IN THE SUPREME COURT OF IOWA

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA and TAYLOR BLAIR, Plaintiff-Appellees, v. IOWA SECRETARY OF STATE PAUL PATE, Defendant-Appellant.	No. 18-1276 BRIEF OF AMICUS CURIAE MUSCATINE COUNTY AUDITOR LESLIE SOULE IN SUPPORT OF MOTION FOR EMERGENCY STAY OF TEMPORARY INJUNCTION AND APPLICATION FOR INTERLOCUTORY APPEAL

COMES NOW Muscatine County Auditor Leslie Soule and submits the following in support of the motion for emergency stay and interlocutory appeal of the temporary injunction entered below:

There are 100 independently-elected officials in the State of Iowa who administer elections. Plaintiffs below failed to bring into court 99% of them in a constitutional challenge to changes to Iowa's election laws. This error was greatly compounded by the specific language used by the district court when it entered a temporary injunction. The injunction has little effect against the one named defendant below, has no effect against the elections officials who were not in court, and creates great uncertainty about the rules by which the upcoming 2018 general election will be conducted. A stay of the district court's order is greatly needed.

Courts do not "strike down" statutes.

The belief that a court can "strike down" an unconstitutional statute "is widely held throughout our legal and political culture." Jonathan Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L.Rev. 3 (2018) (forthcoming)[1]. But this view is "imprecise and misleading" understanding of judicial review. *Id.* at 4. "The power of judicial review is more limited: It permits a court to decline to enforce a statute in a particular case or controversy, and it permits a court to enjoin executive officials from taking steps to enforce a statute – though only while the court's injunction remains in effect." *Id.*

"There is no procedure in American law for courts or other agencies of government – other than the legislature itself – to purge from the statue books, laws that conflict with the Constitution as interpreted by the Courts." *Id.* at n. 5 (citing *Winsness v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006)). The court's power is directed to an official, not the statute, to prevent an unconstitutional law from being enforced. *Id.* (citing *Ex parte Young*, 209 U.S. 123, 155-56 (1908)).

This fallacy can particularly cause mischief in the context of a preliminary injunction. "When a court issues an injunction of this sort, it is widely assumed that the law has been 'blocked' from taking effect…[n]ot so. The law remains in effect even after a court enjoins its enforcement…" *Id.* at 6. "All too often, judicial rhetoric implies that courts formally suspend or revoke

[1] Available at SSRN: https://ssrn.com/abstract=3158038

duly enacted statutes, by claiming that laws have been 'blocked,' 'struck down,' 'nullified,' rendered 'void,' or 'invalidated' by an adverse court ruling. This is writ-of-erasure terminology, and it should be discarded from the legal lexicon." *Id.* at 10-11.

It must be emphasized that avoiding the writ-of-erasure fallacy has nothing to do at all with limiting the power of judicial review. This Court exercises the judicial power of the State of Iowa – including the power to declare that a statute is unconstitutional. That power is in no way limited by describing it accurately. "For those who believe that the political branches must respect the judiciary's constitutional pronouncements as the final and authoritative exposition of the Constitution, it is *still* a mistake to equate the judicially imposed non-enforcement of a statute with a veto-like power to 'strike down' legislation." Mitchell at 12.

The district court fell into this fallacy in crafting its injunction. The order only has two provisions directed to the Secretary of State. He is enjoined from "including on the absentee ballot application language stating '[a]n absentee ballot cannot be issued until ID number is provided or indicating that such information is 'required.'" He is also enjoined from "disseminating materials with the Voter Ready graphic or stating 'Iowa voters will be asked to show a form of valid identification when voting,' or similar words, without a clear statement that identification is not required to vote in 2018." There is no question that Secretary Pate must obey these two provisions unless and until this Court intervenes.

But the district court's order contains four additional provisions directed at House File 516 *itself*. For example, the court ordered "that House File 516's shortening of the timeframe to cast absentee ballots from 40 to 29 days, HF sections 51, 52, and 53; Iowa Code sections 53.8, 53.10, and 53.11 are hereby ENJOINED." This is pure writ-of-erasure fallacy. How can an injunction be directed to a law? Was House File 516 served with the plaintiffs' petition and original notice? Can House File 516 be held in contempt for willfully failing to obey the injunction?

