-Madison. Burden purports to analyze the effect of the new law on the "calculus of voting." Burden Aff. ¶ 9 (Polk County No. CVCV056403). His methodology has as its first principle that a voter will vote so long as the perceived benefit outweighs the cost of voting. Burden Aff. ¶ 10 (Polk County No. CVCV056403). He suggests that the change in the length of the absentee voting period will "disrupt the voting habits of some Iowans." Burden Aff. ¶ 48 (Polk County No. CVCV056403). He further concludes that the 13 percent of absentee voters "accustomed to voting between the 40th and 29th day before the election will now be required to change the date and/or method by which they vote, or not vote at all." Burden Aff. ¶ 48 (Polk County No. CVCV056403). Burden does not say whether any of the Iowa voters he describes are LULAC members, nor does he give any reason why they would be unable to "change the date and/or method by which they vote." Even accepting Burden's statements as the district

court's findings, they do not justify the conclusion that any voter, much less any LULAC member, will be unable to vote under the new law. *See Mid-America Realty*, 406 F.3d at 977.

### *2. The signature matching requirements will not irreparably harm LULAC absent an injunction.*

The district court's findings supporting its conclusion that the signature matching requirements will result in disenfranchisement are too speculative to entitle LULAC to an injunction. "In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 425 (8th Cir. 1996). The district court relied primarily on LULAC's contention that if an absentee ballot received after 5:00 p.m. on the Saturday before an election is deemed defective, the voter will have no opportunity to cure and the vote will not be counted. Order Granting Injunction 07/24/18 P.7-8 (Polk County No. CVCV056403). But that conclusion requires facts supporting a finding that county auditors will routinely mistake authentic signatures for mismatches.

The only evidence LULAC provided supporting a conclusion that absentee votes will be rejected as a result of an "false negative" signature match was a declaration from Linton Mohammad, a

forensic document examiner. Mohammad testified that untrained handwriting examiners are more likely to mistake authentic signatures for mismatches. *See* Mohammad Aff. (Polk County No. CVCV056403). But studies from California and a case from Florida—two states with signature matching requirements—suggest that signature mismatches *in general* are extremely rare. In Florida, the mismatch rate varied from 0.25 percent in some counties to 1.5 percent in others. *See Florida Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *3 (N.D. Fla. Oct. 16, 2016). In the California study, the mismatch rate ranged from 0.15 percent to 1.67 percent. *See* Marshall Aff. Exhibit K (Polk County No. CVCV056403). Because California and Florida, unlike Iowa, did not provide absentee voters with an opportunity to cure signature mismatches, it is unclear how many, if any, of those mismatches were false negatives.

Despite the signature matching requirement having been in effect for special elections in more than fifty Iowa counties as well as the statewide primary on June 5, *see* Williams Aff. ¶ 7 (Polk County No. CVCV056403), and despite having a state-record 49,808 absentee ballots cast, this case does not involve a single plaintiff who

alleges that her absentee ballot application was rejected because of a signature mismatch, much less that she was unable to cure and was "disenfranchised" as a result. The district court noted this, but limited it to the lack of a plaintiff whose ballot was received after 5:00 p.m. on the Saturday before an election. It quoted a statement made by LULAC's counsel at the hearing that they could not produce a plaintiff in those circumstances because the affected voter would not have been notified. But 91 percent of the absentee ballots were received prior to the deadline. Burden Aff. ¶ 60 (Polk County No. CVCV056403). This lawsuit does not involve a plaintiff who alleges that her signature was returned for a signature mismatch at any time.

