ELECTRONICALLY FILED OCT 16, 2020 CLERK OF SUPREME COURT

NO. 20-1249
JOHNSON COUNTY CASE 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.

REPUBLICAN NATIONAL COMMITTEE, DONALD J. TRUMP FOR PRESIDENT, INC., NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPLUBICAN CONGRESSIONAL COMMITTEE, AND, THE REPUBLICAN PARTY OF IOWA,
Intervenors-Appellees.

Interlocutory Appeal from the Iowa District Court for Johnson County
Hon. Lars Anderson, District Judge

BRIEF FOR APPELLANTS

Gary Dickey
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com
Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF ISSUES PRESENTED FOR REVIEW 11

ROUTING STATEMENT 17

STATEMENT OF THE CASE 17

STATEMENT OF FACTS 21

PROCEDURAL HISTORY 33

STANDARD OF REVIEW 35

ARGUMENT 36

I. The district court erred in holding that Plaintiffs are not likely to succeed on the merits of their claims 36

A. HF 2643 unconstitutionally burdens the right to vote. 36

B. HF 2643 violates equal protection. 59

C. HF 2643 violates procedural due process. 67

II. Plaintiffs satisfy the other elements of a temporary injunction. 71

A. Plaintiffs will suffer irreparably harm without a temporary injunction 71

B. There is no adequate legal remedy for abridgments of the right to vote. 74

C. The balance of hardships favors injunctive relief. 75

III. The *Purcell* principle does not apply. 79

CONCLUSION AND REQUESTED RELIEF 82

TABLE OF AUTHORITIES

CASES

AFSCME Iowa Council 61 v. State,
928 N.W.2d 21 (Iowa 2019)... 57, 58, 59, 67

Anderson v. Celebrezze,
460 U.S. 780 (1983)... 41, 42

Barr v. Cardell,
155 N.W. 312 (Iowa 1915)... 38

Boston Correll v. Herring,
212 F. Supp. 3d 584 (E.D. Va. 2016) 75

Boustani v. Blackwell,
460 F. Supp. 2d 822 (N.D. Ohio 2006)... 55

Bryanton v. Johnson,
902 F. Supp. 2d 983 (E.D. Mich. 2012)... 51

Burdick v. Takushi,
504 U.S. 428 (1992).. 38, 41, 42, 43

Bush v. Gore,
531 U.S. 98 (2000)... 62, 64, 65

Chiodo v. Section 43.24 Panel,
846 N.W.2d 845 (Iowa 2014)... 36, 37, 54, 68

Coal. for Ed. in Dist. One v. Bd. of Elections of City of N.Y.,
370 F. Supp. 42 (S.D.N.Y.), *aff'd*, 495 F.2d 1090 (2d Cir.
1974)... 51

Coggeshall v. City of Des Moines,
117 N.W. 309 (Iowa 1908)... 61

Crawford v. Marion County Election Board,
553 U.S. 181 (2008)... 52, 53, 58

Democratic Senatorial Campaign Comm. v. Pate,
No. 20-1281 (Iowa Oct. 14, 2020) (Appel, J., concurring) .... passim

Devine v. Wonderlich,
268 N.W.2d 620 (Iowa 1978)..69

Doe v. Walker,
746 F. Supp. 2d 667 (D. Md. 2010) 42, 77

Dunn v. Blumstein,
405 U.S. 330 (1972)... 43, 76

Edmonds v. Banbury,
28 Iowa 267 (1869).. 37, 40, 54

Erickson v. Blair,
670 P.2d 749 (Colo. 1983) (en banc) 41

Fish v. Kobach,
309 F. Supp. 3d 1048 (D. Kan. 2018), *aff'd sub nom. Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020) 55

Godfrey v. Iowa,
898 N.W.2d 844 (Iowa 2017)..37

Griffin v. Pate,
884 N.W.2d 182 (Iowa 2016)..68

Guare v. State,
167 N.H. 658, 117 A.3d 731 (2015)... 50, 51

Hill v. Stone,
421 U.S. 289 (1975)...44

Hunter v. Hamilton Cty. Bd. of Elections,
635 F.3d 219 (6th Cir. 2011)... 63, 76

In Interest of Johnson,
257 N.W.2d 47 (Iowa 1977)...37

In re Contest of Gen. Election Held on Nov. 4, 2008,
767 N.W.2d 453 (Minn. 2009)... 63, 65

Jones v. U.S. Postal Serv.,
20 Civ. 6516 (VM), 2020 WL 5627002 (S.D.N.Y. Sept. 21, 2020) 31, 44

Jones v. Univ. of Iowa,
836 N.W.2d 127 (Iowa 2013) 67

Kriener v. Turkey Valley Cmty. Sch. Dist.,
212 N.W.2d 526 (Iowa 1973) 75

League of United Latin Am. Citizens of Iowa v. Pate,
No. CVCV056403 (Iowa Dist. Ct. Polk Cty. Jan. 23, 2019) 70

League of Women Voters of Fla., Inc. v. Detzner,
314 F. Supp. 3d 1205 (N.D. Fla. 2018) 49

League of Women Voters of N.C. v. North Carolina,
769 F.3d 224 (4th Cir. 2014) 44, 54, 78

League of Women Voters of U.S. v. Newby,
838 F.3d 1 (D.C. Cir. 2016) 73, 76

Lewis Invs., Inc. v. City of Iowa City,
703 N.W.2d 180 (Iowa 2005) 35

Lewis v. Hughs,
Civil Action No. 5:20-cv-00755-OLG, 2020 WL 4344432 (W.D. Tex. July 28, 2020), *aff'd*, No. 20-50654, 2020 WL 5511881 (5th Cir. Sept. 4, 2020) 40

LULAC v. Abbott,
369 F. Supp. 3d 768 (W.D. Tex. 2019) 63

Luse v. Wray,
254 N.W.2d 324 (Iowa 1977) 38, 39, 43

Lyman v. Baker,
352 F. Supp. 3d 81 (D. Mass. 2018) 63

Martin v. Kemp,
341 F. Supp. 3d 1326 (N.D. Ga. 2018) 42

Mathews v. Eldridge,
424 U.S. 319 (1975) 67, 68

Matlock v. Weets,
531 N.W.2d 118 (Iowa 1995) 76

Max 100 L.C. v. Iowa Realty Co.,
621 N.W.2d 178 (Iowa 2001) 35

Mays v. LaRose,
951 F.3d 775 (6th Cir. 2020) 40, 47

McDonald v. Board of Election Commissioners of Chicago,
394 U.S. 802 (1969) 38, 39, 44

N.C. State Conference of the NAACP v. N.C. State Bd. of Elections,
No. 1:16CV1274, 2016 WL 6581284 (M.D.N.C. Nov. 4, 2016) 72, 74, 78

Ne. Ohio Coal. for Homeless v. Husted,
696 F.3d 580 (6th Cir. 2012) 64

Ne. Ohio Coal. for the Homeless v. Husted,
837 F.3d 612 (6th Cir. 2016) 49, 62

Nelson v. Nat'l Aeronautics & Space Admin.,
530 F.3d 865 (9th Cir. 2008), *rev'd on other grounds*, 562 U.S. 134 (2011) 75

NextEra Energy Res. LLC v. Iowa Utils.
Bd., 815 N.W.2d 30, 45 (Iowa 2012) 59, 60

Ney v. Ney,
891 N.W.2d 446 (Iowa 2017) 73, 74

Obama for Am. v. Husted,
697 F.3d 423 (6th Cir. 2012) .... passim

Ohio Democratic Party v. Husted,
834 F.3d 620 (6th Cir. 2016) 52

PIC USA v. N.C. Farm P'ship,
672 N.W.2d 718 (Iowa 2003) 35

Planned Parenthood of the Heartland v. Reynolds ex rel. State,
No. 17-1579, 2018 WL 3192941 (Iowa June 29, 2018) 57

Planned Parenthood of Mid-Iowa v. Maki,
478 N.W.2d 637 (Iowa 1991) 75

Priorities USA v. State,
591 S.W.3d 448 (Mo. 2020), *reh'g denied* (Jan. 30, 2020) 51

Pub. Integrity All., Inc. v. City of Tucson,
836 F.3d 1019 (9th Cir. 2016) 52

Purcell v. Gonzalez,
549 U.S. 1 (2006) 76, 79, 80, 81

Republican Party of Pennsylvania v. Cortes,
218 F. Supp. 3d 396 (E.D. Pa. 2016) 79

Roman v. Sincock,
377 U.S. 695 (1964) 63

Sear v. Clayton Cty. Zoning Bd. of Adjustment,
590 N.W.2d 512 (Iowa 1999) 72

State v. Hernandez-Lopez,
639 N.W.2d 226 (Iowa 2002) 37, 40, 57

State v. Krogmann,
804 N.W.2d 518 (Iowa 2011) 35

State v. Seering,
701 N.W.2d 655 (Iowa 2005), *superseded by statute on other grounds*, 2009 Iowa 67, 70, 71

Stewart v. Blackwell,
444 F.3d 843 (6th Cir. 2006), vacated and superseded on other grounds, 473 F.3d 692 (6th Cir. 2007) 43, 62, 64

Tashjian v. Republican Party of Conn.,
479 U.S. 208 (1986) 43

Texas Democratic Party v. Abbott,
961 F.3d 389 (5th Cir. 2020) 40

U.S. Student Ass'n Found. v. Land,
546 F.3d 373 (6th Cir. 2008) 78

Veasey v. Perry,
71 F. Supp. 3d 627 (S.D. Tex. 2014), *vacated in part on other grounds*, 830 F.3d 216 (5th Cir. 2016) (en banc) 52

Wesberry v. Sanders,
376 U.S. 1 (1964) 68

Wexler v. Anderson,
452 F.3d 1226 (11th Cir. 2006) 62, 64

Williams v. Salerno,
792 F.2d 323 (2d Cir. 1986) 73

STATUTES

Iowa Code § 39A.2(1)(a)(1) 57

Iowa Code § 39A.2(1)(a)(2) 57

Iowa Code § 39A.2(1)(b)(1) 57

Iowa Code § 48A.9(1) 23

Iowa Code § 53.1 39

Iowa Code § 53.2(1)(a) 21

Iowa Code § 53.2(1)(b) 22,81

Iowa Code § 53.2(4)(a) 21

Iowa Code § 53.2(4)(b) .... passim

Iowa Code § 53.2(4)(d) 28

Iowa Code § 53.17(2) 22

Iowa Code § 692A.103 66

OTHER AUTHORITIES

First Amendment 29

Fourteenth Amendment 29

Iowa Const. art. II, § 1 .... passim

Iowa Constitution art. I, § 6 .... passim

Iowa Constitution art. II 35

James Lynch, *Pate predicts 80% absentee voting in November*, Waterloo-Cedar Falls Courier (Sept. 10, 2020), https://wcfcourier.com/news/local/govt-and-politics/pate-predicts-80-absentee-voting-in-november/article_52e175a1-832b-57fb-8a50-36dbbd3bc668.html 21

Office of the Secretary of State, November General Election Absentee Ballot Statistics, https://sos.iowa.gov/elections/pdf/2020/general/AbsenteeCongressional2020.pdf (last updated Oct. 15, 2020) 16

Office of the Secretary of State, *November General Election Absentee Ballot Statistics*, https://sos.iowa.gov/elections/pdf/2020/general/AbsenteeCongressional2020.pdf , (last updated Sep. 30,2020) 20

See Office of the Iowa Secretary of State, *MEDIA RELEASE: Absentee voting period begins Thursday; Secretary Pate encourages Iowans to vote from home* (Apr. 22, 2020), https://sos.iowa.gov/news/2020_04_22.html 71

COME NOW League of United Latin American Citizens of Iowa ("LULAC") and Majority Forward (collectively, "Plaintiffs"), through counsel, and submit this brief in support of their appeal:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in holding that Plaintiffs are not likely to succeed on the merits of their claims that HF 2643 unduly burdens the right to vote under the Iowa Constitution as well as violates the equal protection and due process clauses of the Iowa Constitution?

