

SUPREME COURT NO. 20-1249
JOHNSON COUNTY CASE NO. CVCV081901

IN THE SUPREME COURT OF IOWA

**LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA
AND MAJORITY FORWARD,**
Plaintiffs-Appellants,

v.

**IOWA SECRETARY OF STATE PAUL PATE,
IN HIS OFFICIAL CAPACITY**
Defendant-Appellee.

**DONALD J. TRUMP FOR PRESIDENT, INC.,
REPUBLICAN NATIONAL REPUBLICAN SENATORIAL
COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL
COMMITTEE AND REPUBLICAN PARTY OF IOWA,**
Intervenors.

*APPEAL FROM THE DISTRICT COURT OF JOHNSON COUNTY
HONORABLE LARS ANDERSON, DISTRICT COURT JUDGE*

**BRIEF OF AMICI CURIAE:
AMERICAN CIVIL LIBERTIES UNION OF IOWA
LEAGUE OF WOMEN VOTERS OF IOWA
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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STATEMENT REQUIRED BY IOWA R. APP. PRO. 6.906(4)(d)

Neither party nor their counsel participated in the drafting of this brief, in whole or in part. Neither party nor their counsel contributed any money to the undersigned for the preparation or submission of this brief. The drafting of this brief was performed *pro bono publico* by amici curiae.

STATEMENTS OF IDENTITY AND INTEREST OF AMICI CURIAE

The **ACLU of Iowa** is the statewide affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the state and federal Constitutions and laws, with thousands of Iowa members. Founded in 1935, the ACLU of Iowa is the fifth oldest state affiliate of the national American Civil Liberties Union. The ACLU of Iowa works in the courts, legislature, and through public education and advocacy to safeguard the rights of everyone in our state. This case challenges portions of House File (HF) 2643 (2020) (“HF 2643”), which was passed to limit the ability of Iowa county auditors to complete absentee ballot applications submitted with missing information. The ACLU of Iowa has a longstanding

interest in ensuring that the law protects the right to vote, including by mail or absentee. The ACLU of Iowa has actively worked for decades to further voting rights for Iowans. The proper resolution of this case, which concerns the right to vote by absentee ballot during a pandemic health crisis therefore is a matter of substantial interest to the ACLU of Iowa and its members. And, because of its experience, record of dedication, and accumulated expertise in the preservation of voting rights, the ACLU of Iowa can materially contribute to the legal dialogue in this case, and ultimately assist the Court in rendering a decision in the matter.

The **League of Women Voters of Iowa** (“the League” or “LWVIA”) is an affiliate of the League of Women Voters of the United States. The League is a nonpartisan, community-based political organization that encourages informed and active participation of citizens in government and attempts to influence public policy through education and advocacy. Founded in 1919, the League of Women Voters of Iowa became the successor of the Iowa Equal Suffrage Association, carrying on a legacy of activism and education. The League has 814 members throughout the state and 11 local

Leagues with the states. One of the LWVIA's primary goals is to promote government that is representative, accountable, responsive, and that assures opportunities for effective and inclusive voter participation in government decision-making.

The LWVIA works to ensure every citizen has the opportunity and information to register and exercise their right to vote. The League is dedicated to ensuring free, fair and accessible voting for all eligible citizens. Its goal is to safeguard the rights of all qualified voters.

The LWVIA has advocated for opportunities for all Iowan voters to cast absentee ballots due to the COVID-19 crisis. It has and will continue to be required to shift its resources from other critical work to provide assistance and educate its members on whether they can legally cast an absentee ballot for the upcoming election including information to support voters in developing their election plans in November.

One of the premier resources that LWVIA offers is its voter guide, candidate and ballot measure research and voter education, its voter hotline, its core voter registration work (which has been

rendered more difficult but all the more important due to the pandemic), among other priorities.

Members of LWVIA include registered voters in Iowa who wish to vote by mail on Election Day to avoid contracting or spreading the COVID-19 virus, who may be new to completing the absentee form and need assistance. LWVIA was supportive of Secretary of State Pate's decision to send pre-filled absentee ballot request forms to all registered Iowa voters ahead of the general election because of the ease it would create for voters in the upcoming election.