The district court concluded that "[b]ased on sheer probability and the amount of absentee ballots previously received after the 5 P.M. deadline, it is nearly certain that at least one voter will be disenfranchised as a result of the handwriting matching provision." Order Granting Injunction 07/24/18 (Polk County No. CVCV056403). That conclusion is not supported by the evidence or the court's findings. House File 516 nearly doubled the amount of time that voters have to apply for an absentee ballot from 70 days to 120 days. In the event of a mismatch, voters are provided an

opportunity to cure by submitting a new application, either in writing or in person, or by updating the voter's signature on record. *See* Iowa Code §§ 53.2(5), 53.18(2). LULAC failed to prove that it would be irreparably harmed if the signature matching requirements were not enjoined.

### *3. Requiring registered voters to provide a verification number on an absentee ballot application will not irreparably harm LULAC*

The district court held that LULAC will suffer irreparable harm if voters are required to include a voter verification number on an application for an absentee ballot. In reaching this conclusion, the district court relied heavily on an error of law. In its Order the court wrote, "Under the law as it is written, a voter is and should be eligible to apply for an absentee ballot without providing a voter verification number." Order Granting Injunction 07/24/18 P.9 (Polk County No. CVCV056403). But the law as written says, "Each application shall contain the following information ... (4) The registered voter's voter verification number." Iowa Code § 53.2(4)(a)(4).

The district court relies on section 53.2(4)(b), which directs the county auditor to obtain any necessary information that was not provided to complete the application. But to say that subsection (b)

makes the absentee voter application misleading or erroneous is an absurd interpretation. If the district court is correct, it is just as misleading and erroneous to inform the voter that they are required to provide their name on the application. *See* Marshall Aff. Exhibit G (Polk County No. CVCV056403).

Once again, the district court's findings do not support its conclusion that LULAC will be irreparably harmed absent an injunction. The district court based its decision on "evidence ... that some voters are dissuaded from applying for absentee ballots if they are required to provide their voter identification number." Order Granting Injunction 07/24/18 (Polk County No. CVCV056403). The "evidence" to which the court refers is a declaration from a LULAC member who testified that voters were reluctant to give the information to a LULAC canvasser. Henry Aff. ¶ 9 (Polk County No. CVCV056403). Even if that were true, it does not in any way suggest that those voters were unable to vote. "The possible harm identified is wholly speculative and because it is, it cannot be called irreparable harm." *Local Union No. 884, United Rubber, Cork, Linoleum, and Plastic Workers of America v. Bridgestone/Firestone, Inc.*, 61 F.3d 1347, 1355 (8th Cir. 1995).

#### *4. The Secretary's public education campaign will not irreparably harm LULAC.*

The district court's findings were also insufficient to support its conclusion that LULAC will be irreparably harmed by the "logo" that depicts the phrase "ID" with a check mark next to it. Order Granting Injunction 07/24/18 (Polk County No. CVCV056403). The district court relied on a paragraph in the Burden declaration wherein he speculates that voters will not read past the first question on the Secretary's website and will thus be left with the impression that they cannot go to the polls without identification in 2018. Burden Aff. ¶ 75 (Polk County No. CVCV056403). Once again, the district court's finding is much too speculative to entitle LULAC to an injunction. *Local Union No. 884*, 61 F.3d at 1355.

### B. The District Court erred when it concluded that LULAC was likely to succeed on the merits.

For the reasons explained in Division I.A. of the Secretary's brief, LULAC is not entitled to an injunction and it is unnecessary to examine their likelihood of success on the merits. Nevertheless, the district court erred when it held that the challenged provisions directly and substantially interfere with the right to vote and applied

strict scrutiny. As a result, the court erroneously concluded that LULAC was likely to succeed on the merits.

***1. Strict scrutiny does not apply.***

In the district court, LULAC identified two separate "bodies of case law" that determine the level of scrutiny that applies to this challenge. The federal framework, known as *Anderson-Burdick*, balances a state's interest in a challenged law against the burden the law imposes. Under *Anderson-Burdick*, "severe restrictions" on a constitutional right survive only if "narrowly drawn to advance a state interest of compelling importance." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (quotations omitted). Regulations that impose "more-than-minimal" but "less-then-severe" burdens require a "flexible" analysis that weighs the burden against the state's asserted interest and chosen means. *Id.* (quotations omitted). "Minimally burdensome and nondiscriminatory regulations," on the other hand, "are subject to a less-searching examination closer to rational basis and the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (quotations omitted). Applying the federal analysis, LULAC's challenge lands squarely in the third box.