PIC USA v. N.C. Farm P'ship, 672 N.W.2d 718 (Iowa 2003)

Max 100 L.C. v. Iowa Realty Co., 621 N.W.2d 178 (Iowa 2001)

Iowa Const. art. II, § 1

Chiodo v. Section 43.24 Panel, 846 N.W.2d 845 (Iowa 2014)

State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002)

Edmonds v. Banbury, 28 Iowa 267 (1869)

Godfrey v. Iowa, 898 N.W.2d 844 (Iowa 2017)

Santi v. Santi, 633 N.W.2d 312 (Iowa 2001)

In Interest of Johnson, 257 N.W.2d 47 (Iowa 1977)

See Barr v. Cardell, 155 N.W. 312 (Iowa 1915)

See Burdick v. Takushi, 504 U.S. 428 (1992)

McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802 (1969)

Luse v. Wray, 254 N.W.2d 324 (Iowa 1977)

1990 Iowa Legis. Serv. H.F. 2329 (Ch. 1238) (West)

Lewis v. Hughs, Civil Action No. 5:20-cv-00755-OLG, 2020 WL 4344432 (W.D. Tex. July 28, 2020), *aff'd*, No. 20-50654, 2020 WL 5511881 (5th Cir. Sept. 4, 2020)

Martin v. Kemp, 341 F. Supp. 3d 1326 (N.D. Ga. 2018)

Democratic Senatorial Campaign Comm. v. Pate, No. 20-1281 (Iowa Oct. 14, 2020)

Erickson v. Blair, 670 P.2d 749 (Colo. 1983)

Mays v. LaRose, 951 F.3d 775 (6th Cir. 2020)

Texas Democratic Party v. Abbott, 961 F.3d 389 (5th Cir. 2020)

Anderson v. Celebrezze, 460 U.S. 780 (1983)

Obama for Am. v. Husted, 697 F.3d 423 (6th Cir. 2012)

Doe v. Walker, 746 F. Supp. 2d 667 (D. Md. 2010)

Price v. N.Y. State Bd. of Elections, 540 F.3d 1010 (2d Cir. 2008)

Dunn v. Blumstein, 405 U.S. 330 (1972)

Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986)

Stewart v. Blackwell, 444 F.3d 843 (6th Cir. 2006), *vacated and superseded on other grounds*, 473 F.3d 692 (6th Cir. 2007)

League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014)

Hill v. Stone, 421 U.S. 289 (1975)

Jones v. U.S. Postal Serv., 20 Civ. 6516 (VM), 2020 WL 5627002 (S.D.N.Y. Sept. 21, 2020)

Goosby v. Osser, 409 U.S. 512 (1973)

Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016)

League of Women Voters of Fla., Inc. v. Detzner, 314 F. Supp. 3d 1205 (N.D. Fla. 2018)

Guare v. State, 167 N.H. 658, 117 A.3d 731, 738 (2015)

Coal. for Ed. in Dist. One v. Bd. of Elections of City of N.Y., 370 F. Supp. 42 (S.D.N.Y.), *aff'd*, 495 F.2d 1090 (2d Cir. 1974)

Bryanton v. Johnson, 902 F. Supp. 2d 983 (E.D. Mich. 2012)

Priorities USA v. State, 591 S.W.3d 448 (Mo. 2020), *reh'g denied* (Jan. 30, 2020)

Crawford v. Marion County Election Board, 553 U.S. 181 (2008)

Pub. Integrity All., Inc. v. City of Tucson, 836 F.3d 1019 (9th Cir. 2016)

Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016)

Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014), *vacated in part on other grounds*, 830 F.3d 216 (5th Cir. 2016) (en banc)

Fish v. Kobach, 309 F. Supp. 3d 1048 (D. Kan. 2018), *aff'd sub nom. Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020)

Boustani v. Blackwell, 460 F. Supp. 2d 822 (N.D. Ohio 2006)

HF 2643 § 125

Planned Parenthood of the Heartland v. Reynolds ex rel. State, No. 17-1579, 2018 WL 3192941 (Iowa June 29, 2018)

AFSCME Iowa Council 61 v. State, 928 N.W.2d 21 (Iowa 2019)

Iowa Code § 39A.2(1)(a)(1)

Iowa Code § 39A.2(1)(a)(2)

Iowa Code § 39A.2(1)(b)(1)

LSCP, LLLP, 861 N.W.2d 846 (Iowa 2015)

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)

NextEra Energy Res. LLC v. Iowa Utils. Bd., 815 N.W.2d 30 (Iowa 2012)

Iowa Code § 53.2(4)(b)

Coggeshall v. City of Des Moines, 117 N.W. 309 (Iowa 1908)

Griffin v. Pate, 884 N.W.2d 182 (Iowa 2016)

Bush v. Gore, 531 U.S. 98 (2000)

Wexler v. Anderson, 452 F.3d 1226 (11th Cir. 2006)

Hunter v. Hamilton Cty. Bd. of Elections, 635 F.3d 219 (6th Cir. 2011)

Roman v. Sincock, 377 U.S. 695 (1964)

Lyman v. Baker, 352 F. Supp. 3d 81 (D. Mass. 2018)

LULAC v. Abbott, 369 F. Supp. 3d 768 (W.D. Tex. 2019)

In re Contest of Gen. Election Held on Nov. 4, 2008, 767 N.W.2d 453 (Minn. 2009)

Iowa Constitution Art. I, § 9

State v. Seering, 701 N.W.2d 655 (Iowa 2005), *superseded by statute on other grounds*, 2009 Iowa Acts ch. 119, § 3 (codified at Iowa Code § 692A.103 (Supp. 2009)), as recognized in *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21 (Iowa 2019)

Jones v. Univ. of Iowa, 836 N.W.2d 127 (Iowa 2013)

Mathews v. Eldridge, 424 U.S. 319 (1975)

Griffin v. Pate, 884 N.W.2d 182 (Iowa 2016)

Wesberry v. Sanders, 376 U.S. 1 (1964), *cited with approval in Devine v. Wonderlich*, 268 N.W.2d 620, 623 (Iowa 1978)

League of United Latin Am. Citizens of Iowa v. Pate, No. CVCV056403 (Iowa Dist. Ct. Polk Cty. Jan. 23, 2019)

2. Did Plaintiffs satisfy the other elements of a temporary injunction?

N.C. State Conference of the NAACP v. N.C. State Bd. of Elections, No. 1:16CV1274, 2016 WL 6581284 (M.D.N.C. Nov. 4, 2016)

Sear v. Clayton Cty. Zoning Bd. of Adjustment, 590 N.W.2d 512 (Iowa 1999)

Obama for Am. v. Husted, 697 F.3d 423 (6th Cir. 2012)

Williams v. Salerno, 792 F.2d 323 (2d Cir. 1986)

Ney v. Ney, 891 N.W.2d 446 (Iowa 2017)

League of Women Voters of U.S. v. Newby, 838 F.3d 1 (D.C. Cir. 2016)

Planned Parenthood of Mid-Iowa v. Maki, 478 N.W.2d 637 (Iowa 1991)

Nelson v. Nat'l Aeronautics & Space Admin., 530 F.3d 865 (9th Cir. 2008), *rev'd on other grounds*, 562 U.S. 134 (2011)

Boston Correll v. Herring, 212 F. Supp. 3d 584 (E.D. Va. 2016)

Terrace v. Thompson, 263 U.S. 197 (1923)

Kriener v. Turkey Valley Cmty. Sch. Dist., 212 N.W.2d 526 (Iowa 1973)

Matlock v. Weets, 531 N.W.2d 118 (Iowa 1995)

Purcell v. Gonzalez, 549 U.S. 1 (2006)

Dunn v. Blumstein, 405 U.S. 330 (1972)

Hunter v. Hamilton Cty. Bd. of Elections, 635 F.3d 219 (6th Cir. 2011)

Doe v. Walker, 746 F. Supp. 2d 667 (D. Md. 2010)

League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014)

U.S. Student Ass'n Found. v. Land, 546 F.3d 373 (6th Cir. 2008)

3. Does the Purcell principle apply?

Purcell v. Gonzalez, 549 U.S. 1 (2006)

Republican Party of Pennsylvania v. Cortes, 218 F. Supp. 3d 396 (E.D. Pa. 2016)

Democratic Senatorial Campaign Comm. v. Pate, No. 20-1281 (Iowa Oct. 14, 2020).

Veasey v. Perry, 769 F.3d 890 (5th Cir. 2014)

Frank v. Walker, 135 S. Ct. 7 (2014) (mem.) (same)

Husted v. Ohio State Conference of NAACP, 135 S. Ct. 42 (2014)

North Carolina v. League of Women Voters, 135 S. Ct. 6 (2014) (mem.)

Republican Nat'l Comm. v. Democratic Nat'l Comm., Case No. 19A1916, slip op. (U.S. Apr. 6, 2020)

ROUTING STATEMENT

The Court has retained this interlocutory appeal. (10/14/2020 Order.)

STATEMENT OF THE CASE

All registered Iowa voters are eligible to cast absentee ballots. Because of the COVID-19 pandemic, voters are relying heavily on absentee voting to safely exercise their fundamental right to vote in the November general election. The Secretary of State has encouraged voters to do so by mailing absentee ballot requests to every registered active Iowa voter. As of the date of this brief, county auditors were still receiving and processing thousands of absentee ballot requests—and will keep receiving such requests through October 24.[1] The nearer the election looms, the more critical it becomes that auditors be able to process those requests as expeditiously as possible so that voters may receive their ballots, vote, and mail them back in time to be counted. Under Iowa law,

---

[1] Office of the Secretary of State, November General Election Absentee Ballot Statistics, https://sos.iowa.gov/elections/pdf/2020/general/AbsenteeCongressional2020.pdf (last updated Oct. 15, 2020) (reporting 768,735 absentee ballots requests received and over 14,000 still awaiting processing).

absentee ballots not postmarked by November 2 are rejected in their entirety.

Historically, county auditors have been able to rely on the best available means to process absentee ballot request in a timely manner. One of the best available means included referring to the voter registration database ("I-Voters") to confirm missing or incomplete information. But in July, the legislature passed HF 2643, which prohibits county auditors from using I-Voters to process absentee ballots, instead requiring auditors to seek any and all missing information directly from the voter, and to do so by following a series of steps that guarantees the slowing of processing absentee ballot requests.

Plaintiffs filed their petition challenging HF 2643 on July 14, 2020.[2] They asserted that HF 2643 (1) unduly burdens the fundamental right to vote in violation of the Iowa Constitution; (2) violates the Iowa Constitution's Equal Protection Clause; and (3) violates the Due Process guarantees of the Iowa Constitution. They asserted that HF 2643 should be subject to strict scrutiny because it necessarily implicates the

---

[2] Specifically, Section 124 is the operative section being challenged. For simplicity, Plaintiffs refer to "HF 2643".

fundamental right to vote. Plaintiffs submitted multiple uncontested declarations from county election officials documenting the detrimental impact HF 2643 will have on their ability to timely process absentee ballot requests. Plaintiffs also submitted undisputed expert testimony establishing that HF 2643 ties the hands of county auditors (without any added benefit to election security) from engaging in a long-standing and efficient practice to complete absentee ballot requests, thereby creating a serious risk that any voter who requests an absentee ballot on or after October 20, 2020, or potentially even earlier, will not have their ballot counted. (08/10/2020 Declaration of Eitan Hersch ("Hersch Decl.") ¶ 28, 47; *see generally* 08/10/2020 Declaration of Travis Weipert ("Weipert Decl."); 08/10/2020 Declaration of Joel Miller ("Miller Decl."); 08/10/2020 Declaration of Roxanna Moritz ("ISACA Decl."); 08/10/2020 Declaration of Patrick Gill ("Gill Decl."); 08/10/2020 Declaration of Jessica Lara ("Lara Decl.").)

Indeed, USPS itself has effectively warned that voters who submit an absentee ballot request up to ten days before the October 14 deadline are at risk of not having their ballot counted. (08/10/2020 Hersch Decl ¶ 28; *see* Declaration of Christopher Bryant ("Bryant Decl."), Ex. 15 at 2.)

Plaintiffs' petition named Secretary Pate as the Defendant. Shortly after Plaintiffs filed, a group of Republican Party and campaign organizations (the "Intervenors") sought and were granted intervention.

In opposing Plaintiffs' motion for a temporary injunction, Secretary Pate did not contest any of Plaintiffs' factual allegations regarding HF 2643's impact on county auditors' ability to timely process absentee ballot requests. Instead, he argued that, despite the fact that HF 2643 impacted the safest way to exercise the right to vote during a pandemic, it did not implicate the fundamental right to vote, and therefore should be reviewed with a "rational basis" analysis. The Secretary asserted HF 2643 was supported by the state's interest in election security. He offered no facts indicating there were security or fraud concerns with absentee ballot requests before HF 2643 or that HF 2643 made voting by absentee ballot more secure. Intervenors made similar arguments as the Secretary.