STANDARD OF REVIEW

On Plaintiffs-Appellants' interlocutory appeal, this Court reviews the decision by a district court to deny an injunction *de novo*. *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 180 (Iowa 2001). Constitutional challenges are also rereviewed *de novo*. *Griffin v. Pate*, 884 N.W.2d 182, 184 (Iowa 2016). While the decision to issue a temporary injunction typically rests with the district court in the first instance, "this discretion is a legal one, and, if not based upon sufficient grounds, will be reversed upon appeal." *PIC USA v. N.C. Farm P'ship*, 672 N.W.2d 718, 722 (Iowa 2003) (citing *Swan v. City of Indianola*, 121

N.W. 547, 549 (1909)). Moreover, “the trial court's factual findings are not binding.” *Opat v. Ludeking*, 666 N.W.2d 597, 603 (Iowa 2003). Reversal is also appropriate if the district court has abused its discretion or “the decision violates some principle of equity.” 621 N.W. 2d at 180.

In addition to its appellate jurisdiction over the interlocutory review of the district court’s denial of a temporary injunction, this Court also has original jurisdiction to enter a temporary injunction of the challenged law. Iowa R. Civ. Pro. 1.1506(2).

ARGUMENT

We are in the midst of a highly contagious global pandemic. As other state and federal courts around the country have recognized, without the availability of absentee voting, the pandemic will put many voters in the untenable position of risking serious illness or death to exercise the franchise. The State expects that a supermajority of voters in Iowa will overwhelmingly rely on absentee voting to exercise the franchise in the upcoming general election. The Petitioners in this case presented the district court with uncontroverted evidence that the challenged provisions of HF 2643 will significantly burden the

voting rights of tens of thousands of Iowa absentee voters. Despite this undisputed evidence, the district court denied the Petitioners' injunction, based on a single federal case, and a single Iowa case relying upon that federal case. In so doing, it misread the holdings of both cases and failed to account for the substantial weight of subsequent authority recognizing that burdens on absentee voting during this global pandemic *are* burdens on the fundamental right to vote generally, and are likely to violate equal protection. As a result, the district court must be reversed, and a temporary injunction should be entered before October 5, 2020, when absentee voting begins. Amici respectfully ask this Court to act promptly to protect Iowans from an untenable position of choosing between their health and their fundamental right to vote.

I. HF 2643 Violates the Fundamental Right to Vote Enshrined in the Iowa Constitution and is Subject to Strict Scrutiny

The right to vote is enshrined in the Iowa Constitution as a fundamental right. Iowa Const. art. II, § 1; *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 848 (Iowa 2014) (stating voting is a fundamental right in Iowa). As this Court has recognized, the right to vote is foundational to all other constitutional rights secured by the People of Iowa. *Griffin*,

884 N.W.2d at 185 (“In our representative form of governing, it serves to give a voice to the people. This voice is as important to the democracy as it is to those the democracy governs.”) (internal citation omitted). This is not disputed by either Appellees or Appellants.

However, relying on federal law, the Johnson County district court order (“Order”) held that “a request for an absentee ballot [is] likely to be found not to involve the right to vote.” Order at 15. This holding risks no less than the rights of tens of thousands of Iowans to exercise the franchise in the coming election, is clear error, and should be reversed.

This Court applies strict scrutiny to policies that burden voting. *State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002) (“If the asserted right is fundamental, we apply strict scrutiny analysis.”); *King v. State*, 818 N.W.2d 1, 31 (Iowa 2012) (same); *Chiodo*, 846 N.W.2d at 856 (“[R]egulatory measures abridging the right to vote must be carefully and meticulously scrutinized.”) (internal citations omitted). This Court must therefore “determine whether the government action infringing the fundamental right is narrowly tailored to serve a compelling government interest.” *Hernandez-Lopez*, 639 N.W.2d at 238.

Appellees contend that while “voting” generally may be a fundamental right in Iowa, absentee voting is not.

This argument is unavailing in good times, because it places the rights of Iowans who must rely on absentee voting to vote at all—including Iowans who have some forms of disabilities, Iowans with caretaking responsibilities that foreclose their ability to go to the polls, or Iowans serving in the military overseas – at a lesser stature than the rights of Iowans who are lucky enough to be able to vote in-person at the polls. Iowa’s laws have long recognized the equal status of the voting rights belonging to those eligible Iowa electors that are able to vote at the polls on election night, and those belonging to those who are not so lucky.¹ Consistent with the importance placed upon voting