Under the Iowa constitution, strict scrutiny applies to statutes that *directly and substantially interfere* with a fundamental right. *State v. Seering*, 70 N.W.2d 655, 663 (Iowa 2005). If a fundamental right is not involved, or if the challenged law does not substantially interfere with a fundamental right that is involved, the rational basis test applies. *McQuistion v. City of Clinton*¸ 872 N.W.2d 817, 832-33 (Iowa 2015). Indeed, "[n]ot every government action that relates in any way to a fundamental liberty must be subjected to strict-scrutiny analysis ... Instead, the alleged infringement is unconstitutional only when it 'has a direct and substantial impact' on the fundamental right ... Reasonable regulations that do not directly and substantially interfere with the right may be imposed." *McQuistion*, 872 N.W.2d at 833. Because the absentee ballot provisions do not directly or substantially interfere with the right to vote, they are not subject to strict scrutiny under the Iowa constitution.

The district court reached the staggeringly broad conclusion that any "state action[] affecting [the fundamental right to vote], must be subject to strict scrutiny." Order Granting Injunction 07/24/18 P.14 (Polk County No. CVCV056403). Its conclusion is inconsistent with this Court's decisions in *McQuistion* and *Hensler v. City of*

*Davenport*, 790 N.W.2d 569, 583 (2010). Those cases hold that even where a law affects a fundamental right, it is subject to strict scrutiny only when it directly and substantially intrudes into the exercise of that right. *McQuistion*, 872 N.W.2d at 833; *Hensler*, 790 N.W.2d at 583. The district court's conclusion that the challenged provisions directly and substantially interfere with the right to vote because of the number of Iowans who vote absentee creates a "one way ratchet" that will impair the ability of the Secretary and the legislature to operate fair and efficient elections.

LULAC's challenge to the length of the absentee voting period is illustrative. There is no question that, standing alone, a 29-day absentee voting period—during which votes may be cast in-person or by mail and without excuse—is constitutional. Indeed, it is one of the most generous in the nation. *See* National Conference of State Legislatures Report, State Laws Governing Early Voting (March 21, 2018), http://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx. Iowa is one of only a handful of states that have ever allowed voters to cast an absentee ballot more than 29 days prior to the date of a primary or general election. Having gone beyond constitutional requirements in the

past, the State is "free to return in part to the standard prevailing generally throughout the United States." *Crawford v. Board of Educ. Of City of Los Angeles*, 458 U.S. 527, 542 (1982).

The district court's Order has the effect of declaring that 40 days is a constitutional minimum for absentee voting in Iowa unless the State can show that any change is narrowly tailored to achieve a compelling interest. It creates a "one way ratchet" that discourages the legislature from experimenting with expanded opportunities for early or absentee voting, knowing that they will not be able to go back. It will hamper the State's ability to adapt to changing needs of county auditors and voters in the future because any changes to the system as it is currently constituted will be raked over the coals in court.

The Burden affidavit suggests that voter turnout may be depressed by, among other things, relocating a polling place, requiring recent movers to update registration, or re-drawing legislative district lines. Burden Aff. ¶ 21 (Polk County No. CVCV056403). The logic applied by the district court suggests that those changes should also be subject to strict scrutiny. The Secretary does not dispute that laws which directly and substantially interfere

with the fundamental right to vote under the Iowa constitution must be subject to the most searching inquiry. But none of the provisions challenged in this case do so interfere; the rational basis test is appropriate.

