IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-1249

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA and MAJORITY FORWARD,
Plaintiff-Appellants,

vs.

IOWA SECRETARY OF STATE PAUL PATE,
Defendant-Appellee

DONALD J. TRUMP FOR PRESIDENT, INC., THE REPUBLICAN NATIONAL COMMITTEE, THE NATIONAL REPUBLICAN SENATORIAL COMMITTEE, THE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, and THE REPUBLICAN PARTY OF IOWA,
Intervenor-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
THE HONORABLE LARS G. ANDERSON, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

Nature of the Case

This is an interlocutory appeal from an order denying a temporary injunction. Plaintiff-Appellants League of United Latin American Citizens of Iowa and Majority Forward (herein collectively "LULAC") challenge the constitutionality of an amendment to Iowa Code section 53.2 concerning requests for absentee ballots. In the district court, LULAC argued that it was likely to succeed on the merits of its constitutional claims and that it would be irreparably harmed absent an injunction. The district court held that LULAC was not likely to succeed on the merits and denied relief.

Course of Proceedings & Facts

In June, the Iowa legislature passed a law requiring registered voters to provide certain information, including a voter verification number, on an absentee ballot request form. *See* 2020 Ia. Legis. Serv. Ch. 1121 §§ 123-24 (H.F. 2643) (West). LULAC filed a lawsuit in July and sought a temporary injunction in August. LULAC's request for a temporary injunction involves only section 124 of H.F. 2643 and the upcoming general election, but the context of the challenged statute goes back to the voter identification law passed in 2017. The voter identification law required voters to present identification at the polls

or to provide a voter verification number on an absentee ballot request form. *See* 2017 Ia. Legis. Serv. Ch. 110 §§ 6, 27 (H.F. 516) (WEST). A Polk County district court upheld the voter verification number requirement for absentee voters in 2019. *See League of United Latin American Citizens of Iowa v. Pate*, Polk County No. CVCV056403, 2019 WL 6358335, at *14-15 (Iowa Dist. Ct. Sept. 30, 2019).

Prior to the voter identification law, the absentee ballot request provision required a voter's name and signature, date of birth, address, and the name or date of the election. *See* Iowa Code § 53.2(4) (2017). It also provided that "if insufficient information has been provided, either on the prescribed form or on an application created by the applicant, the commissioner shall, by the best means available, obtain the additional necessary information." *Id.* After the statute was amended to include a voter verification number, the Secretary promulgated an administrative rule interpreting the phrase "best means available." *See* Iowa Admin. Code 721.21.306(53). The rule provided that the phrase "means contacting the voter directly by mail, email, or telephone or in person. Commissioners may not use the voter registration system to obtain the information." *Id.*

The administrative rule was challenged as well, with a Polk County district court concluding that the Secretary was not "clearly vested with authority to interpret" section 53.2(4)(b) and that his interpretation of "best means available" was not correct. *See League of United Latin American Citizens of Iowa v. Pate*, Polk County No. CVCV056608 (Iowa D. Ct. Jan 23, 2019). The legislature stepped in this year, amending Iowa Code section 53.2 in two relevant parts. First, the legislature changed the language stating that "Each application shall contain the following information" to "To request an absentee ballot, *a registered voter shall provide*." *See* 2020 Ia. Legis. Serv. Ch. 1121 § 123 (H.F. 2643) (West) (emphasis added). Second, the legislature removed the phrase "by the best means available, obtain the necessary information" and replaced it with a requirement that the county auditors contact the voter to obtain the missing information. *Id*. § 124. LULAC challenges the second change in this action.

The law became effective on July 1, 2020. LULAC waited two weeks after the effective date before filing the instant action and nearly six weeks from the effective date before seeking a temporary injunction. *See* Petition at Law and Equity 07/14/20; Motion for

Temporary Injunction 08/10/20. On August 12, the district court set a hearing on the request for a temporary injunction for September 23, 2020. Order Setting Hearing 08/12/20. LULAC waited another three weeks before filing a motion requesting an earlier hearing. Motion for Earlier Hearing 09/03/20. Their motion was denied and the parties appeared for a hearing on September 23. The district court denied the motion for a temporary injunction, concluding that Plaintiff-Appellants had not demonstrated a likelihood of success on the merits of their constitutional claims. Ruling 09/25/20. This Court granted interlocutory appeal on October 14.