¹ Remarkably, Iowa has had an “Absent Voters Law” allowing qualified voters to vote by U.S. Mail since at least 1915. *See* Iowa Code Ch. 3-B (1915 Suppl.), <https://www.legis.iowa.gov/docs/shelves/code/ocr/1915%20Iowa%20Code%20Supplemental%20Supplement.pdf>. Iowa has allowed absentee voting by voters physically present in the county but unable to vote due to illness or disability, in addition to voting by Iowans overseas, since at least 1924. Iowa Code Ch. 44 (1924), <https://www.legis.iowa.gov/docs/shelves/code/ocr/1924%20Iowa%20Code.pdf>. Iowa has had “no excuse” absentee voting since at least 1993. Iowa Code §§ 53.1, 53.2 (1993),

by the Iowa Constitution, under Iowa law, any eligible Iowa voter has a right to vote absentee for any reason. Iowa Code §§ 53.1, 53.2(a).

But even if true under normal circumstances, the argument that absentee voting is not “voting” for purposes of the Iowa Constitution cannot be so during the COVID-19 health crisis. Absentee voting *is* voting for the vast majority of Iowans who plan to vote by absentee in the upcoming general election. Approximately 80 percent of Iowans who participated in the June 2020 primary voted absentee, *see* Pet. of Law & Equity at 9, and the Secretary of State estimates that 80 percent of people voting will also cast ballots by absentee in the upcoming November general election.² The fact that the overwhelming proportion of Iowans voting will do so via absentee ballot in the upcoming election was not even considered by the district court in its holding that “a request for an absentee ballot [is] likely to be found not

<https://www.legis.iowa.gov/docs/shelves/code/ocr/1993%20Iowa%20Code.pdf>.

² *80 Percent of Votes in Iowa Could be Absentee, Top Election Official Predicts*, CEDAR RAPIDS GAZETTE (Sept. 9, 2020), <https://www.thegazette.com/subject/news/government/secretary-of-state-paul-pate-iowa-november-election-absentee-voting-prediction-20200909>.

to involve the right to vote.” With such large numbers of Iowans voting absentee, absentee ballot requests are an integral component of voting—if not as a general principle of Iowa constitutional voting rights law, given Iowa’s current and historical protection of the right to vote by those electors who cannot vote at the polls on election day, then at least now, during the global pandemic. Under the circumstances of the COVID-19 emergency, it is simply impossible to separate “absentee voting” from “voting.” See *Feldman v. Ariz. Sec’y of State’s Office*, 840 F.3d 1057, 1089 (9th Cir. 2016) (“[W]hen 80% of the electorate uses early absentee voting as the method by which they cast their ballots, the method has transcended convenience and has become instead a practical necessity.”) (Thomas, J., dissenting), *reh’g en banc granted* 841 F.3d 791 (2016) (*en banc*); see also *Feldman v. Ariz. Sec’y of State’s Office*, 843 F.3d 366 (9th Cir. 2016) (Thomas, J.) (*en banc*) (granting motion for injunction on logic similar to Judge Thomas’s dissent from original panel opinion), *stayed* 137 S. Ct. 446 (2016).

It is no choice to say that Iowa voters can vote in person during a health crisis—for many this would mean not being able to vote at all. For at least a substantial number of Iowans at higher risk of contracting

COVID-19—including those persons who are senior citizens, with physical disabilities, are confined to nursing homes or rehabilitation centers, have preexisting medical conditions, or are out of state (including active members of the armed forces)—the inability to vote absentee is *total* disenfranchisement, because voting in person would risk serious illness or even death. The Iowa Secretary of State’s data shows that 78.5 percent of Iowans aged 65 years and older were registered to vote in the 2018 general election, the highest rate of any age group.³ A third of the votes cast in the 2018 election were by voters aged 65 years and older.⁴

As one court recently put it, requiring in-person voting during the pandemic creates “an untenable choice: risk contracting a potentially fatal illness by voting in person, or foregoing their right to vote in a presidential election.” *Jones v. U.S. Postal Serv.*, No. 20 CIV. 6516 (VM), 2020 WL 5627002, at *2 (S.D.N.Y. Sept. 21, 2020). Indeed, as another court recently found:

³ State Data Center of Iowa, OLDER IOWANS: 2020 (May 2020), <https://www.iowadatacenter.org/Publications/older2020.pdf>.

⁴*Id.*

[I]t is relatively difficult to vote in person without risking the possibility of infection, especially for those who are more susceptible to the ravaging harms of COVID-19. In other words, during 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 fundamental right to vote. As such, in these circumstances, absentee voting impacts voters' fundamental right to vote.