The district court acknowledged that Secretary Pate did not contest most of Plaintiffs' factual allegations regarding COVID-19 and the impact of HF 2643. (09/5/20 Order at 11.) It then held that HF 2643 was likely to be found "not to involve the right to vote" because it is "related

to a request for an absentee ballot." (09/5/20 Order at 15.) It then applied rational basis review to each of Plaintiffs' claims and denied their motion for a temporary injunction. (09/5/20 Order.)

The district court erred. HF 2643 burdens the fundamental right to vote and should have been subject to strict scrutiny. Regardless, Plaintiffs prevail under any level of scrutiny because HF 2643 is not supported by any cognizable state interest. HF 2643 also violates the Equal Protection and Due Process Clauses of the Iowa Constitution.

STATEMENT OF FACTS

I. Iowa law authorizes absentee voting without excuse, a right a record number of Iowans are exercising in the ongoing pandemic.

As of October 15, 2020, more than 768,000 Iowans have requested absentee ballots for the November election, and more than 14,000 of those requests were still being processed.[3] At this time during the 2016 general election, 422,048 Iowans had requested absentee ballots and only 2,530

---

[3] Office of the Secretary of State, *November General Election Absentee Ballot Statistics*, https://sos.iowa.gov/elections/pdf/2020/general/AbsenteeCongressional2020.pdf, (last updated Sep. 30,2020).

remained to be processed—county auditors are now faced with an *over 450% increase in pending requests* compared to 2016.[4]

Iowa election officials have encouraged voters to vote by absentee ballot in the general election. They have been preparing for that election with the assumption that absentee voting will be widespread because of both the pandemic and encouragement to vote by absentee ballot from elections officials all the way up to the Secretary.[5]

For decades, Iowa law has broadly permitted any voter in Iowa to vote absentee. Iowa Code § 53.2(1)(a). Voters seeking to do so must submit a request to their county auditor. That request must contain certain information, including the voter's date of birth, permanent address, and their voter verification number. Iowa Code § 53.2(4)(a); (08/10/2020 Bryant Decl., Ex. 11.)

---

[4] Office of the Secretary of State, *November General Election Absentee Ballot Statistics*, https://sos.iowa.gov/elections/pdf/2016/general/AbsenteeCongressional2016.pdf (last visited Oct 15, 2020) (reporting 422,048 requested absentee ballots and 419,518 sent absentee ballots on October 20, 2016).

[5] James Lynch, *Pate predicts 80% absentee voting in November*, Waterloo-Cedar Falls Courier (Sept. 10, 2020), https://wcfcourier.com/news/local/govt-and-politics/pate-predicts-80-absentee-voting-in-november/article_52e175a1-832b-57fb-8a50-36dbbd3bc668.html.

The voter verification number is the voter's Iowa driver's license or non-operator identification number, or the Voter PIN (collectively, the "ID Number"). Voter PINs are issued on Voter Identification Cards ("Voter ID Card") sent to voters who do not have an Iowa-issued driver's license or non-operator ID. (*Id.*, Ex. 1.) Voter ID Cards were first mailed to voters without an Iowa driver's license or non-operator ID in December 2017, and thereafter to new registrants only. (*Id.*, Ex. 2.)

Iowa permits voters to submit requests for absentee ballots up until 5 p.m. ten days before a general election. (*Id.*, Ex. 3); Iowa Code § 53.2(1)(b) (adopting by reference voter registration deadline, Iowa Code § 48A.9(1)). For the November 3, 2020, general election, that means Iowa voters may request absentee ballots up until October 24. Requests received up to and on October 24 must be processed by the county auditor's office, and only then will the absentee ballot be mailed by the county auditor to the voter. Iowa Code § 53.2(1)(b). To be counted, mailed absentee ballots must be postmarked by the Monday before election day (November 2) and received by noon on the Monday following the election. Iowa Code § 53.17(2).

II. Absentee voting resulted in record turnout in the June primary.

Since early in the pandemic, Secretary Pate has advised voters that "[t]he safest way to vote [is] by mail." (08/10/2020 Bryant Decl., Ex. 4.) To facilitate this, the Secretary sent every active registered voter an absentee ballot request form prior to the June primary and "encourage[d] all eligible Iowans who want to vote in the primary to use the absentee method." (*Id.*, Ex. 5.) Voters responded enthusiastically: the primary saw record-shattering numbers of absentee ballot requests. (*Id.*, Ex. 6.) The Secretary received widespread praise for running such a successful election in the middle of the pandemic, at a time when virtually every other state that had a primary was being justly criticized for widespread chaos and disenfranchisement. (*See, e.g.*, *id.*, Ex. 6, 8.)

III. HF 2643 imposes entirely avoidable delays in processing absentee ballot requests, threatening lawful Iowa voters' right to vote without sufficient justification.

Rather than applaud the wildly successful primary election, the legislature abruptly changed the law regarding how auditors had processed absentee ballot requests for decades by passing HF 2643.

Prior to the enactment of HF 2643, county auditors were directed to use "the best means available" to fill in missing information from an absentee ballot request if the application otherwise included sufficient

information to verify the voter's identity to the auditor's satisfaction. HF 2643 § 124; Iowa Code § 53.2(4)(b). In particular, voters often omit the Voter ID altogether–not knowing what it is–or put down the wrong combination of numbers, either through accidental transposition or by transcription error. (08/10/2020 Lara Decl. ¶ 5.) This is particularly true for voters who lack an Iowa driver's license or Non-Operator ID, whose ID Number for absentee voting purposes is the four-digit Voter PIN printed on a Voter ID Card that they may not even realize they were ever issued. (*Id.*; *see also* 08/10/2020 Gill Decl. ¶ 4.) Because Voter ID Cards for many voters were last issued three years ago, many voters may have since misplaced the card, or have no memory of receiving it. (*See* 08/10/2020 Weipert Decl. ¶ 4.) This issue is so persistent that even when one county auditor mailed blank request forms to all voters in advance of a July special election and included a separate piece of paper with form that included the Voter PIN, more than 18% of applicants *still* failed to transcribe it on the request they submitted, or got the number wrong. (08/10/2020 Gill Decl. ¶ 5.)

To fix a missing or erroneous Voter ID, county auditors had, for years, often referred to I-Voters, the voter registration database, a

practice that enabled them to promptly and efficiently process voters' absentee ballot requests, and to do so without any known incidents of fraud. (08/10/2020 ISACA Decl. ¶ 16; *see also* 08/10/2020 Weipert Decl. ¶ 12.) This was not "guessing," as the Intervenors assert. (10/05/2020 Intervenors' Resistance at 3.) This was referring to the personally identifiable information available to them on *both* the request and I-Voters, making sure it matched, and filling in one piece of information that was commonly omitted or erroneous. This is no different than, for example, a person calling their bank or utility company and not knowing their account number but being able to sufficiently verify their identity in other ways so that the customer service agent can still access their account. Moreover, county auditors retained discretion to contact voters if needed.

In contrast, under the law as amended by HF 2643, if an absentee ballot request contains *any* mistakes or omissions, auditors may no longer refer to I-Voters or take any steps other than those specifically laid out in HF 2643 itself to process the application. And, HF 2643 requires auditors to engage in an often protracted, unrealistic, and entirely inefficient back and forth with the voter to attempt to obtain information

that, in the case of the four-digit Voter PIN in particular, the voter does not even have to begin with.

Specifically, HF 2643 requires auditors to first attempt to "contact the applicant by telephone and electronic mail" within 24 hours after receiving the request to attempt to obtain the information. HF 2643 § 124; Iowa Code § 53.2(4)(b). Voters, however, often cannot be reached by those means, as many do not provide that contact information when making an absentee ballot request—and, for those that do, many are likely to ignore unexpected phone calls or email. (*See* 08/10/2020 Hersch Decl. ¶¶ 40-41.). If a voter cannot be reached by phone or email, the auditor must physically mail a letter asking for the missing data. HF 2643 § 124; Iowa Code § 53.2(4)(b).[6] These circumstances exponentially

---

[6] While there is a place for a voter to provide his or her "contact info" on the pre-printed absentee ballot request forms sent out by the Secretary and made available by auditors (specifically in the form of a phone number and/or email address), the instructions to the form make it clear that this information is not required. (08/10/2020 Weipert Decl. ¶ 5; 08/10/2020 Bryant Decl., Ex. 11.) As of July 2020, 51.5% of more than 2 million registrants did not have a listed telephone number in I-Voters and email addresses were not listed at all. (08/10/2020 Hersch. Decl. ¶ 38.) And if a voter does not provide a phone or email address, it is unclear whether a county auditor can, under the new law, use I-Voters to determine that contact information. *See* Iowa Code § 53.2(4)(b) ("A

increase the burden involved when a voter, who likely rarely uses a Voter PIN, is unable to find or provide it. HF 2643 also does not specify a period of time that an auditor must wait between calling or emailing and sending the letter, nor does it provide any time by which an auditor must mail the letter if the voter's phone number and email are missing entirely. HF 2643 § 124; Iowa Code § 53.2(4)(b).

Ultimately, to cure the problem, an auditor's request for information will have to reach the voter and the voter will have to respond in time to receive the absentee ballot, vote, and mail it by November 2. If the auditor never receives the missing information from the voter themselves—information already known to the State and in I-Voters—they simply cannot process the request and the voters will not be able to vote absentee. *See* HF 2643 § 124; Iowa Code § 53.2(4)(b). Ironically, if the Voter PIN was missing from the request and the voter did not know it in the first place, the voter would then have to call the county auditor to obtain the information by providing two pieces of personally identifying information—the very same information already

---

commissioner shall not use the voter registration system to obtain additional necessary information.").

included on the absentee ballot request in the auditor's possession from the beginning of this process. Iowa Code § 53.2(4)(d). But even *that* is not guaranteed—as a young voter, Ms. Garcia, discovered, when her county auditor's office *refused* to provide the Voter PIN by phone. (08/27/2020 Declaration of Cristal Garcia ("Garcia Decl.") ¶ 6.) Thus, under HF 2643, there may be *no* way for voters to obtain "missing" information that they are not aware they have or cannot locate.

Expert analysis confirms all the worst expectations of the negative impact HF 2643 is likely to have on lawful Iowa voters.[7] It demonstrates that, even under the most favorable circumstances, HF 2643 adds at least a week to the process for correcting an absentee ballot request and issuing an absentee ballot to a voter. (08/10/2020 Hersch Decl. ¶ 26.) In present circumstances, with the postal service explicitly warning of

---

[7] Analysis by Eitan Hersch, a well-respected professor of political science at Tufts University, confirms these expectations. (08/10/2020 Hersch Decl. ¶ 5.) Dr. Hersch analyzed, among other things, the delays that will result for Iowa voters who do not submit complete absentee ballot requests; how many voters are likely to be impacted; and the undue burdens imposed on voters in comparison any benefits conferred through HF 2643. (*Id.* at ¶ 3.)

service delays and a global pandemic prompting an enormous increase in absentee voting, HF 2643 almost certainly will result in far longer delays.

In short, HF 2643 creates a serious risk that any voter submitting a request on or after *October 20th* (four days before the state's deadline for voters to submit requests for the November election), or likely far earlier, will not have their ballot counted. (*Id.*) Indeed, voters who submit their requests up to ten days before the deadline are at risk of not having their ballot counted. (*Id.* at ¶ 28.) This is because there simply is not time for auditors to follow the mandate of HF 2643 and allow the voter to vote and to mail the ballot by November 2. A conservative estimate for the number of voters who will face this risk ranges from 10,000 to 30,500. (*Id.* at ¶ 42.)

Delays in processing absentee ballot requests at a time when more voters seek to safely exercise their right to the franchise during the pandemic will only be exacerbated by the struggles of the USPS, which has already proven in multiple primaries around the country to be

struggling to timely deliver election mail in the pandemic.[8] And the USPS has recently warned that voters should expect further election-related mail delays in November.[9] Voters who do not receive their absentee ballots as anticipated are not only severely burdened, but, in the face of confusion and last-minute election day voting, may not be able to vote at all, whether due to age, work, school, illness, health risks, or other reasons.[10] *See Jones v. U.S. Postal Serv.*, 20 Civ. 6516 (VM), 2020 WL 5627002, at *2 (S.D.N.Y. Sept. 21, 2020) (stating without a reliable mail in ballot option, voters "confront an untenable choice: risk contracting a potentially fatal illness by voting in person, or foregoing their right to vote in a presidential election").