These four provisions are legally a nullity. They are not directed to the Secretary of State (and, as will be seen below, they certainly are not directed to any county commissioner of elections). The Iowa Legislature passed and the Governor signed House File 516. Once the law was approved by the Governor he transmitted it to the Secretary of State to be kept in the archives of our government. Iowa Constitution Art. III, § 16. Despite the language of the district court's order, no one is going to open up that file cabinet and do anything to the document. When the Code Editor compiles the 2019 Code of Iowa containing all laws of a general and permanent nature he will, most assuredly, include every provision of House File 516 as it was enacted and approved. Nothing has been "struck down."

Although couched in the form of an injunction, the actual language of the district court's order is more in the form of a preliminary quasi-declaratory judgment that certain provisions of House File 516 are unconstitutional. But this status does not constrain the actions of county auditors in the

administration of upcoming elections. For example, a declaratory judgment from a federal court that a state criminal statute is unconstitutional would not prohibit a later prosecution under the statute. *Steffel v. Thompson*, 415 U.S. 452, 470 (1974). "What is clear, however, is that even though a declaratory judgment as 'the force and effect of a final judgment,' 28 U.S.C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt." *Id.* Of course "a favorable declaratory judgment…cannot make even an unconstitutional statute disappear." *Id.* at 469.

The district court casts an allegation of unconstitutionality over House File 516 which should promptly be remedied by this Court. Certainly if Secretary Pate is to be enjoined from enforcing these provisions of House File 516 he deserves the courtesy of a court order which actually says that. The difficulty he faces at the present time is greatly compounded by the other 99 elected officials who are charged with the administration of elections but are not even named parties in this action. The failure to include county auditors as defendants greatly magnifies the errors in the district court's order.

The failure to sue the correct defendants

Plaintiffs mounted a constitutional challenge solely against Secretary of State Paul Pate. Pate is the state commissioner of elections. Iowa Code § 47.1(1). His duties include supervising the activities of county commissioners of elections, prescribing a uniform system of election practices and procedures, and promulgating forms required for the conduct of elections. *Id.* But the day-

to-day conduct of elections falls upon Iowa's 99 county auditors who are each designated as the county commissioner of elections. Iowa Code § 47.2(1). These officials are the ones who select polling locations, hire and train poll workers, and actually count ballots. See, Iowa Code Chapter 39, 39A, 43, 44, 45, 47, and 48A through 53 (collectively describing the elections system of the State of Iowa).

The plaintiffs' litigation strategy apparently seeks to bind county auditors by obtaining a judgment against the secretary of state. Basic principles of due process do not permit this. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67 (1972). Essentially the plaintiffs seek a kind of judicial universality – a view that a constitutional-law judgment against one party should be understood as binding against all other similarly situated parties. This view has "subjected to decades of wuthering criticism." Josh Blackman, *The Irrepressible Myths of Cooper v. Aaron,* Georgetown Law Journal, Vol. 107 at 16-17, 2019 (forthcoming)[2]. A court cannot "call[] for obedience by all within the purview of the rule that is declared." Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1008 (1965). "It had been the accepted learning that no one is bound a court's judgment except parties to the litigation." Philip Kurland, *Politics, The Constitution and the Warren Court* 327 (1970).

[2] Available at SSRN: https://ssrn.com/abstract=3142846

Secretary Pate's duties unquestionably include "supervis[ing] the activities of county commissioners of elections." Iowa Code § 47.1(1). This does not mean, however, that he is the same as the county auditors or that they do not independently deserve due process. The secretary has no authority to hire, discipline, or fire county auditors – they are independently elected by their constituents. See, Iowa Code § 331.501 (providing for office of auditor) and § 333.505 (specifying auditor's duties relating to elections). At best, the secretary is first among equals. Compare, *Griffin v. Pate*, 884 N.W.2d 182, 184 (Iowa 2016) (action challenging disenfranchisement of convicted felon filed against both secretary of state and county auditor). "When a statute is challenged as unconstitutional, the proper defendants are the officials whose role it is to administer and enforce the statute." *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011).