It is worth noting that the period during which a voter may submit an absentee ballot request form for the November general election began on July 6, a little over a month before LULAC filed their motion for a temporary injunction. The deadline to request a mailed absentee ballot—the challenged law does not affect voters who request absentee ballot forms in person pursuant to Iowa Code section 53.2(1)(a)—is fast approaching. Such requests must be received by the county auditors' offices by 5 p.m. on Saturday, October 24. Iowa Code § 53.2(1)(b). Meanwhile, the challenged law

has been in place and county auditors have presumably been contacting voters to obtain missing information.[1]

ARGUMENT

I. The District Court Did Not Abuse Its Discretion When It Denied LULAC's Motion for Temporary Injunction.

Preservation of Error

Because the parties are filing final briefs simultaneously in this appeal, the Secretary cannot comment on the preservation of error for any arguments made in LULAC's brief. That said, LULAC argued in the district court that H.F. 2643 burdens the right to vote as well as the due process and equal protection clauses of the Iowa constitution. The district court ruled on those claims and they are preserved for this Court's review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Standard of Review

The denial of a temporary injunction is reviewed for abuse of discretion. *Lewis Investments, Inc. v. City of Iowa City*, 703 N.W.2d 180, 184 (Iowa 2005). As this Court has held:

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[1] In its brief supporting its application for interlocutory appeal, LULAC cites the number of absentee ballots requested as of September 30, 2020. That number was not available to the district court and it is a fact that is not part of the record for this appeal.

> [T]he decision to issue or refuse a temporary injunction rests largely within the sound discretion of the district court. We recognize a temporary injunction is a delicate matter, and the exercise of judicial power to issue or refuse a temporary injunction requires great caution, deliberation, and sound discretion. Thus, we will not generally interfere with the district court decision unless the discretion has been abused or the decision violates some principle of equity.

PIC USA v. North Carolina Farm Partnership, 672 N.W.2d 718, 722 (Iowa 2003) (cleaned up).

Merits

An injunction is an "extraordinary remedy" that should not be granted unless "clearly required to avoid irreparable damage." *Planned Parenthood of Mid-Iowa v. Maki*¸ 478 N.W.2d 637, 639 (Iowa 1991). The court must "carefully weigh the relative hardship which would be incurred by the parties upon the award of injunctive relief." *Maki*, 478 N.W.2d at 639 (citing *Green v. Advance Homes, Inc.*, 293 N.W.2d 204, 208 (Iowa 1980)). This Court has "repeatedly emphasized that the issuance or refusal of a temporary injunction is a delicate matter—an exercise of judicial power which requires great caution, deliberation, and sound discretion." *Kleman v. Charles City Police Dept.*, 373 N.W.2d 90, 96 (Iowa 1985). Perhaps most

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

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

A. LULAC did not show that it was likely to succeed on the merits.

1. Absentee voting and the Iowa Constitution.

LULAC argued in the district court that strict scrutiny applies to their challenge because the law "burdens the right to vote" in violation of article II section 1 of the Iowa Constitution. That section states that eligible electors "shall be entitled to vote at all elections which are now or hereafter may be authorized by law." Iowa Const. art II, § 1. But the challenged law affects only a request for an absentee ballot. This Court has not decided whether the state constitution guarantees a right to receive an absentee ballot, but the United States Supreme Court and other federal circuit courts have held that the federal constitution does not. *See McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 807 (1969); *see also Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 n.6 (1969) ("In *McDonald* ... we were reviewing a statute which made casting a ballot easier for some who were unable to come to the polls ... at issue was not a claimed right to vote but a claimed right to an absentee ballot."); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring in the judgment) ("That the State accommodates some voters by permitting (not requiring) the

casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required."); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020) ("There is no constitutional right to an absentee ballot."); *Texas Democratic Party v. Abbott*, 961 F.3d 389, 406 (5th Cir. 2020) ("Because the plaintiffs' fundamental right is not at issue, *McDonald* directs us to review only for a rational basis").

2. Strict scrutiny does not apply because the challenged law does not burden the right to vote.

Iowa courts apply strict scrutiny to laws that abridge the right to vote. *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 848 (Iowa 2014). However, "[n]ot every government action that relates in any way to a fundamental liberty must be subjected to strict-scrutiny analysis ... Instead, the alleged infringement is unconstitutional only when it 'has a direct and substantial impact' on the fundamental right ... Reasonable regulations that do not directly and substantially interfere with the right may be imposed." *McQuistion v. City of Clinton*¸ 872 N.W.2d 817, 832-33 (Iowa 2015). In *McDonald*, a group of inmates awaiting trial could not go to the polls in person because they were detained in the Cook County jail for nonbailable offenses or because they could not afford bail. *McDonald*, 394 U.S. at 803-04.