---

[8] (*See, e.g.*, 08/10/2020 Bryant Decl., Exs. 8 (New York's primary), 13 (Wisconsin's primary), 18 (Ohio's primary), 19 (Georgia's primary, as well as other June primaries).)

[9] (08/10/2020 Bryant Decl., Exs. 13 at 6 ("Ballots requested less than seven days before an election are at high risk of not being delivered, completed by voters, and returned to the election offices in time"), 14, and 15 at 2 (USPS recommends that voters request their absentee ballots not later than 14 days before Election Day).)

[10] Early voting does not solve this problem, as a voter expecting an absentee ballot will not have any reason to vote early and in-person. And at least some people will be unable to do vote in-person at all due to health risks.

Legislators stated that the bill was motivated by concerns about "voter security," but were unable to identify any specific instance of absentee-ballot-related voter fraud or any other problem that the bill was trying to remedy or explain how this cumbersome process was tailored to address that problem. (08/10/2020 Br. Mot. Temp. Inj. at 8 n.3). The county auditors' official association actively *opposed* HF 2643, because it "burdens Iowa county auditors and voters with no corresponding electoral security benefit to the people of Iowa." (08/10/2020 ISACA Decl. ¶ 16.) The Secretary and Intervenors have likewise not identified any incidents of fraud associated with the way absentee ballot requests were processed before HF 2643 or explained how HF 2643 is tailored to address election security or fraud. (08/20/2020 Sec.'s Resistance at 8, 10, 14; 09/15/2020 Intervenors' Resistance at 8 (stating only that states have an interest in protecting elections from possible fraud).)

In reality, Iowa already has a robust election security framework that has been nationally recognized by the Department of Homeland Security as a model for other states to follow and that earned Secretary Pate awards prior to the enactment of HF 2643. (08/10/2020 ISACA Decl. ¶ 15.) HF 2643 adds nothing to this system, and, unless it is suspended,

it will continue to add unnecessary burdens to both election administrators' plates and on Iowa voters' ability to exercise their right to the franchise, particularly during the current pandemic.

PROCEDURAL HISTORY

Plaintiffs filed a Petition in Law and Equity on July 14, 2020, just 2 weeks after the legislature passed HF 2643, and a Motion for Temporary Injunction on August 10, to (1) enjoin HF 2643's requirement that "[a] commissioner shall not use the voter registration system to obtain additional necessary information"; and (2) enjoin HF 2643's ban on commissioners from using the "best means available" to "obtain the additional necessary information" to cure absentee ballot applications with missing information. (07/14/2020 Pet.; 08/10/2020 Mot. Temp. Inj.)

The Secretary filed a Resistance to Plaintiffs' Motion for Temporary Injunction on August 20 (08/20/2020 Resistance.) Intervenors were granted intervention on September 8 (09/08/2020 Order.) Intervenors filed a Resistance to Plaintiffs' Motion for Temporary Injunction on September 15 (09/15/2020 Intervenors' Resistance.)

On September 23, the district court held oral argument on Plaintiffs' Motion for Temporary Injunction.[11] On September 28, the district court denied Plaintiffs' Motion for Temporary Injunction after applying rational basis scrutiny to Plaintiffs' claims. (09/28/2020 Order.)

Plaintiffs applied for interlocutory appeal of the order denying a temporary injunction on September 30. This Court granted Plaintiffs' application for interlocutory appeal on October 14.

Finally, as the Court is aware, after this case was filed, the Secretary issued a Directive prohibiting pre-filled absentee ballot requests.[12] Some county auditors sent pre-filled requests anyway, resulting in various litigation, including before this Court. On October 14, the Court vacated an order in Polk County that had stayed the Directive as unlawful. *Democratic Senatorial Campaign Comm. v. Pate*

---

[11] Plaintiffs requested an expedited hearing upon filing their motion for temporary injunction, but the district court declined to schedule one. (08/10/2020 Pls.' Mot. Temporary Inj. at 1; 08/12/2020 Order Setting Hr'g. at 1.) The district court also declined to move the hearing to an earlier date in response to a joint request from the Plaintiffs and the Secretary. (09/03/2020 Joint Mot. Earlier Hr'g Date Mot. for Temporary Inj.; 09/08/2020 Order)

[12] Off. of the Iowa Sec'y of State, Emergency Election Directive (July 17, 2020).

("DSCC"), No. 20-1281 (Iowa Oct. 14, 2020). That matter, however, did not involve the constitutionality of HF 2643 and therefore is not binding (as the Court recognized by accepting review here). *See id.*; (*see also* 10/14/2020 Order.)

STANDARD OF REVIEW

An appellate court reviews legal questions regarding "alleged violations of constitutional rights . . . *de novo*." *State v. Krogmann*, 804 N.W.2d 518, 522 (Iowa 2011). It reviews a denial of a temporary injunction for abuse of discretion.[13] *Lewis Invs., Inc. v. City of Iowa City*, 703 N.W.2d 180, 184 (Iowa 2005). Abuse of discretion "is found if 'a court acts on grounds clearly untenable or to an extent clearly unreasonable.'" *Krogmann*, 804 N.W.2d at 523.

---

[13] To be entitled to a temporary injunction, a plaintiff must show a likelihood of success on the merits, a substantial injury or damages will result unless an injunction is granted, and that no adequate legal remedy is available." *PIC USA v. N.C. Farm P'ship*, 672 N.W.2d 718, 723 (Iowa 2003) (citation omitted). Courts also consider the "circumstances confronting the parties and balance the harm that temporary injunction may prevent against the harm that may result from its issuance." *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181 (Iowa 2001) (citation omitted).

ARGUMENT

I. The district court erred in holding that Plaintiffs are not likely to succeed on the merits of their claims

A. HF 2643 unconstitutionally burdens the right to vote.

The district court incorrectly held that HF 2643 does not burden the right to vote because it implicates a request for an absentee ballot, and therefore is subject to rational basis scrutiny. (See 09/28/2020 Order at 15 ("The claims in this case, however, are related to a request for an absentee ballot, which are likely to be found not to involve the right to vote.").) This was clear legal error. HF 2643 unconstitutionally burdens the right to vote enshrined in Article II, Section 1 of the Iowa Constitution. Under both Iowa and federal case law, it is subject to strict scrutiny. But even if HF 2643 were subject to rational basis review, the conclusion that it survives it in this case was itself error.

1. Infringements on the right to vote are subject to strict scrutiny

The Iowa Constitution expressly protects the right to vote as a fundamental right. Iowa Const. art. II, § 1; *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 848 (Iowa 2014). As a result, any regulatory measures that abridge that right "must be carefully and meticulously scrutinized,"

Chiodo, 846 N.W.2d at 848 (emphasis added). *See also State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002) ("If the asserted right is fundamental, we apply strict scrutiny analysis"). "This right . . . cannot be destroyed or impaired by the legislature," *Edmonds v. Banbury*, 28 Iowa 267, 271 (1869). Although federal cases analyzing a burden on the right to vote under the U.S. constitution use a sliding-scale approach under *Anderson-Burdick*, this more exacting standard is established by the right to vote enumerated in Article II, Section 1 of the Iowa Constitution, which has no direct analogue in the federal Constitution.

"It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens." *Godfrey v. Iowa*, 898 N.W.2d 844, 865 (Iowa 2017). The Iowa courts have the responsibility to "ultimately determine constitutional requirements in Iowa and [they] are under no obligation to uphold a state statute [even if] in the view of the Supreme Court of the United States it is not unconstitutional." *In Interest of Johnson*, 257 N.W.2d 47, 49 (Iowa 1977). And case law establishes that the Iowa Constitution is more protective of the right to vote than the U.S. Constitution. The Iowa Supreme Court has held that

the Iowa Constitution protects the right to write-in a vote for a candidate not listed on the ballot. *See Barr v. Cardell*, 155 N.W. 312, 315 (Iowa 1915). But the U.S. Supreme Court rejected the same claim under the U.S. Constitution. *See Burdick v. Takushi*, 504 U.S. 428, 441 (1992).

2. The court erred in applying rational basis to Plaintiffs' claims.

The district court erred, however, by finding that a request to vote *absentee* does not implicate the fundamental right to vote. To reach this conclusion, the district court improperly relied on *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 808, 811 (1969), and *Luse v. Wray*, 254 N.W.2d 324, 330 (Iowa 1977) to apply rational basis review to HF 2643's restrictions on absentee voting. (09/28/2020 Order at 15.) These cases are inapplicable. Relevant case law is clear that once a state enables voters to cast their ballots by other means, including absentee, it may not impose unjustified burdens on that right. Moreover, laws that result in the disenfranchisement of voters—as here—should be evaluated under strict scrutiny, even if the law on its face does not deny the right to vote.

First, *McDonald* and *Luse* are inapposite. Both involved voter classifications and equal protection claims, rather than the burden on the

right to vote. Specifically, *McDonald* considered whether a state could lawfully deny incarcerated inmates the right to vote absentee under the federal constitution, while *Luse* considered whether Iowa could require more burdensome procedures for hospitalized patients voting absentee than for other absentee voters.[14] *McDonald*, 394 U.S. at 804, 806; *Luse*, 254 N.W.2d at 330. Notably, *Luse* was decided long before Iowa extended absentee voting to all qualified voters. 1990 Iowa Legis. Serv. H.F. 2329 (Ch. 1238) (West) (amending in 1990 Iowa Code § 53.1 to allow absentee voting "[w]hen the elector expects to be unable to go to the polls and vote on election day"). Thus, neither *McDonald* nor *Luse* considered how or whether any state may burden a voter's access to absentee voting when a state has declared that all registered voters may vote absentee. [15]

---

[14] Moreover, the *Luse* court expressly *did not* hold that restrictions on absentee voting are subject to rational basis scrutiny; instead, in dicta, it stated that the rational basis test "would appear" to be appropriate but that it found "no necessity to choose between the tests," holding that the challenged statute survived any level of scrutiny. *Luse*, 254 N.W.2d at 330-31.

[15] The additional cases cited to by the Secretary and Intervenors in their Resistances to Plaintiffs' Application for Interlocutory Appeal are likewise neither authoritative nor persuasive. (*See* 10/05/2020 Sec.'s Resistance at 9; 10/05/2020 Intervenors' Resistance at 8.) Neither considered whether burdens on absentee voting would violate a state constitution such as Iowa's. Further, neither involved states like Iowa

For the reasons discussed above, because restrictions on voting rights in Iowa are subject to a higher level of scrutiny than under the federal constitution, and because Iowa has now extended absentee voting to all voters, burdens on absentee voting should be evaluated under strict scrutiny. *See Hernandez-Lopez*, 639 N.W.2d at 238 ("If the asserted right is fundamental, we apply strict scrutiny analysis."); *Edmonds*, 28 Iowa at 272; *DSCC*, No. 20-1281 at 27-28 (Iowa Oct. 14, 2020) (Appel, J., concurring) (stating burden absentee voting should be evaluated under strict scrutiny); *see also Lewis v. Hughs*, Civil Action No. 5:20-cv-00755-OLG, 2020 WL 4344432, at *11 (W.D. Tex. July 28, 2020), *aff'd*, No. 20-50654, 2020 WL 5511881 (5th Cir. Sept. 4, 2020) (rejecting application of *McDonald* where at issue "is not whether Plaintiffs have a constitutional right to vote by mail contrary to Texas law, but, rather, given that they

---

that have chosen to expand the right to vote absentee without an excuse to all eligible electors equally. Instead, each the states involved selectively permitted certain electors to vote absentee or take advantage of certain absentee provisions. *Mays v. LaRose*, 951 F.3d 775 (6th Cir. 2020) (only hospitalized individuals allowed to request absentee ballots after deadline); *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020) (only voters with qualifying excuses permitted to vote absentee).

already have this right, whether these challenged restrictions present an undue burden . . . .") (internal citation omitted). Other states have properly recognized that interference with voters' ability to vote by absentee ballot is a burden on the fundamental right to vote. *Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983) (en banc) (stating voters who cannot vote in person on election day, "no less than in-person voters, should be able to present their views on issues of public importance without being encumbered by an unyielding standard of statutory exactitude. . . . [T]he right to vote is a fundamental right of the first order"); *see also DSCC*, No. 20-1281 at 27–28 (Iowa Oct. 14, 2020) (Appel, J., concurring) (discussing cases).