Thomas v. Andino, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *17 n. 20 (D.S.C. May 25, 2020) (internal citations omitted); *see also Common Cause Indiana v. Connie Lawson*, No. 120-CV-02007-SEBTAB, 2020 WL 5798148, at *6 (S.D. Ind. Sept. 29, 2020) (“[T]he risk of infection in locations where large numbers of people congregate is substantial[.]”). It is illogical to find that burdens on absentee voting *never* implicate the fundamental right to vote itself, especially during this health emergency. As the Supreme Court of Tennessee recently put it:

Characterizing absentee voting by mail as a ‘privilege’ begs the question of whether, under some circumstances, limitations on this lawful method of voting can amount to a burden on the right to vote itself. The answer to that question must be yes. If it were not, even when the right to vote is unavailable through any other means, deprivation of absentee voting by mail would nevertheless be deemed not to burden the fundamental right to vote itself.

Fisher v. Hargett, 604 S.W.3d 381, 401 (Tenn. 2020).

The burdens that HF 2643 place upon county auditors and voters alike were unchallenged by Appellees at the district court. Order at 11 (“Defendants do not challenge most of Plaintiffs’ declarants’ assertions.”). Appellants submitted overwhelming affidavit evidence of these burdens in support of their temporary injunction motion, including from Jessica Lara, the Hardin County Auditor, Roxanna Moritz, the president of the Iowa State Association of County Auditors and the Auditor of Scott County, Travis Weipert, the Johnson County Auditor, and Patrick Gill, the Woodbury County Auditor. Each expert described in detail the severe burdens that HF 2643 places upon voters during these already trying circumstances.

A. The District Court Relied on a Single Inapposite and Limited Federal Case

The district court correctly noted that this Court may look to analogous federal case law when construing the Iowa Constitution. *See* Order at 14, n.3 (citing *State v. Olsen*, 293 N.W.2d 216, 219 (Iowa 1980); *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 340 (Iowa 2015)). But the federal case cited by the district court is both dated and inapplicable.

The district court relied entirely on a single federal case—*McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802

(1969) for the crucial proposition that federal courts hold that absentee ballots do not implicate the right to vote. *See Order* at 15. But *McDonald* is inapposite in several respects, discussed below. This Court should instead look to the numerous contemporaneous state and federal court decisions set forth in this brief that recognize the importance of absentee voting to the exercise of the franchise during the current global pandemic.

First, *McDonald* was an equal protection challenge brought by unsentenced inmates otherwise eligible to vote but not entitled to receive absentee ballots. The Supreme Court did not apply heightened scrutiny because there was “nothing in the record to indicate that the Illinois statutory scheme [had] an impact on [the inmates’] ability to exercise the fundamental right to vote.” 394 U.S. 802 at 807. This is unlike the present case, where application of HF 2643 could prevent tens of thousands of people from voting, according to the evidence submitted by Petitioners. (*See, e.g., Moritz* aff. ¶ 11 (“[C]ounty auditors will now also be required to send letters to the likely tens of thousands of Iowans statewide who will provide missing, incomplete, or illegible information on their Request Forms.”); *Gill* aff. ¶ 5 (“Of the

approximately 9,900 postcards that voters returned to my office, 1,811- or more than 18%-were missing an Absentee ID Number. This figure does not include the postcards that had an incorrect Absentee ID Number or other missing information that we managed to resolve using the I-Voter database.”). Because there was no evidence that the inmates’ right to vote would be burdened by the unavailability of absentee ballots, the Supreme Court applied rational basis review. 394 U.S. 802 at 809. Here, there is uncontradicted evidence of the severe burdens that HF 2643 would place upon voters.

Second, unlike the inmates in *McDonald*, the Appellants here do not admit that their complaint is “barren of any indication that the State might not” redress the alleged burdens on their right to vote. *Compare id.* at 808 n.6, with Pet. of Law & Equity at 3-17. Rather, appellants allege (again through uncontested evidence) that the unique circumstances and danger posed by the COVID-19 pandemic effectively eliminates many Iowans’ ability to safely vote in person. *See* Pet. of Law & Equity at 4-5. Thus, because Appellants are required to either vote absentee or not vote at all, HF 2643 severely burdens their right to vote. *See Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir.

2012) (rejecting the state’s reliance on *McDonald* and noting that “Plaintiffs did not need to show that they were legally prohibited from voting, but only that burdened voters have few alternate means of access to the ballot.”) (internal citations omitted).