Moreover, LULAC challenges the constitutionality of House File 516 on its face. By its nature, "a facial challenge asserts that the statute is void for every purpose and cannot be constitutionally applied to any set of facts." *F.K. v. Iowa Dist. Court for Polk County*, 630 N.W.2d 801, 805 (Iowa 2001); *see also Planned Parenthood of the Heartland v. Reynolds*, -- N.W.2d --, 2018 WL 3192941, at *20 (Iowa June 29, 2018) ("Generally, to succeed on a facial challenge, the petitioner must prove a statute is totally invalid and therefore, incapable of any valid application."). It is not enough to argue that the challenged absentee voting provisions are unconstitutional under a given set of facts—such as for "voters who are young, low income, have less education, are more residentially mobile, are racial and ethnic minorities, and favor the Democratic Party over the Republican Party." *See* Burden Aff. ¶ 107 (Polk County No. CVCV056403). Rather, this Court must determine whether any set of facts exists under which the statute would be constitutional.

### *2. Applying the rational basis test, LULAC cannot show that it is likely to succeed on the merits.*

The rational basis analysis requires the court to determine whether there is "a reasonable fit between the government interest and the means utilized to advance that interest." *Seering*, 701 N.W.2d at 662. Here, the State has an important interest in protecting the integrity of its elections through prevention and deterrence of voter fraud, as well as an interest in ensuring that its elections are conducted in a fair and even manner. *See* Williams Aff. ¶ 6 (Polk County No. CVCV056403). In general, and especially in the context of a petition for temporary injunctive relief, courts do not "require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Husted*, 834 F.3d at 633 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)). Indeed, the United States Supreme Court upheld a photo identification requirement in Indiana designed to combat voter fraud because, despite the fact that the "record contained no evidence of any such fraud actually occurring in Indiana at any time in its history," the Court had "no question about the legitimacy or importance of the State's interest in counting only the votes of eligible

voters." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 195-96 (2008).

In the context of a temporary injunction, characterized by a limited record and a compressed timeline, the State's interests in regulating the election process are practically presumed sufficient under the rational basis test. *See Husted*, 834 F.3d at 627 (holding that when the rational basis test is applied, "the State's important regulatory interests are generally sufficient to justify the restrictions."); *see also Devine v. Wonderlich*, 268 N.W.2d 620, 623 (Iowa 1978) ("Among legitimate statutory objects [for the regulation of voting] are shielding the elector from the influence of coercion and corruption, protecting the integrity of the ballot, and insuring the orderly conduct of elections."). LULAC bore the burden to prove its entitlement to an injunction, and it did not show that it was likely to succeed on the merits under the rational basis test.

### C. The balance of harms favors the Secretary.

The district court was required to determine whether the balance of harms favors the party seeking the injunction or the party opposing it before granting an injunction. *See Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). In this

case, the balance of harms favors the Secretary. Shortening the in-person absentee voting period from 40 days to 29 days minimally burdens absentee voters. The current absentee voting period is more generous to absentee voters in Iowa than in all but a handful of states. The district court's findings do not support a conclusion that absentee voters who prefer to vote during the period 30 days prior to an election through 40 days prior to an election will be unable to vote absentee during the following 29 days. On the contrary, as explained above, more absentee ballots were cast in the June primary than in any primary election in the State's history. Williams Aff. ¶ 8 (Polk County No. CVCV056403)

The signature matching requirements also minimally burden absentee voters. The current law expands the period for accepting applications for absentee ballots from 70 days to 120 days, providing absentee voters with a period almost twice as large in which to apply for an absentee ballot and cure any defect if necessary. Moreover, as discussed above, the record contains no evidence of even a single Iowa application or ballot that was rejected under the signature matching requirement despite having been in effect for special

elections in more than fifty Iowa counties and the statewide primary on June 5, 2018.