The present circumstances create enormous confusion about how upcoming elections will be administered. Should county auditors simply decide that since they are not parties in the underlying action they are free to ignore the district court's order? Is there no possibility that a contempt action would be brought against an auditor? What happens if five concerned citizens bring a removal action against a county auditor for failure to fully enforce House File 516? What would happen if someone challenges every absentee ballot submitted more than 29 days before the election? Iowa Code § 53.31 (providing for challenges to absentee ballots to be filed by 5:00 p.m. the Friday before an election). Should a special precinct board in ruling on such a challenge apply

the law as written or as "enjoined" by the district court's order? These are difficult questions and there is precious little time left before the 2018 general election to answer them. The imminent election, in fact, counsels greatly against the wisdom of the district court's order.

Court intervention in election rules is disfavored when an election is imminent

Purcell v. Gonzalez, 549 U.S. 1 (2006) is instructive here. Arizona implemented changes to its election laws, including a requirement for showing identification at a polling place and proving citizenship when registering to vote. *Id.* at 1. The provisions were approved by ballot initiative in 2004. *Id.* Various individuals and organizations filed suit in May 2006 challenging the changes and seeking a stay of implementation before the 2006 general election. *Id.* at 3. The circuit court granted a stay one month before the election. *Id.* The state immediately sought to vacate the stay in the U.S. Supreme Court. The Court granted the requested relief.

"Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4-5. "[T]he facts in these cases are hotly contested and '[n]o bright line separates permissible election-related regulation from unconstitutional infringements.' Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules." *Id.* at

5. Justice Stevens wrote separately to note the benefit of a full factual record developed after the election. "Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation." *Id.* (Stevens, J., concurring).

The dilatory conduct of the plaintiffs here is similar to that in *Purcell*. The Iowa Legislature transmitted House File 516 to the Governor for his signature on May 3, 2017. House Journal 1147 (87th General Assembly). The Governor approved the bill two days later. *Id.* at 1148. The plaintiffs waited nearly 14 months – from May 5, 2017 to June 27, 2018 – to seek a temporary injunction. District Court order 1. The order has now been entered 104 days before the 2018 general election (and much sooner before numerous special elections which will be conducted throughout the state).

"A party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, ___ U.S. ___, 138 S.Ct. 1942, 1944 (2018). "That is a true in election law cases as elsewhere." *Id.* (citing *Lucas v. Townsend*, 486 U.S. 1301 (1988) (Kennedy, J., in chambers); *Fishman v. Schaffer*, 429 U.S. 1325 (1976) (Marshall, J., in chambers)). A preliminary injunction entered soon before an election may "work[] a needlessly chaotic and disruptive effect upon the electoral process." *Id.*

The risk of this effect is greatly magnified by the choice to leave out of court the 99% of elections officials who will actually enforce House File 516. But suppose the plaintiffs had included county auditors and suppose further

the district court had avoided the writ-of-erasure fallacy in crafting its order; there would still be ample reason to stay the injunction so close to an election. *Purcell* teaches that these kinds of election regulation cases present close and difficult questions for "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4.

Consider the actions of the U.S. Supreme Court in the month before the 2014 general election. The Court stayed a district court order requiring Ohio to restore extra days of early voting, *Husted v. Ohio State Conference of NAACP*, 135 S. Ct. 42 (2014) (mem.); stayed a Fourth Circuit order which would have restored same-day voter registration in North Carolina, *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014) (mem.); vacated a Seventh Circuit order which blocked a Wisconsin voter identification law, *Frank v. Walker*, 135 S. Ct. 7 (2014) (mem.); and refused to vacate a Fifth Circuit stay of a Texas voter identification law which had been found unconstitutional and in violation of the Voting Rights Act, *Veasey v. Perry*, 135 S. Ct. 9 (2014) (mem.).

On the merits, these orders appear to be contradictory. For example, the Wisconsin voter identification law went ahead but the Texas law did not. But the broader principle of *Purcell* was applied – no changes to election rules before an election. As memorandum opinions these are not precedent. But collectively they should instruct this Court's approach to the district court's stay order.

Conclusion

The temporary injunction should be stayed by this Court. This Court should also grant the secretary's application for interlocutory appeal. This course will alleviate great uncertainty in the administration of elections by Iowa's county auditors.

Respectfully submitted,

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