The inmates applied for absentee ballots, but their requests were rejected because Illinois law limited absentee voting to a class of voter that did not include individuals detained in jail in their county of residence. *Id.* The United States Supreme Court refused to apply strict scrutiny to the challenge because there was no evidence that that the state would not provide the inmates with another method of voting, such as special voting booths in the jail, guarded transportation to the polls, or temporary bail relief. *Id.*, 394 U.S. at 807-08 & n.6, 7. In its words, the absentee rules did "not themselves deny [the inmates] the exercise of the franchise; nor, indeed, d[id] Illinois' Election Code so operate as a whole[.]" *Id.* at 807-08.

In *Luse v. Wray*, this Court briefly examined whether the constitutionality of an absentee ballot regulation affecting hospital patients should be analyzed strict scrutiny or the rational basis test. 354 N.W.2d 324, 330 (Iowa 1977). First, the Court said that it "ha[s] no doubt that under its power to regulate voting, the legislature could impose the requirements of [the challenged law] on all absentee voters." *Id.* The question in the case, however, was whether the classification of patients rendered the provision invalid. But, no doubt recognizing that the class of "hospital patients" is not a suspect class

for purposes of determining constitutional scrutiny, the Court explained that the question "raises the further inquiry whether the test of constitutionality of the classification is to be the usual one of a rational basis or the more stringent one, *in cases involving certain fundamental rights*, of a compelling state interest." *Id.* (emphasis added). Citing *McDonald*, the Court expressed its view that the rational basis test would apply. *Id.*

In this case, LULAC has argued that the challenged law "burdens the right to vote by creating a needlessly complicated, time-consuming, and in many cases entirely ineffectual procedure that will significantly delay the process of sending absentee ballots to countless lawful voters." *See* Plaintiff's Mem. Supporting Motion for Temporary Injunction 08/10/20. In the first place, whether election procedures are needlessly complicated, time-consuming, or ineffectual are legislative or administrative judgments.[2] That said, that is not what the law does. The law requires voters who request absentee ballots to

[2] As this Court explained in its per curiam decision reversing a stay entered by a Polk County district court, "it is not the role of the court system to evaluate the wisdom or fairness of policy choices made by other branches of government. Actions of the legislative and executive branches may be highly debatable in their wisdom, but that is not a sufficient reason for the judicial branch to substitute something different." *DSCC, et al. v. Pate*, Sup. Ct. No. 20-1281, slip op. at 8 (Iowa Oct. 14, 2020).

provide certain basic identifying information and tasks county auditors with contacting the voter to obtain that information if the voter fails to provide it.

Any alleged burden posed by the law must be measured against the baseline of "the usual burdens of voting." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.). For example, in the context of a voter identification requirement in Indiana, the United States Supreme Court observed that "making a trip to the [D]MV, gathering the required documents and posing for a photograph surely do not qualify as a substantial burden on the right to vote," as these acts do not "represent a significant increase over" what voters usually must do to cast a ballot in the first place. *Id.*

LULAC relied almost entirely on an allegation that voters "regularly fail[] to fully or accurately complete their Request Forms." Such failure triggers the auditors' duty to contact the voter, causing a delay in sending absentee ballots to those voters that might prove fatal for incomplete requests sent at or very near the deadline. But voters' failure to comply with the law does not mean the law is unduly burdensome. Moreover, as this Court recognized in the *DSCC* case, Iowa code section 53.2 "unmistakeably requires *the applicant* to

provide the required personal information." *DSCC*, Sup. Ct. No. 20-1281, slip op. at 5 (emphasis in original). LULAC does not challenge the legal requirement that the necessary information be provided by the voter in the as-amended section 53.2(4)(a). It is important to note that Iowa law requires a voter to request an absentee ballot for every election in which the voter votes by absentee ballot. Section 53.2(4)(a) requires the voter to provide the necessary information to request an absentee ballot every time. The law's requirement is not satisfied by a voter having provided the information at some point in the past.