Third, and most important, Appellants here are not seeking to litigate their right to vote absentee. *McDonald* concerns inmates’ right to receive absentee ballots. But this right is unchallenged in Iowa. Iowa Const. art. II, § 1; Iowa Code §§ 53.1, 53.2(a). Nor is the right to vote absentee disputed by the Appellees. *See* Appellee Resistance to Mot. for Temp. Inj. at 3 (“Iowa law broadly permits absentee voting.”). Appellants intend to exercise this right, particularly since the COVID-19 pandemic makes voting in person an unsafe and unviable option. Therefore, the question before this Court is *not* whether Appellants have a constitutional right to vote by absentee (as in *McDonald*), but rather, given that they already have this right, whether the challenged statute presents an undue burden, an equal protection violation, or a due process violation. As one court explained:

this case is not about Wisconsin’s outright refusal to allow in-person absentee voting. Rather, plaintiffs allege that the state is denying them the opportunity to exercise a right that they already have. Put differently, plaintiffs contend that by

choosing to give its citizens the privilege of in-person absentee voting, the state must administer that privilege evenhandedly.

One Wisconsin Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 933 (W.D. Wis. 2016), *rev'd in part on other grounds, Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020).

Not only is *McDonald* inapposite, but it is also out of date. The Supreme Court itself has limited *McDonald* at least three times. As one court recently explained, “the Supreme Court has expressly restricted its applicability to cases in which there is no evidence showing that the challenged restriction will prohibit the plaintiff from voting.” *Jones v. U.S. Postal Serv.*, 2020 WL 5627002, at *15 (citing *Goosby v. Osser*, 409 U.S. 512, 521–22 (1973)); *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974); *see also Am. Party of Tex. v. White*, 415 U.S. 767, 794–95 (1974). As the Supreme Court itself distinguished *McDonald*, “[e]ssentially the Court’s disposition of the claims in *McDonald* rested on failure of proof.” 414 U.S. 524 at 529. In yet another case, the Supreme Court noted that in *McDonald*, “there was nothing in the record to indicate that the challenged Illinois statute had any impact on the appellants’ exercise of their right to vote” and “[a]ny classification actually

restraining the fundamental right to vote . . . would be subject to close scrutiny.” Hill v. Stone, 421 U.S. 289, 300 n.19 (1975) (emphasis added).

B. *McDonald* is Particularly Inappropriate During the COVID-19 Crisis

The district court’s interpretation of *McDonald* is particularly inconsistent with how federal courts have interpreted state absentee ballot provisions, especially in the context of the COVID-19 health emergency. As the court in *Jones v. U.S. Postal Serv.* explained:

[T]he disease has engendered widespread fear that conducting elections requiring voters to appear at the polls to cast their ballots in person, there having to occupy enclosed spaces through which thousands of people would pass throughout the day and handle the same voting equipment, would produce conditions conducive to the spread of the illness.

2020 WL 5627002, at *1; *see also Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 4484063, at *14 (M.D.N.C. Aug. 4, 2020) (“[R]equiring absentee voters to seek out contact with another person, even adhering to social distancing requirements, still places the voters at sufficient risk to constitute a cognizable injury for standing purposes.”); *Common Cause Indiana*, 2020 WL 5798148, at *5 (“While COVID-19 poses a potentially severe health risk to all individuals, public health experts have warned that it can be

particularly dangerous for certain demographics, including older people, people with underlying medical conditions, and people of color.”).

Indeed, the *McDonald* court’s ultimate determination that “the right to vote [was not] at stake” in that case was premised on the fact that the challenged burden on absentee voting was a “relatively trivial inconvenience encountered by a voter . . . when other means of exercising the right to vote [were easily] available.” *O'Brien v. Skinner*, 414 U.S. at 532 (Marshall, J. Concurring). This is not the case under the current circumstances, in which in-person voting could be potentially life-threatening. As one court recently observed, “in-person voting, while still technically an available option, forces voters to make the untenable and illusory choice between exercising their right to vote and placing themselves at risk of contracting a potentially terminal disease.” *Thomas*, 2020 WL 2617329, at *17 n.20. In Iowa, over 91,000

people – 1 in 34 Iowans – have tested positive for COVID-19, and 1,378 Iowans have died from the disease as of October 3.⁵