Second, at the very least the district court should have used the *Anderson-Burdick* sliding scale test that federal courts now use to analyze undue burdens on the right to vote under the First and Fourteenth Amendments of the U.S. Constitution. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick*, 504 U.S. at 434. Indeed, this Court recently recognized the appropriateness of this standard. *See DSCC*, No. 20-1281 at 10 (Iowa Oct. 14, 2020).Under this "flexible" standard, courts "weigh" (1) "'the character and magnitude of the

asserted injury to the rights . . . that the plaintiff seeks to vindicate' against" (2) "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

Under this test, once a state extends the franchise to enable voters to cast their ballots by different means, it may not impose unjustified burdens on that right. *See, e.g.*, *Obama for Am. v. Husted*, 697 F.3d 423, 430-32 (6th Cir. 2012) (finding burdens on right to vote early in-person violated constitution, even if there was no fundamental right to vote by such means); *Martin*, 341 F. Supp. 3d at 1338 ("[O]nce the state creates an absentee voting regime, they must administer it in accordance with the Constitution.") (quotation marks omitted); *Doe v. Walker*, 746 F. Supp. 2d 667, 681 (D. Md. 2010) (stating the court "reaches the unremarkable conclusion that where 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") (citing

Burdick, 504 U.S. at 434, *Price v. N.Y. State Bd. of Elections*, 540 F.3d 1010 (2d Cir. 2008)).[16]

Finally, courts routinely find that laws that result in the disenfranchisement of voters impose a severe burden and must be subject to strict scrutiny, even when those laws do not on their face deny the right to vote.[17] *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 342–343 (1972) (applying strict scrutiny to challenge to a durational residency requirement that disenfranchised a segment of voters); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 228 (1986) (applying strict scrutiny to a law that banned political parties from allowing independent voters to vote in their primary); *Stewart v. Blackwell*, 444 F.3d 843, 848 (6th Cir. 2006*), vacated and superseded on other grounds*, 473 F.3d 692

---

[16] In response to Plaintiffs' argument that *McDonald* and other federal cases cited by Defendant and Intervenors are unpersuasive, the district court misunderstood Plaintiffs' to argue that federal cases are not instructive as to due process claims under the Iowa Constitution. (See 09/28/2020 Order at 14 n.3.) This is not the case.

[17] *Luse* itself implies that the constitutional analysis would have been different in that case had the challenged conduct affected "a large proportion" of voters instead of only a small number of ballots. *Luse*, 254 N.W.2d at 331-32 (stating that, where only 135 ballots out of 9202 total went uncounted, the challenged action did not "rise[] to the level of a constitutional violation but noting this might not be the case where "a large proportion of the total vote . . . is set aside . . . .").

(6th Cir. 2007) (finding "severe" burden where unreliable punch card ballots and optical scan systems resulted in thousands of votes not being counted). This is because "even one disenfranchised voter—let alone several thousand—is too many[.]" *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014). *See also Hill v. Stone*, 421 U.S. 289, 300 n.9 (1975) ("The [*McDonald*] Court expressly noted 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. Any classification actually restraining the fundamental right to vote, the Court noted, would be subject to close scrutiny.") (citing *McDonald*, 394 U.S. at 807-09); *Jones v. U.S. Postal Serv.*, 2020 WL 5627002, at *15 ("[T]he Supreme Court has expressly restricted [*McDonald*'s] applicability to cases in which there is no evidence showing that the challenged restriction will prohibit the plaintiff from voting.") (citing *Goosby v. Osser*, 409 U.S. 512, 521–22 (1973)).

Accordingly, strict scrutiny or at least heightened scrutiny applies to Plaintiffs' challenge. But, for the reasons described below, HF 2643 does not survive any level of scrutiny.

3. HF 2643 cannot withstand review under strict scrutiny.

Under the well-established authority discussed above, it is plain that HF 2643 imposes a severe burden on the right to vote. Simply put, voters who do not receive an absentee ballot due to completely innocent errors or omissions that in the past would have been easily and efficiently addressed by the county auditors may be unable to vote in person at all, especially because of the pandemic. The Secretary himself has urged voters to vote absentee, describing it as "the safest way" to vote. (08/10/2020 Bryant Decl, Ex. 4.)

Indeed, given the overwhelming number of absentee ballot requests this year, the burden on auditors of having to make individual phone calls, send emails, and—if that is unsuccessful (or if they are lacking the relevant voter contact information)—send individual letters to the likely tens of thousands of voters who will provide missing, incomplete, or illegible information on their requests—will significantly compound delays in issuing ballots. (08/10/2020 ISACA Decl. ¶ 11; 08/10/2020 Weipert Decl. ¶ 9; 08/10/2020 Lara Decl. ¶¶ 9–11; 08/10/2020 Hersch Decl. ¶ 36.)

The cumulative result will be that thousands of Iowans will face a serious risk of losing their ability to vote absentee. (08/10/2020 Hersch Decl. ¶ 42.) Voters will be thoroughly confused over whether a ballot is coming to them in the mail or whether they can even permissibly vote in person having applied to vote in absentee. Voters who are not confused may still be unable to vote on election day due the very impediments that lead them to seek an absentee ballot in the first place. While it is true that Iowa also offers early voting, to the extent these voters anticipate receiving an absentee ballot, or if they cannot vote in person because the pandemic, early voting will not alleviate the risk of disenfranchisement. *Cf. DSCC*, No. 20-1281 at 27 (Iowa Oct. 14, 2020) (Appel, J., concurring) (indicating where absentee voting is not possible, voters will have to choose between their health and safety and voting).

Plaintiffs recognize that, in the context of discussing the Secretary's recent Directive, this Court expressed some skepticism that making a complete and accurate ballot request imposes a burden on voters. *DSCC*, No. 20-1281 at 10 (Iowa Oct. 14, 2020).[18] But in this case there is

---

[18] Ultimately, however, the Court held that the burdens cited by the plaintiffs in that case resulted "from the decisions of the three county

significant, undisputed evidence that errors on absentee ballot requests submitted by Iowa voters are extraordinarily common. *See* 08/10/2020 ISACA Decl. ¶ 8, 08/10/2020 Gill Decl. ¶ 5, 08/10/2020 Hersch Decl. ¶ 13; 08/10/2020 Weipert Decl. ¶ 4.) Moreover, one young voter *tried* to fill out the form correctly but simply could not--she had lost her driver's license and her county auditor's office refused to provider her Voter PIN to her over the phone. (08/27/2020 Garcia Decl. ¶ 6.) These common errors were easily remedied by allowing county auditors the discretion to use the "best means available" to process the request, including I-Voters. (08/10/2020 Lara Decl. ¶ 6; 08/10/2020 Gill Decl. ¶¶ 5-6; 08/10/2020 Weipert Decl. ¶ 4.)

Suggesting voters should simply request their ballots early to avoid HF 2643's problems, as the Secretary does, begs the question.[19]

---

auditors not to follow that directive or Iowa Code section 53.2." *DSCC*, No. 20-1281 at 9 (Iowa Oct. 14, 2020).

[19] The Secretary cites *Mays v. LaRose*, 951 F.3d 775 (6th Cir. 2020), in support of this assertion. (10/05/2020 Sec.'s Resistance at 12.) There, the Sixth Circuit found that two individuals who were arrested and missed a deadline to request an absentee ballot were not discriminated against by a law that provided an exception to the absentee ballot request deadline only for voters who were unexpectedly hospitalized or whose children were unexpectedly hospitalized after the deadline. Comparing this factual scenario to the experience of a good section of the electorate at

(10/05/2020 Sec.'s Resistance at 12.) HF 2643 threatens to deprive voters, who *timely* submit absentee ballot requests with easily correctable omissions or transpositions, of their right to vote absentee: that is the very burden at issue The evidence is undisputed that even under a *best-case scenario* with no delays on the part of the voter, the county, or USPS, HF 2643 adds *a full week* to the process of delivering an absentee ballot. (08/10/2020 Hersh Decl. ¶ 26.) Voters who submit their absentee ballot requests within ten days of the state deadline have, in prior elections, comprised more than 40% of the absentee ballot electorate. (*Id.* ¶ 4.) HF 2643 does not, then, imperil the votes of a small subset of procrastinators but rather a robust plurality of absentee voters who, in their timely requests for absentee ballots, may make an innocent mistake or omission in omitting something like a Voter PIN, a number they rarely use and have never needed before to request an absentee ballot.[20]

---

large—literally thousands of Iowa voters—who fill out a timely application in good faith and yet routinely make the same types of mistakes or omissions in doing so is completely misplaced.

[20] The Secretary attacks Dr. Hersch's estimate that 11,000 to 34,000 Iowans will submit correctable request forms within 10 days of the deadline as an "exaggerated estimate" because "absentee voting totals from 2016 include in person absentee voting at county auditors' offices and satellite voting locations." (10/05/2020 Sec.'s Resistance at 5 n.2.) But

Because HF 2643 will result in voter disenfranchisement, strict scrutiny applies, as discussed above in Section I.A.2. But even when elections laws or procedures impose unjustifiable burdens on voters short of disenfranchisement, courts regularly invalidate them as unconstitutional where those burdens are not outweighed by the state's asserted interests in imposing them, as here. *See e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631-633 (6th Cir. 2016) (holding burden of requiring a voter to perfectly complete birthdate and address fields for an absentee vote was "in their own control" but still unconstitutional because state failed to substantiate its asserted interest in preventing voter fraud); *Obama for Am.*, 697 F. 3d at 433 (holding burden of challenged voting practice was not "slight" even though it did not "absolutely prohibit early voters from voting"); *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1216 (N.D. Fla. 2018) (holding a directive that "categorically prohibited" offering early voting

---

the Secretary tellingly fails to identify how many absentee voters exercised these options in 2016. If this number was meaningful, one surmises that the Secretary—the keeper of such statistics for the State of Iowa—would have highlighted it. (*See* 08/27/2020 Plaintiffs' Reply at 10 n. 6.) Yet despite having multiple opportunities in this litigation to offer that information, he has not done so.

on college campuses made it substantially more difficult for young voters to access early voting, unconstitutionally burdening their right to vote); *Guare v. State*, 167 N.H. 658, 665, 117 A.3d 731, 738 (2015) (holding confusing language on voter registration form imposed at least an unreasonable burden because it "*could* cause an otherwise qualified voter not to register to vote") (emphasis added).

In addition to the clear burdens imposed on voters who have to jump through additional hoops to provide information to auditors that is already in the auditors' possession (and that in many cases, the voter may not even have or know where to find) to successfully vote absentee, there is no question that HF 2643 will create significant voter confusion. Both new voters and those who have submitted absentee ballot request without incident in the past will not anticipate contact from county auditors or know that they have to respond to have their absentee ballot request processed. Many voters, especially young voters, will also not know what to do if their absentee ballots are never sent. (08/10/2020 Hersch Decl. ¶ 41; 08/10/2020 Henry Decl. ¶ 9; 08/10/2020 Poersch Decl. ¶ 5.)

Courts regularly find that voter confusion constitutes a burden on the right to vote, especially where it may lead to disenfranchisement. *See Coal. for Ed. in Dist. One v. Bd. of Elections of City of N.Y.*, 370 F. Supp. 42, 51 (S.D.N.Y.), *aff'd*, 495 F.2d 1090 (2d Cir. 1974) (recognizing "confusion [about where to vote stemming from improper election worker instruction] undoubtedly denied some [] voters the right to [cast] an effective vote"); *Bryanton v. Johnson*, 902 F. Supp. 2d 983, 995–96 (E.D. Mich. 2012) (holding inconsistent standards regarding a citizenship checkbox on certain voting forms caused widespread confusion, which likely "interfere[d] with the right of all voters."); *Priorities USA v. State*, 591 S.W.3d 448, 460 (Mo. 2020), *reh'g denied* (Jan. 30, 2020) (declaring affidavit requirement unconstitutional because it caused voter confusion); *Guare*, 167 N.H. at 665, 117 A.3d at 738 (holding voter registration form requirement that caused widespread confusion that led "an otherwise qualified voter not to register to vote" imposed an "unreasonable burden" on "the fundamental right to vote").