The absentee ballot request form states clearly that "a registered voter **MUST** provide the following necessary information," followed by an explanation of the information that must be provided. *See* Plaintiff's Exh. 11 to Declaration of Christopher Bryant. The form and the instructions also explain that a "Voter Verification Number" means an Iowa driver's license or non-operator identification number or the four-digit PIN located on an Iowa Voter Identification card mailed to voters who do not have either a driver's license or non-operator identification. *Id.* The form itself states that any voter may request a voter identification card from the county auditor. *Id.* The

instructions accompanying the form repeat that statement in bold type. *Id.* The instructions also encourage voters to include a phone number or email address "in the event their County Auditor needs to confirm any information on the request form." *Id.*

As this Court explained in its per curiam decision in the *DSCC* case, LULAC's alleged burdens "should be put in perspective":

> Iowa is one of only eleven states where the government mailed an absentee ballot application to every registered voter. The absentee voting period began on October 5 and continues through November 2. In person early voting is also allowed during that period. Iowa also allows same-day voter registration. On Election Day itself, the polls will be open in Iowa or fourteen hours, one of the longest time periods afforded in the nation. This is significant for voters who may wish to vote in the traditional way but are concerned about crowded polling places in light of COVID-19.

DSCC, Sup. Ct. No. 20-1281, slip op. at 9. In addition, voters may request absentee ballots up to one hundred and twenty days prior to an election. *See* Iowa Code § 53.2(1)(b).

A voter who waits until the very end and fails to correctly fill out the request form cannot blame his failure to receive a timely absentee ballot on the challenged law. *See Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020) ("So electors who fail to vote early cannot blame Ohio

law for their inability to vote; they must blame 'their own failure to take timely steps to effect their enrollment.'") (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973)). And even then, a voter who requests a ballot but does not receive one can still go to the polls and vote on election day or by early in-person absentee. The Secretary is providing county auditors with personal protective equipment and more than two million dollars of federal grant money to ensure that voters can safely vote in person in each precinct. *See* Declaration of Heidi Burhans ¶ 10.

3. The challenged law survives rational basis review.

Because the challenged law does not burden the right to vote, rational basis review is appropriate both under the Iowa constitution and the federal *Anderson-Burdick* analysis.[3] The rational basis test "defers to the legislature's prerogative to make policy decisions by requiring only a plausible policy justification, mere rationality of the facts underlying the decision and, again, a merely rational

[3] Under *Anderson-Burdick*, "[m]inimally burdensome and nondiscriminatory regulations are subject to a less-searching examination closer to rational basis and the State's important regulatory interests are generally sufficient to justify the restrictions." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (quotations omitted).

relationship between the [state action] and the policy justification." *Varnum v. Brien*, 763 N.W.2d 862, 879 (Iowa 2009). And, critically, a justification's sufficiency is generally a "'legislative fact'" that must be accepted if reasonable, not an "'adjudicative fact[ ]'" subject to courtroom testing. *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) (*Frank I*); *see also Crawford*, 553 U.S. at 194–97 (opinion of Stevens, J.); *Husted*, 834 F.3d at 632.

In this case, LULAC is asking this Court to declare the challenged law facially unconstitutional and issue a statewide injunction. A facial challenge is "the most difficult to mount successfully because it requires the challenger to show the statute under scrutiny is unconstitutional in all its applications." *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223, 231 (Iowa 2018) (internal quotation marks omitted). Facial challenges are disfavored because they "often rest on speculation," and they "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be

applied." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks omitted).

Specific to the voting context, a court "must consider only the statute's broad application to *all* [of the State's] voters," and the "facial challenge must fail where the statute has a plainly legitimate sweep." *Crawford*, 553 U.S. at 202–03 (opinion of Stevens, J.) (emphasis added) (citation omitted). Hence the challenge to Indiana's photo ID law in *Crawford* fell short because "[t]he application of the statute to the vast majority of Indiana voters [was] amply justified." *Id.* at 204. Likewise in Wisconsin and North Dakota. *See Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (*Frank II*); *Brakebill v. Jaeger*, 932 F.3d 671, 679 (8th Cir. 2019) (reversing temporary statewide injunction for North Dakota voter identification law that did not burden majority of voters). This Court must look to the law's "broad application to all [Iowa] voters," rather than to a "small number who may experience a special burden." *Crawford*, 553 U.S. at 200-02.

The State has an undeniably legitimate interest in maintaining the integrity of elections and properly identifying absentee ballot requests. *See Devine v. Wonderlich*, 268 N.W.2d 620, 623 (Iowa

1978) ("Among legitimate statutory objects [for the regulation of voting] are shielding the elector from the influence of coercion and corruption, protecting the integrity of the ballot, and insuring the orderly conduct of elections."). As the United States Supreme Court has explained:

> A State indisputably has a compelling interest in preserving the integrity of its election process. Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Purcell v. Gonzalez, 127 S.Ct. 5, 7 (2006) (cleaned up).