There is a litany of federal courts that have rejected the application of *McDonald* to absentee voting in the context of the pandemic. See e.g., *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917, at *22 (5th Cir. Sept. 10, 2020) (“*McDonald* is a limited holding on its own terms because it is based on a lack of evidence in the record.”) (concurrency); *Common Cause Indiana*, 2020 WL 5671506, at *6 (“[T]his case does not fall within *McDonald*’s framework.”); *Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-CV-00374, 2020 WL 5412126, at *21 (M.D. Tenn. Sept. 9, 2020) (“*McDonald* does not apply if there is prevention of voting – including prevention of voting in merely one manner (time and place) among several, if that manner is one that the voter as a practical manner would have to employ in order to vote at all.”); *Lewis v. Hughs*, No. 5:20-CV-00577-OLG, 2020 WL 4344432, at *11 (W.D. Tex. July 28, 2020), *aff d*, No. 20-50654, 2020

⁵ COVID-19 in Iowa, Summary Statistics, <https://coronavirus.iowa.gov/#CurrentStatus> (last accessed Oct. 3, 2020).

WL 5511881 (5th Cir. Sept. 4, 2020) (rejecting use of *McDonald* where “Plaintiffs allege that the unique danger posed by the COVID-19 pandemic effectively eliminates their ability to safely vote in person”); *see also Vote Forward v. DeJoy*, No. CV 20-2405 (EGS), 2020 WL 5763869, at *6 (D.D.C. Sept. 28, 2020) (“Because Plaintiffs have provided evidence that the USPS policy will inhibit many voters’ ballots from being counted in the November 2020 election, *McDonald’s* rational basis test is inappropriate.”); *Jones v. U.S. Postal Serv.*, 2020 WL 5627002, at *15 (rejecting *McDonald* in the context of Postal Service ballot handling procedures). The Appellees cannot, and do not even attempt, to overcome this substantial weight of precedent.

C. The Iowa Supreme Court Case Citing *McDonald* is Also Inapplicable

The district court’s order cited only a single Iowa authority, *Luse v. Wray*, 254 N.W.2d 324 (Iowa 1977), which in turn had cited *McDonald*. The district court relied on *Luse* for the key proposition that “the Iowa Supreme Court has also stated that the rational basis test should be applied to a challenge of an absentee ballot statute under the Iowa Constitution.” Order at 15. But this is not what the *Luse* opinion held. The court in *Luse* critically did *not* hold that rational basis must

be applied to all challenges to Iowa absentee ballot statutes. Instead the court noted that “the appropriate test would appear to be . . . rational basis” (citing *McDonald*) [but] “[w]e find no necessity to choose between the tests.” (emphasis added). 254 N.W.2d at 330-31. This dicta is thin sauce to use as the sole basis of the district court’s determination that rational basis must be used to evaluate whether HF 2643 survives constitutional muster.

Luse is plainly distinguishable. First, the court there found that the challenged statute “appears to be a good faith effort to improve the voting process of the class involved.” 254 N.W.2d at 331. Unchallenged evidence from the Appellants shows that far from “improving” the voting process, HF 2643 would place severe burdens on that process. See Appellant Reply in Supp. of Pl.’s Mot. for Temp. Injunctive Relief at 8-14. Second, *Luse* held that the challenged conduct did not “rise[] to the level of a constitutional violation” because only 135 ballots were at issue, which were “not of constitutional proportions which would justify judicial relief.” 254 N.W.2d at 331-332. However, the court also noted “[w]e intimate no opinion on a situation in which, while an election itself is upheld, a large proportion of the total vote in the election is set aside .

. . .” *Id.* at 332 (emphasis added). As noted above, the Iowa Secretary of State himself has estimated that 80 percent of Iowa voters could vote absentee in the November election. If even a portion of those requests are set aside due to HF 2643, it would surely “rise to the level of a constitutional violation.”

II. Even if Absentee Voting is not a Fundamental Right, Iowa Must Administer Absentee Voting in Accordance with the Iowa Constitution

Even if this Court declines to find that absentee voting during the current global pandemic is a fundamental right under the Iowa Constitution, absentee voting, once established by the legislature, must still be administered in a manner consistent with the Iowa and federal constitutions. Even *McDonald* held that “once the States grant the franchise, they must not do so in a discriminatory manner.” 394 U.S. 802 at 807. Thus, while it may be true that this Court has not specifically decided whether the Iowa Constitution protects the right to vote absentee during the current health emergency, once the state establishes a statutory regime, it must be administered in accordance with the state constitution.