That the burden imposed on HF 2643 may be more severe on some voters than others—such as the elderly, those with significant health risks posed by the pandemic, young voters who may be more apt to make

mistakes or be confused by the process, or those who cannot otherwise vote on election day does not negate the burden on the right to vote. To the contrary, courts applying *Anderson-Burdick* are directed to look at a challenged law's impact on the voters that it will actually burden.[21] *Crawford v. Marion County Election Board*, 553 U.S. 181, 199–203 (2008) (plurality op.); *id.* at 212–23, 237 (Souter, J., dissenting); *id.* at 237 (Breyer, J., dissenting); *see also Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (explaining *Crawford* instructs that "courts may consider not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe"); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627–32 (6th Cir. 2016) (measuring challenged law's "disparate burden on African-American voters"); *Veasey v. Perry*, 71 F. Supp. 3d 627, 686 (S.D. Tex. 2014) ("This Court reads *Anderson* and

---

[21] Of particular concern is that HF 2643 will disproportionately burden younger voters and Latinx Iowans. (08/10/2020 Hersch Decl. ¶¶ 42–44. (stating "young adults" are likely to be most burdened by HF 2643 because they tend to vote later, are more likely to lack a DOT-issued ID and therefore must use a PIN that is likely not known to them, and are less likely to have a phone number listed in the Iowa voter registration system); *see also* 08/10/2020 Henry Decl. ¶¶ 6–9; 08/10/2020 Poersch Decl. ¶ 5.)

Burdick, as well as the lead opinion in *Crawford*, to require balancing the state's interest against the burdens imposed upon the subgroup [of voters most impacted by the challenged law]."), *vacated in part on other grounds*, 830 F.3d 216 (5th Cir. 2016) (en banc).

This analysis does not require intentional discrimination as the Intervenors suggest, (10/05/2020 Intervenors' Resistance at 12, 16), but it analyzes the actual impact of the burden. And, even restrictions that "may appear" to create only "slight" burdens "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation,'" *Crawford*, 553 U.S. at 191 (citation omitted), even if that burden is only imposed on a small group of voters. *See League of Women Voters of Fla., Inc.*, 314 F. Supp. at 1216–17 (holding that although "[a]t first blush, Plaintiffs' burdens appear slight," the lopsided impact on younger voters of the election law preventing university building from being early voting location impermissibly created "a secondary class of voters" and warranted preliminary injunction).

In short, both the evidence and the case law show that Plaintiffs are likely to succeed in showing that HF 2643 imposes a severe burden on the right to vote, and the trial court should not have held otherwise.

4. No state interest adequately justifies the burdens imposed by HF 2643.

The district court also abused its discretion in finding that the State's interest justifies HF 2643. The State's only asserted interest in enacting HF 2643 was "election security," but this claim was entirely unsupported and therefore cannot survive even a rational basis review, let alone heightened or strict scrutiny. The right to vote "cannot be destroyed or impaired by the legislature." *Edmonds*, 28 Iowa at 271.

For decades before the enactment of HF 2643, county auditors routinely used the I-Voters database to obtain information missing from an absentee ballot request. Tellingly, legislators could not identify even a *single* instance of absentee ballot voting fraud precipitating the enactment of HF 2643. The Iowa auditors themselves rejected the notion that HF 2643 was required to protect against—or would in any way operate to prevent—fraud. (08/10/2020 ISACA Decl. ¶16.) Under the Iowa Constitution, the abridgement to the right to vote right "must be carefully and meticulously scrutinized." *Chiodo*, 846 N.W.2d at 848. Therefore, prevention of *theoretical* voter fraud should not be sufficient to justify burdens on the right to vote. *See, e.g.*, *League of Women Voters of N.C.*, 769 F.3d at 246 (holding fraud prevention was a tenuous

justification for state's voting restriction, because it was remote and only theoretically imaginable); *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1112 (D. Kan. 2018), *aff'd sub nom. Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020) (determining that "the magnitude of potentially disenfranchised voters impacted by the [demonstrated proof of citizenship] law and its enforcement scheme cannot be justified by the scant evidence of noncitizen voter fraud before and after the law was passed"); *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 826 (N.D. Ohio 2006) (holding statute unconstitutional when state "speculated" an interest in preventing voter fraud).

HF 2643 is simply not rationally related to "election security" or absentee ballot fraud, especially in a state where neither has ever been a problem. HF 2643 does nothing to protect voter identity or enhance the security of the absentee ballot application process. (*See* 08/10/2020 ISACA Decl. ¶ 16 (stating HF 2643 "burdens Iowa county auditors and voters with no corresponding electoral security benefit to the people of Iowa"); *see also* 08/10/2020 Weipert Decl. ¶ 12 ("We do not have a problem with election integrity in Iowa. I am not aware of any incident of absentee-ballot-related election fraud in Johnson County during my

tenure.”).) If a voter omits his or her Voter ID number but provides the correct birth date, street address, middle name, and last four digits of the Social Security number—all the information necessary to “verify” the voter’s identity is already provided on the request itself. And in that case, there would be no reason to question whether the absentee ballot was requested by the voter, which the Court indicated was a concern with using pre-filled absentee ballot requests. *DSCC*, No. 20-1281 at 7 (Iowa Oct. 14, 2020).

In fact, if a voter is contacted by a county auditor because of a missing Voter PIN, and the voter does not know the PIN, the voter should be able to obtain it from the county auditor if the voter provides two pieces of personally identifying information—the same information already on the form. HF 2643 § 125 (although, in at least once incident, a voter was refused this information by an auditor). (08/27/2020 Garcia Decl. ¶ 6.) Notably, these pieces of personally identifiable information are commonly available, including in publicly available data that can be obtained from Iowa voter registration records. (08/10/2020 Hersch Decl. ¶ 49.) HF 2643 does nothing to prevent someone from obtain someone else’s ID Number using this publicly available information.

Thus, even if rational basis applied, HF 2643 does not survive given the lack of fit between the purported government interest and the law. *See Planned Parenthood of the Heartland v. Reynolds ex rel. State*, No. 17-1579, 2018 WL 3192941, at *21 (Iowa June 29, 2018) (stating under rational basis test, courts must consider "whether there is a 'reasonable fit between the government interest and the means utilized to advance the interest'") (quoting *Hernandez-Lopez*, 639 N.W.2d at 238); *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 32 (Iowa 2019) ("The rational basis standard, while deferential, is not a toothless one in Iowa…the court will not simply accept the purported justification at face value and will examine it to determine whether it [i]s credible as opposed to specious") (internal quotation marks and citations omitted).

Finally, Iowa already protects against election fraud in other ways that actually work. *See* Iowa Code § 39A.2(1)(a)(1) (a person commits the crime of election misconduct in the first degree by procuring or submitting a fraudulent voter registration application); Iowa Code § 39A.2(1)(a)(2) (making falsification of oath on absentee registration punishable as election misconduct in the first degree); Iowa Code § 39A.2(1)(b)(1) (procuring or submitting a fraudulent absentee ballot is

punishable as election misconduct in the first degree); (08/10/2020 ISACA Decl. ¶ 15 (highlighting efforts to protect the integrity of state elections)).

And by all accounts, it does so incredibly successfully. Iowa has been upheld as a model of elections security, even before HF 2643 was passed, when county auditors were routinely using the "best means available" to ensure that lawful voters were not unduly delayed or wrongfully denied absentee ballots when they timely submitted requests. (08/10/2020 ISACA Decl. ¶ 15.) The Iowa auditors themselves rejected the notion that HF 2643 was required to protect against—or would in any way operate to prevent—fraud. (*Id.* ¶ 16.) The connection between the law and the legislature's stated interest in passing it, in short, is not just tenuous, it is nonexistent.

For these reasons, HF 2643 is *not* a restriction that "protect[s] the integrity and reliability of the electoral process itself," and therefore is not constitutional. *See DSCC*, No. 20-1281 at 10 (Iowa Oct. 14, 2020) (quoting *Crawford*, 553 U.S. at 189-90). The district court erred by "simply accept[ing]" the "election security" justification "at face value[,]" even though Plaintiffs showed that HF 2643 does not enhance "election security." *AFSCME Iowa Council 61*, 928 N.W.2d at 32 (quoting *LSCP,*

LLLP, 861 N.W.2d 846, 860 (Iowa 2015)). There simply is no rational relationship between HF 2643 and election security. Accordingly, HF 2643 cannot withstand rational basis review, let alone heightened review or strict scrutiny.

B. HF 2643 violates equal protection.

The errors set forth above are reason alone to reverse the district court. But the district court also abused its discretion in finding that Plaintiffs are unlikely to succeed on their separate equal protection claim, brought under the Iowa Constitution.

Iowa's equal protection clause "is essentially a direction that all persons similarly situated should be treated alike." *AFSCME Iowa Council 61*, 928 N.W.2d at 31 (quoting *Varnum v. Brien*, 763 N.W.2d 862, 878–79 (Iowa 2009)). It is "identical in scope, import, and purpose" to the federal equal protection clause, making federal equal protection law instructive. *Varnum*, 763 N.W.2d at 878 n.6. To proceed with an equal protection analysis, Iowa courts make a threshold determination as to whether the law being challenged involves persons who are similarly situated. *NextEra Energy Res. LLC v. Iowa Utils.* Bd., 815 N.W.2d 30, 45 (Iowa 2012). Here, all Iowa voters have the right to request an absentee

ballot, and they are therefore similarly situated. Indeed, all registered voters automatically received a blank absentee ballot request form. (08/10/2020 Bryant Decl., Ex. 20.)

Once it is determined that persons are similarly situated, the court determines the level of scrutiny depending on the type of legislative classification being challenged. *NextEra Energy Res. LLC*, 815 N.W.2d at 45. As explained in Section I.A.2., HF 2643's restrictions on absentee voting are analyzed under strict scrutiny, not under the rational basis test. Therefore, the district court erred in using the rational basis test to analyze Plaintiffs' equal protection claim. Regardless, HF 2643 cannot survive any level of scrutiny under the equal protection clause because it subjects voters to arbitrary and disparate treatment regarding their absentee ballot requests.

HF 2643 fails to establish any standards regarding how long a county auditor should wait after emailing or calling a voter who has submitted an incomplete absentee ballot request before trying to reach the voter by mail. *See* Iowa Code § 53.2(4)(b). An auditor in one county may make a phone call, not get an answer, and immediately send the letter HF 2643 requires. An auditor in another county may make

multiple calls and send multiple emails and wait several days—or longer—before mailing the voter. There is no protocol that would guide the auditors to use the same, or even similar, procedures. The result is that similarly situated voters will be treated differently, will experience varying delays in obtaining their ballots, and will face higher barriers to vote based on the county in which they live, or even within a county itself. Auditors statewide will have free reign to act as expeditiously or as slowly as they like.

Courts repeatedly have held unconstitutional such arbitrary and disparate treatment that burdens the right to vote and violates equal protection.[22] The Iowa Constitution requires like voters to be treated alike. *See Coggeshall v. City of Des Moines*, 117 N.W. 309, 313 (Iowa 1908) (noting "an arbitrary classification of voters will not be tolerated . . ., and it is doubtful whether any substantial discrimination between electors with full suffrage may be upheld"). Instructive federal cases agree. In *Bush v. Gore*, the U.S. Supreme Court recognized that lack of statewide standards and guidance from state-level officials effectively

---

[22] *Griffin v. Pate*, 884 N.W.2d 182 (Iowa 2016), relied upon by Intervenors, did not involve an equal protection claim.

denied voters their fundamental rights, holding that equal protection is required not only in the "initial allocation of the franchise," but also to "the manner of its exercise," and that "once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. 98, 104–05 (2000); *see also Wexler v. Anderson*, 452 F.3d 1226, 1231–32 (11th Cir. 2006) (finding a non-uniform voting practice that makes it "less likely" that a person in one county will "cast an effective vote" than a voter in another county is a question "of constitutional dimension"); *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 635 ("A plaintiff may state an equal-protection claim by alleging that lack of statewide standards results in a system that deprives citizens of the right to vote based on where they live."); *Stewart*, 444 F.3d at 870-72 (applying strict scrutiny and stating that the government cannot impose disparate burdens for voters casting ballots in different counties in a statewide election).

Moreover, as described in Section I.A.4. above, the State's ostensible interest in "election security" is not rationally related to HF 2643 and therefore does not survive any level of scrutiny. HF 2643 thus violates Article I, Section 6 of the Iowa Constitution.

The district court nevertheless held that Plaintiffs did not show a likelihood of success on the merits of their claim because they did not show intentional discrimination and because *Bush v. Gore* is distinguishable, following *In re Contest of Gen. Election Held on Nov. 4, 2008*, 767 N.W.2d 453, 466 (Minn. 2009) (hereinafter "*Sheehan v. Franken*"), a Minnesota Supreme Court case, on both points. (09/28/2020 Order at 18–19 & n.6.) In doing so, the district court abused its discretion.