On the other side, the Secretary has spent over $724,000 on updating election administrative materials, printing and mailing voter identification cards, training materials, public educational materials and promotions, and other expenses to implement House File 516. Williams Aff. ¶ 15 (Polk County No. CVCV056403). The Secretary also trained all 99 county auditors and their election staff on the changes required by House File 516. Williams Aff. ¶ 12 (Polk County No. CVCV056403). The Elections Division conducted in-person training sessions on November 30, 2017, May 2, 2018, and May 4, 2018. Williams Aff. ¶ 12 (Polk County No. CVCV056403). In addition to these in-person training sessions, the Elections Division provided written training materials, and answered numerous individual questions from county election officials. Williams Aff. ¶ 12 (Polk County No. CVCV056403).

Training for this election is ongoing. If the challenged provisions are enjoined through the general election, the Secretary estimates that it would cost a significant amount to revise all of the systems and printed materials, and update every voter in Iowa

regarding the status of the absentee balloting and voter identification requirements through a statewide mailing. Williams Aff. ¶ 15 (Polk County No. CVCV056403).[1] Under these circumstances, the balance of harms favors the Secretary.

The district court brushed aside these substantial concerns about harm to the Secretary in favor of the unsupported conclusion that voters will be disenfranchised or "experience substantial obstacles" absent an injunction. The "substantial obstacles" must refer only to the upcoming general election, though, because these laws have been in place since January and no evidence from the significant number of elections up to this point suggests that voters are facing "substantial obstacles." Even the voter affidavits submitted by LULAC, while revealing some administrative hiccups and accompanying frustration, show that each affiant was able to vote. The Secretary has at all times during this litigation expressed a

[1] The district court, apparently unconvinced by the Secretary's good faith estimate of the cost of complying with an injunction, set LULAC's bond at $2,500. The parties appeared for a hearing on the motion for temporary injunction just over one week after the motion was filed. Given the extremely compressed timeline, the Secretary had little opportunity to explain more fully the anticipated cost of complying. If this Court affirms the injunction, the bond should be increased, or, in the alternative, this Court should remand for a hearing on the amount of the bond.

willingness to move forward quickly in the hope of reaching a decision on the merits prior to the November election. If the parties are able to do so, LULAC will not be harmed in any way by a decision setting aside the injunction.

### D. The district court's injunction is overbroad.

The district court's order enjoins the enforcement of Iowa Code §§ 53.2(4), 53.2(5), 53.8, 53.10, 53.11, and 53.18(3). It is possible to read the injunction in a way that prohibits enforcement of much of Iowa's absentee voting process. For example, Iowa Code section 53.8 instructs the county auditor to mail an absentee ballot upon receipt of an application immediately after the ballots are printed, but no more than twenty-nine days prior to an election. The district court's order, on its face, enjoins enforcement of this entire section. LULAC argues that the court intended to reverse only the changes in the law made by House File 516. It cites *State v. Books*, 225 N.W.2d 322, 325 (Iowa 1975), for the proposition that a court can invalidate an amendment to a statute and effectively resurrect the prior law. For reasons expressed more fully in the brief amicus curiae of Muscatine County

Auditor Lesilie Soule,[2] the Secretary disagrees. In any event, the injunction as written is overbroad and should be modified if this Court affirms.

## CONCLUSION

A temporary injunction is an extraordinary equitable remedy, especially when sought to block a duly-enacted statute. The district court's findings did not support a conclusion that LULAC met its burden. The injunction should be set aside.

Respectfully submitted,

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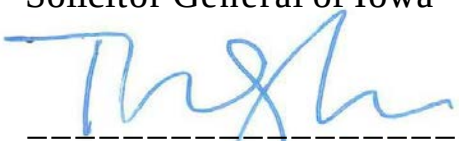

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[2] The amicus brief also argues that LULAC did not sue the correct defendants. Because Iowa Code section 47.1(1) designates the Secretary as the state commissioner of elections, directs him to supervise the activities of the county commissioners of elections (the auditors), and directs that he shall prescribe uniform election practices and procedures, the Secretary is the proper defendant in this action.

## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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