Appellees argue that absentee voting is not a *federal* fundamental right. Yet even in the federal context, federal courts across the country have held that once a state establishes an absentee voting regime, the state must administer it in accordance with the Constitution. *See e.g., Frederick v. Lawson*, No. 119-CV-01959SEBMJD, 2020 WL 4882696, at *8 (S.D. Ind. Aug. 20, 2020) (“[O]nce a state creates an absentee voting regime, as Indiana has done, courts have found that it must be administered in a manner that comports with the Constitution.”); *Richardson v. Tex. Sec’y of State*, No. SA-19-CV-00963-OLG, 2020 WL 5367216, at *20 (W.D. Tex. Sept. 8, 2020) (“[C]ourts around the country have recognized that while it is true that absentee voting is a privilege and a convenience to voters, this does not grant the state the latitude to deprive citizens of due process with respect to the exercise of this privilege.”) (internal citations omitted); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) (“[O]nce the state creates an absentee voting regime, they ‘must administer it in accordance with the Constitution.’”); *Middleton v. Andino*, No. 3:20-CV-01730-JMC, 2020 WL 5591590, at *27 (D.S.C. Sept. 18, 2020) (“[S]imply because a right to absentee voting is not guaranteed by the First Amendment does not

mean absentee voting is *per se* unprotected.”); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006) (“[T]he state's action in creating an absentee voting program served to alter the rights of those electors who participate in the program. Accordingly, approved absentee voters are entitled to due process protection. Under the Illinois Election Code, such voters risk the deprivation of their vote, a liberty interest, based on factual issues relating to their ballot.”). This principle has perhaps never been more important than in the context of the COVID-19 pandemic, because many voters may not be able to safely exercise the franchise unless by voting absentee.

As the Supreme Court explained, “[liberty and property] interests [can] attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law” and emphasized, “we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.” *Paul v. Davis*, 424 U.S. 693, 710-11 (1976) (applying due process clause if, “as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished”); *see*

also *Roth v. Reagen*, 422 N.W.2d 464, 468 (Iowa 1988) (“ Apart from those interests guaranteed by the Bill of Rights, the interests comprehended within the meaning of either ‘liberty’ or ‘property’ in the due process clause are those which the state has initially recognized and protected by state law.”).

Likewise, courts have held that where a state authorizes the use of absentee ballots, any restrictions imposed on absentee voting must comply with the Equal Protection Clause. *See e.g., Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1029 (N.D. Fla. 2018) (holding that plaintiffs had shown a likelihood of success in establishing that Florida's signature verification requirement for mail-in absentee ballots violated the Equal Protection Clause); *Doe v. Walker*, 746 F. Supp. 2d 667, 681 (D. Md. 2010) (“ [W]here a state has authorized the use of absentee ballots, any restriction it imposes on the use of those absentee ballots which has the effect of severely burdening a group of voters must be narrowly tailored to further a compelling state interest.”).

The district court, despite the presence of uncontroverted evidence that there is no evidence of fraud associated with absentee

ballots, credited the state's "interest in maintaining the integrity of the election process." Order at 16. But federal courts have found that barebones allegations of "election fraud" or "election integrity" are not sufficient to justify restrictions on absentee voting. *See e.g., Common Cause Indiana*, 2020 WL 5798148, at *17 (finding states "may not simply invoke the phrase 'election integrity' without further explanation and expect those incantations to carry the day"); *Fish v. Schwab*, 957 F.3d 1105, 1133 (10th Cir. 2020) (finding while the State has an interest in preventing voter fraud, there must be evidence "that such an interest made it necessary to burden voters' rights").

CONCLUSION

As this Court is well aware, "the United States is in the midst of a pandemic necessitating extraordinary steps to keep voters safe." *Common Cause Indiana*, 2020 WL 5671506, at *6. Far from helping to keep voters safe, HF 2643 burdens the right to vote by making it more difficult for the estimated 80 percent of Iowa voters planning to vote absentee to do so.

Because the fundamental voting rights and equal protection rights of tens of thousands of Iowans will be violated absent an

injunction, this Court should grant Plaintiffs-Appellants' motion for a temporary injunction and/or reverse the district court's denial of a temporary injunction below on the merits of the interlocutory appeal.

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CERTIFICATE OF SERVICE

I hereby certify that the Amicus Brief was electronically filed on October 3, 2020, and was electronically served upon all parties through counsel via EDMS.

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