First, courts have repeatedly affirmed the principle that Plaintiffs need not show intentional discrimination to succeed on an equal protection claim based on arbitrary and disparate treatment in the exercise of the fundamental right to vote. *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 234 n.13 (6th Cir. 2011) ("[W]e reject ORP's argument that there can be no violation of the Equal Protection Clause . . . without evidence of intentional discrimination."); *Roman v. Sincock*, 377 U.S. 695, 710 (1964) (implying equal protection violations regarding voting rights occur when there is either "arbitrariness or discrimination") (emphasis added); *Lyman v. Baker*, 352 F. Supp. 3d 81, 88 (D. Mass. 2018) ("[A]rbitrariness may suffice to prove a 'one person, one vote' violation, even in the absence of invidious discrimination.") (citing

Hunter, 635 F.3d at 234 & n.13); *LULAC v. Abbott*, 369 F. Supp. 3d 768, 780 (W.D. Tex. 2019) ("[T]he Supreme Court ha[s] recognized . . . that a 'one person, one vote' claim could be based on either invidious discrimination or arbitrary and disparate treatment.") (citing *Roman*, 377 U.S. at 710).

Indeed, courts frequently find that arbitrary and disparate treatment in exercising the fundamental right to vote violates the equal protection clause without discussion of discriminatory intent. *See Bush*, 531 U.S. at 105–1 09; *see also Wexler*, 452 F.3d at 1231–32 (finding a non-uniform voting practice that makes it "less likely" a person in one county will "cast an effective vote" than a voter in another county is a question "of constitutional dimension"); *Ne. Ohio Coal. for Homeless*, 696 F.3d at 598 (plaintiff may state equal protection claim by alleging lack of statewide standards results in a system that deprives citizens of right to vote based on where they live); *Stewart*, 444 F.3d at 876–77 (allegations of disproportionate use of unreliable voting equipment among counties stated equal protection violation). The district court was simply and obviously wrong on the law, and it abused its discretion by requiring Plaintiffs to show discriminatory intent.

Second, the district court incorrectly found *Bush v. Gore* "largely inapplicable" here, relying on *Sheehan v. Franken*, which rejected *Bush v. Gore*'s application to a case involving differing implementation of statutory requirements for absentee ballots. (09/28/2020 Order at 19 n.6.); *see also Sheehan v. Franken*, 767 N.W.2d at 463. Plaintiffs, however, do not argue that local counties cannot "in the exercise of their expertise[] develop different systems for implementing elections." *Sheehan*, 767 N.W.2d at 465 (quoting *Bush*, 531 U.S. at 109). The equal protection violation here is the State's imposition of a statutory restriction on absentee balloting processing *without* any guidance on when or how county auditors should conduct the follow-up voter outreach that HF 2643 requires. This will result in precisely the kind of ad hoc, standardless procedures varying by and within counties that the Supreme Court found unconstitutional in *Bush*. *See* 531 U.S. at 530-531 (finding it constitutionally problematic when balloting procedures lacked uniform guidance, such that they "might vary not only from county to county but indeed within a single county from one recount team to

another").[23] Thus, while the voters themselves may have to take similar steps to request an absentee ballot, voters are at risk of being treated differently because of the lack of standards in HF 2643 itself, distinguishing this scenario from *DSCC v. Pate*, in which the Court found that voters in Johnson, Linn, and Woodbury Counties were not treated differently from other voters. *See DSCC*, No. 20-1281 at 8 (Iowa Oct. 14, 2020).

Moreover, *Sheehan* rejected *Bush*'s applicability because in *Sheehan*—unlike this case—"there were clear statutory standards . . . about which all election officials received common training." *Id.* at 466. *Sheehan* therefore *supports* Plaintiffs' reliance on *Bush*. *See id.* (stating "the essence of the equal protection problem addressed in *Bush* was that there were no established standards under Florida statutes" for addressing the voting issue in that case, and consequently, "each county (indeed, each recount location within a county) was left to set its own

---

[23] For the same reasons, the Secretary's reliance on *Bush* to support the proposition that "[v]ariations in local practice for implementing absentee voting procedures are necessary and unavoidable in a state with ninety-nine counties" is misplaced. (10/05/2020 Sec.'s Resistance at 19.)

standards”). *Bush* controls this case, and the district court abused its discretion in disregarding it.

C. HF 2643 violates procedural due process.

Finally, the district court also erred in holding that Plaintiffs are unlikely to succeed on their separate procedural due process claim. (09/28/2020 Order at 21.) The Iowa Constitution guarantees that “no person shall be deprived of life, liberty, or property, without due process of law.” Art. I, § 9. Iowa courts have developed a two-step process to adjudicate a procedural due process claim brought under the state constitution. The court first determines whether a liberty or property interest is indeed at stake. *State v. Seering,* 701 N.W.2d 655, 665 (Iowa 2005), *superseded by statute on other grounds*, 2009 Iowa Acts ch. 119, § 3 (codified at Iowa Code § 692A.103 (Supp. 2009)), as recognized in *AFSCME Iowa Council 61*, 928 N.W.2d at 31.

If a liberty interest is at stake, the court then follows *Mathews v. Eldridge* by “balanc[ing] three factors to determine what process is due”: (1) the private interest that will be affected by the government action; (2) the risk of the erroneous deprivation of the interest, and the probable value of additional procedures; and (3) the government interest in the

regulation, including the burdens imposed by additional procedures. *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 145 (Iowa 2013) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1975)). The district court erred by identifying the wrong liberty interest and by incorrectly applying the *Mathews* balancing test.

Even though the liberty interest at issue here is the fundamental right to vote ensured by the Iowa Constitution, the district court "assume[d] an interest here based on the statutory right to obtain an absentee ballot as provided in Iowa Code Chapter 53." (9/28/2020 Order at 21.) The district court concluded that HF 2643 does not violate procedural due process and reasoned that "[a]ny existing right here is purely statutory since no fundamental right is implicated . . . ." (*Id.*) In other words, the district court's finding relied upon its assumption that HF 2643 implicated a statutory right as opposed to a fundamental right. But as explained in Section I.A.2., HF 2643 implicates the fundamental right to vote.

Finally, the district court erroneously applied the *Mathews v. Eldridge* test to find that the Plaintiffs are unlikely to succeed on the merits. (*Id.* at 21–22.)

First, regarding the nature of the private interest at stake, the Court has repeatedly recognized that voters have a weighty private interest in the exercise of the franchise. *See Griffin v. Pate*, 884 N.W.2d 182, 185 (Iowa 2016); *Chiodo*, 846 N.W.2d at 848; *see also Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."), *cited with approval in Devine v. Wonderlich*, 268 N.W.2d 620, 623 (Iowa 1978).

Second, the State's ban on county auditors continuing to use I-Voters to cure technical errors or easily rectifiable omissions in absentee ballot requests carries an immense risk of depriving voters of their fundamental right to vote. *See* supra Section I.A.3. Before HF 2643, an Iowan who submitted a request with missing or incorrect information—but with enough information for county commissioners to verify their identity using I-Voters—would have had their absentee ballot request promptly fulfilled, received an absentee ballot, and been able to place their ballot in the mail within about a 5-day window. (08/10/2020 Hersh Decl. at 11.) Now, by contrast, the same activities may take 12 days to complete—and in some cases, significantly longer. (*Id.*) That process is

insufficient for those individuals who submit absentee ballot requests with technical violations up to 10 days *before* the deadline to request an absentee ballot. (*Id.* ¶ 28.)[24]

Finally, while the State has not articulated any legitimate interest rationally related to HF 2643, the law also *imposes* unnecessary burdens by requiring additional, gratuitous procedures. (08/10/2020 ISACA Decl. ¶ 6; *see also* 08/10/2020 Gill Decl. ¶ 9; 08/10/2020 Lara Decl. ¶ 9; 08/10/2020 Weipert Decl. ¶ 5.) As another Iowa court has already noted, auditors are tasked with finding missing information on requests "and the voter registration system may provide those commissioners with the best access to that information. The Secretary's decision to prohibit the use of the voter registration system is clearly against reason and evidence." (08/10/2020 Bryant Decl., Ex. 16 at 9.) This is precisely why that court rejected Secretary Pate's effort to impose this same restriction by administrative rulemaking in *League of United Latin Am. Citizens of*

---

[24] The Secretary has argued that individuals negatively impacted by HF 2643 can still vote in person, and thus there is not a procedural due process problem. (10/05/2020 Sec.'s Resistance at 20.) This argument is meritless. The right to vote absentee has been granted to Iowan voters, and the Secretary is obligated to afford appropriate due process protections to the absentee ballot process. *Seering*, 701 N.W.2d at 665.

Iowa v. Pate, No. CVCV056403 (Iowa Dist. Ct. Polk Cty. Jan. 23, 2019). As the court noted there, the Secretary's rule prohibiting county auditors from using I-Voters—a method used for "the last forty years"—was "irrational, illogical, and wholly unjustifiable." (08/10/2020 Bryant Decl., Ex. 16. at 7–8.) HF 2643 unquestionably deprives Iowan citizens of their right to liberty without due process. *Seering,* 701 N.W.2d at 665.

II. Plaintiffs satisfy the other elements of a temporary injunction.

The district court determined that Plaintiffs would not likely succeed on the merits of their claim, and denied the temporary injunction on that basis. But Plaintiffs sufficiently established below that they meet all factors required for a temporary injunction.

A. Plaintiffs will suffer irreparably harm without a temporary injunction

Plaintiffs will suffer irreparable harm without a temporary injunction because HF 2643 will abridge Iowans' right to vote and require Plaintiffs to divert substantial resources to countering the harms imposed on voters by HF 2643.

LULAC is the largest and oldest Latino civil rights organization in the United States. Its purpose is to advance the economic condition, educational attainment, political influence, health, housing, and civil

rights of all Hispanic nationality groups through community-based programs operating at more than 1,000 LULAC councils nationwide. (08/10/2020 Declaration of Joe Henry ("Henry Decl.") ¶ 3.) LULAC has more than 600 members across Iowa, and especially young members who may be figuring out how to request an absentee ballot for the first time—members like Ms. Garcia, who attempted to, but could not, fill out her absentee ballot correctly without additional and unnecessary steps. (08/10/2020 Henry Decl. ¶¶ 3, 7, 9; 08/27/2020 Garcia Decl. ¶¶ 3–10.) Plaintiffs' members are at risk of disenfranchisement because of HF 2643 and the delays and confusions it causes with processing absentee ballot requests. The risk of disenfranchisement is especially high in the context of the current pandemic. As Secretary Pate recognized during the June Primary, voters should not have to choose between risking their health and safety and voting.[25]

"Denying an eligible voter her constitutional right to vote and to have that vote counted will always constitute irreparable harm." *N.C.*

---

[25] *See* Office of the Iowa Secretary of State, *MEDIA RELEASE: Absentee voting period begins Thursday; Secretary Pate encourages Iowans to vote from home* (Apr. 22, 2020), https://sos.iowa.gov/news/2020_04_22.html.

State Conference of the NAACP v. N.C. State Bd. of Elections, No. 1:16CV1274, 2016 WL 6581284, at *8 (M.D.N.C. Nov. 4, 2016). Once denied, "'there can be no do-over and no redress.'" *Id.* (citations omitted); *see also Sear v. Clayton Cty. Zoning Bd. of Adjustment*, 590 N.W.2d 512, 513, 516 (Iowa 1999) (finding injunction appropriate in action alleging plaintiffs would be "denied due process by being deprived of an interest in real estate without notice or an opportunity to be heard"); *Obama for Am.*, 697 F.3d at 436 ("A restriction on the fundamental right to vote . . . constitutes irreparable injury."); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (finding "irreparable harm if [plaintiffs'] right to vote were impinged upon"); *cf. Ney v. Ney*, 891 N.W.2d 446, 451 (Iowa 2017) (recognizing "personal interests" are "rights cognizable in equity and eligible for protection through injunctive relief upon proper proof").

Moreover, both LULAC and Plaintiff Majority Forward, both of which advocate for voter participation in Iowa, introduced uncontroverted evidence below demonstrating that they will be forced to divert significant time and resources to equip voters to surmount the burdens imposed by HF 2643. (*See* 08/10/2020 Henry Decl. ¶¶ 11–12; 08/10/2020 Poersch Decl. ¶ 4.) In the context of an election, organizations

are irreparably harmed when they must allocate significant resources to attempt to prevent the negative impact of a law. *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 9, 13 (D.C. Cir. 2016) (finding proof-of-citizenship requirement on voter registration forms caused irreparable harm to voting rights organizations because it would "likely impair their efforts to register voters," imposing "programmatic injury" through increased "expenditures" to combat the harms the requirement caused to individual voters); *see also N.C. State Conference of the NAACP*, 2016 WL 6581284, at *9 (finding organization's diversion of resources in response to a state's federal election law violations "perceptibly impair[ed] [its] ability to mobilize, educate and protect voters before and during the general election," satisfying a showing of irreparable harm) (citations and quotation marks omitted). Plaintiffs therefore established that they will be irreparably harmed without injunctive relief.

B. There is no adequate legal remedy for abridgments of the right to vote.

Because HF 2643 violates the constitutional right to vote, there is no adequate remedy at law. "[A]n injunction can only issue if the available legal remedies are inadequate to avoid the substantial injury"; in other words, if "the character of the injury is such 'that it cannot be

adequately compensated by damages at law, . . . occasion[s] [a] constantly recurring grievance which cannot be removed or [otherwise] corrected,' or would result in a multiplicity of suits or interminable litigation." *Ney*, 891 N.W.2d at 451–52 (citations omitted); s*ee also Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 640 (Iowa 1991) (finding injunction warranted where "reliance on recovery of money damages is inadequate"). "[C]onstitutional violations cannot be adequately remedied through damages."); *Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008), *rev'd on other grounds*, 562 U.S. 134 (2011); *see also Boston Correll v. Herring*, 212 F. Supp. 3d 584, 615 (E.D. Va. 2016) ("Where a state statute inhibits constitutional rights, and its enforcement will deprive a plaintiff of those rights, the threat to enforce that statute constitutes 'a continuing unlawful restriction upon and infringement of the rights' of the plaintiff as to which he has 'no remedy at law which is as practical, efficient or adequate as the remedy in equity.'") (quoting *Terrace v. Thompson*, 263 U.S. 197, 215 (1923)).

C. The balance of hardships favors injunctive relief.

Finally, the balance of hardships favors the Court's entry of injunctive relief to prevent abridgement of the right to vote in the

upcoming general election. *See Kriener v. Turkey Valley Cmty. Sch. Dist.*, 212 N.W.2d 526, 536 (Iowa 1973) ("[C]ourts in this jurisdiction are committed to the 'relative hardship' or 'balance of convenience' standard" when assessing the appropriateness of injunctive relief); *see also Matlock v. Weets*, 531 N.W.2d 118, 123 (Iowa 1995) (finding an injunction "properly balanced so as not to place an undue hardship on [defendant]" where "[t]he inconvenience the injunction imposes on him does not outweigh the harm to [petitioner] it seeks to prevent").

HF 2643's new, burdensome, and entirely unjustifiable impositions on the absentee voting process undermine the right to vote. The public has a "strong interest in exercising the 'fundamental political right' to vote.'" *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Dunn*, 405 U.S. at 336); *see also Newby*, 838 F.3d at 12 (describing "'the fundamental political right to vote,'" as "'preservative of all rights,' and 'of the most fundamental significance under our constitutional structure'") (citations omitted). "That interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful." *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011); *Obama for Am.*, 697 F.3d at 437 ("The public interest . . .

favors permitting as many qualified voters to vote as possible."). A temporary injunction would ensure Iowans' ability to exercise their right to vote in the 2020 general election without the impediments and delays occasioned by HF 2643.

Defendants have no legitimate interest in upholding and implementing the restrictions imposed under HF 2643. While "ensuring final, fair, and orderly elections is clearly an important state interest," the State will "not articulate[] a single, specific injury" that would result from returning to the pre-HF 2643 world. *Doe*, 746 F. Supp. 2d at 680. Indeed, HF 2643 will impose *additional* administrative burdens on county auditors and poll-workers—including increased risks during the pandemic—whereas an injunction will return to the status quo and allow county auditors to use the best means available to process absentee ballot requests, whether that means using I-Voters or contacting voters. (08/10/2020 Weipert Decl. ¶ 11 (Johnson County will need "dozens of full-time and part-time staff members stuffing envelopes together in an enclosed space" if required to send the follow-up letters that HF 2643 mandates); 08/10/2020 ISACA Decl. ¶ 9 (considering the volume of absentee ballot requests, auditor compliance with "COVID-19 safety

guidance, which is to minimize the number of staff present in the office, stagger shifts where possible, and physically spread out the essential positions that do have to be in the office" is extremely difficult even without HF 2643's additional burden)); *see also League of Women Voters of N.C.*, 769 F.3d at 248 (balance of the harms weighed against the State despite "little time to implement the relief … grant[ed]," where "systems have existed, do exist, and simply need to be resurrected"); *Obama for Am.*, 697 F.3d at 436 (finding burden on public "outweighs any corresponding burden on the State, which has not shown that [election authorities] will be unable to cope with [preexisting absentee ballot requirements]—as they have successfully done in past elections"); *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 388–89 (6th Cir. 2008) ("Because the risk of actual voter fraud is miniscule when compared with the concrete risk that [the State's] policies will disenfranchise eligible voters, we must conclude that the public interest weighs in favor of [preliminary injunctive relief].").

Because "even one disenfranchised voter . . . is too many," any burden imposed on the State by a grant of injunctive relief is clearly outweighed by the burden HF 2643 imposes on voters' exercise of their

constitutionally protected right to vote. *N.C. State Conference of the NAACP*, 2016 WL 6581284, at *10.

III. The *Purcell* principle does not apply.

In their resistances to Plaintiffs' application for interlocutory review, both the Secretary and Intervenors argue the *Purcell* principle should apply to this action, i.e. that an injunction should not be issued this close to the general election. This argument is misplaced for several reasons.

First, the *Purcell* principle, which derives its name from *Purcell v. Gonzalez*, stands for the proposition that *federal* courts should generally refrain from issuing election-related orders that "result in voter confusion and consequent incentive to remain away from the polls." 549 U.S. at 4–5. It is, in other words, a federal judicially-created doctrine that this Court is not at all bound to follow. The philosophy undergirding the principle is built at least in part on federalism concerns about federal courts disrupting state elections processes at the 11th hour. *See Republican Party of Pennsylvania v. Cortes*, 218 F. Supp. 3d 396, 405 (E.D. Pa. 2016) (citing *Purcell* for proposition that "[f]ederal intervention at this late hour risks a disruption in the state electoral process [which]

is not to be taken lightly…. This important equitable consideration goes to the heart of our notions of federalism”). Those concerns are not present here, when a *state* court considers a challenge to *state* elections practices.

Second, Purcell was focused on “confusion and consequent incentive to remain away from the polls.” 549 U.S. at 4–5. A temporary injunction here neither risks confusing voters nor encourages them to stay away from the polls. Quite the opposite. Plaintiffs’ requested relief—permitting county auditors to use the I-Voters system to verify or correct missing or incorrect information on absentee ballot requests—would return the absentee ballot request process to the way it had been for years, without incident. Thus, Plaintiffs do not ask the Court to “rewrite” election laws on the eve of the election, but to restore the status quo. *DSCC*, No. 20-1281 at 10 (Iowa Oct. 14, 2020).

If HF 2643 is enjoined, even at this point, then voters are *more likely* to receive their absentee ballot. If it is not, voters will be subject to a new, confusing, and cumbersome procedure just to receive their absentee ballot. Neither the Secretary nor the Intervenors explain how

not asking the voters to do anything new at all would promote electoral chaos sufficient to fall within the ambit of *Purcell*.[26]

For this reason, federal courts—including the U.S. Supreme Court in a decision affirming the extension of a ballot receipt deadline on the literal eve of the Wisconsin primary election earlier this year—have properly recognized that *Purcell* is not a hard and fast rule, meant to apply anytime there is a request for injunction shortly before an election, and have issued injunctions within weeks or days of an election. *See* Ex. 2, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, Case No.

---

[26] Intervenors rely on a laundry list of cases that are irrelevant to the case at bar because they all involve injunctions to provisions that that change when or how voters can vote.(10/04/2020 Intervenors' Resistance at 19–22 (citing *Purcell*, 549 U.S. 1 (2006) (per curiam) (involving challenges to enforcement of voter ID law); *Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014) (same); *Frank v. Walker*, 135 S. Ct. 7 (2014) (mem.) (same); *Husted v. Ohio State Conference of NAACP*, 135 S. Ct. 42 (2014) (mem.) (involving challenge to timing in which voters could cast their ballots); *North Carolina v. League of Women Voters*, 135 S. Ct. 6 (2014) (mem.) (involving challenge to timing and manner in which voters could register)).) But an injunction would not change voter qualifications, move voters' polling locations, or do anything else that might confuse voters to their detriment—it simply returns Iowa's election system to the status quo that existed up until the legislature abruptly changed the law only a few months ago.

19A1916, slip op. at 1, 3–4 (U.S. Apr. 6, 2020) (modifying the ballot receipt deadline in Wisconsin the day before the election).

As of this filing, voters still have over a week (until October 24) to request an absentee ballot. Iowa Code § 53.2(1)(b), and county auditors continue to process absentee ballots including, presumably, those they have been unable to process thus far because of HF 2643. In prior elections county auditors received more than 40% of overall absentee ballot requests in the last ten days—this year that window is between October 14 and October 24. (08/10/2020 Hersh Decl. ¶ 4.) Enjoining HF 2643 and allowing county auditors to access the I-Voters database could prevent the disenfranchisement of thousands of lawful Iowa voters. This Court is not too late to act.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, Plaintiffs respectfully request this Court reverse the district court's order denying Plaintiffs' motion for a temporary injunction and remand with instructions to issue a temporary injunction to:

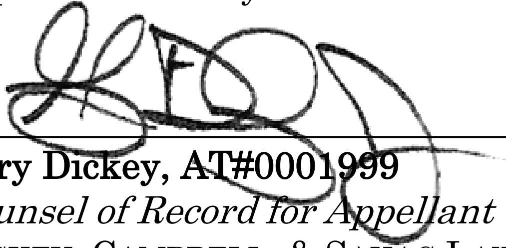
(A) Enjoin HF 2643's requirement that "[a] commissioner shall not use the voter registration system to obtain additional necessary information";

(B) Enjoin HF 2643's ban on commissioners from using the "best means available" to "obtain the additional necessary information" to cure absentee ballot applications with missing information.

PROOF OF SERVICE & CERTIFICATE OF FILING

On October 16, 2020, I served this brief on all other parties by EDMS to their respective counsel.

I further certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on October 16, 2020.



Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com

Marc E. Elias (*pro hac vice*)
Christopher J. Bryant (*pro hac vice*)
PERKINS COIE, LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200 Facsimile: (202) 654-6211
melias@perkinscoie.com
cbryant@perkinscoie.com

Kevin J. Hamilton (*pro hac vice*)
Amanda J. Beane (*pro hac vice*)
Nitika Arora (*pro hac vice*)
PERKINS COIE, LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000 Facsimile: (206) 359-9000
khamilton@perkinscoie.com
abeane@perkinscoie.com
narora@perkinscoie.com

Jessica R. Frenkel (*pro hac vice*)
PERKINS COIE LLP
1900 Sixteenth Street, Suite 1400
Denver, CO 80202
Denver, CO 80202-5255
Telephone: 303.291.2300 Facsimile: (303) 291-2400
jfrenkel@perkinscoie.com

Counsel for the Plaintiffs-Appellants

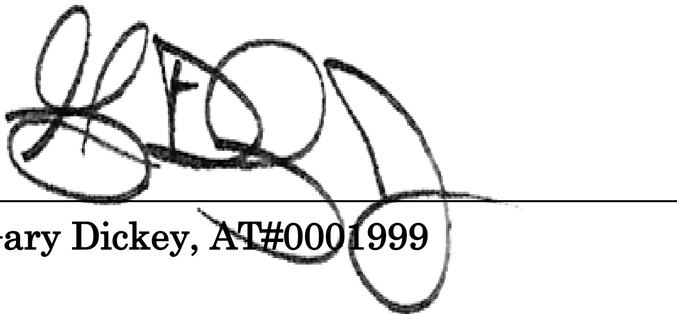
COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was $0.00 and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

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

[x] this brief has been prepared in a proportionally spaced typeface using Century in 14 point and contains 13,863 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).



Gary Dickey, AT#0001999