Under the rational basis test, this Court must look only for "a reasonable fit between the government interest and the means utilized to advance that interest." *State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005). A law that requires a voter to provide basic identification information to request an absentee ballot fits comfortably with the legitimate interests of the State. The information required, particularly the voter verification number,

makes requesting an absentee ballot on behalf of someone else more difficult. Indeed, a Polk County district court has already held that requiring absentee voters to provide a verification number when requesting a ballot "does not infringe upon the right to vote for the vast majority of eligible voters, and passes rational basis scrutiny." *League of United Latin American Citizens of Iowa v. Pate*, Polk County No. CVCV056403, 2019 WL 6358335, at *14-15 (Iowa Dist. Ct. Sept. 30, 2019).

The district court in that case explained that, because its decision allowed anyone to request a voter identification card from their county auditor, "there is no reason for any registered voter not to have a driver's license, nonoperator's ID or Voter ID Card. The number on that ID simply needs to be written on the application. This presents no additional burden to the absentee ballot application process." *Id.* at *15. It further held:

> The rational basis scrutiny of the requirement that a voter provide a verification number on an absentee ballot application, and the result of that scrutiny, is the same as with the requirement that voters produce identification at the polls. There is a reasonable fit between the government interest of ensuring the integrity of, and instilling public confidence in, all elections in this state, and the means utilized to advance that interest of requiring a

> voter verification number on an absentee ballot application. It may even be more reasonable of a fit in the case of voting absentee, where the voter is not seen in person at the polling place, and trial testimony revealed that that mail-in absentee voter fraud is more prevalent in Iowa than impersonation at the polls.

Id. Allowing the county auditors to fill in the missing information, particularly the voter verification number, without contacting the voter undermines that goal. LULAC argued in the district court that the law "does nothing to stop" improper absentee ballot requests because it is theoretically possible for someone to obtain a voter's verification number using "commonly-available information." But a law need not be airtight under the rational basis test. In fact, under the test only an "extreme degree[] of overinclusion and underinclusion in relation to any particular goal" crosses the line. *Racing Ass'n Of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 10 (Iowa 2004).

This Court explained in the *DSCC* case that requiring a voter to fill in the necessary information on an absentee ballot request "help[s] ensure that the person submitting the request is the actual voter." *DSCC*, Sup. Ct. No. 20-1281, slip op. at 7. It further explained:

> Iowans encounter this line of thinking every day. For example, to do many debit card or credit card transactions, it is necessary for the consumer to enter personal information such as the person's address, zip code, or PIN. The card company already has this information; the only reason to ask for it is to ensure that the person doing the transaction is the actual cardholder.

DSCC, Sup. Ct. No. 20-1281, slip op. at 7. Indeed, because Iowa law does not require the absentee ballot to be returned by the voter herself, "requiring the applicant to complete certain personal information on the absentee ballot application form helps ensure that the ballot (which virtually anyone in Iowa can return) was *requested* by the voter." *Id.* Moreover, an absentee ballot request can be used to update information for some voters. *See* Iowa Code § 53.2(8). If a voter submits a request with a name or address that does not match the voter registration system, the auditor cannot know whether the information is correct except by contacting the voter. Because the burden on the vast majority of voters is minimal[4] and there is a rational relationship between the law's requirements and the State's

[4] The district court noted that LULAC submitted affidavits from various auditors suggesting "that the requirements of HF 2643 will burden them as far as time and resources needed for compliance." Ruling P.20 09/25/20. But the court explained that any such burdens "do[] not necessarily equate to a constitutionally significant burden on the voter." *Id.*

legitimate interests, LULAC has not shown that it is likely to succeed on the merits of its challenge.

4. The challenged law does not violate the equal protection clause.

LULAC argued in the district court that the challenged law violates the equal protection clause because voters in different counties may be treated differently. In other words, some counties may wait for a longer or shorter period of time between attempting to contact a voter by phone or email and mailing a notice. Plaintiffs cite *Bush v. Gore*, 531 U.S. 98 (2000), for the proposition that a "lack of statewide standards and guidance from state-level officials effectively denied voters their fundamental rights." But LULAC has simply misread the law. The auditors are required to attempt to contact the voter by telephone or e-mail, if available, or by mailing a notice "within twenty-four hours after the receipt of the absentee ballot request." Iowa Code § 53.2(4)(b). LULAC's contention that some auditors "may make multiple calls and send multiple emails and wait several days—or longer—before mailing the voter," *see* Plaintiff's Memorandum P.20, is simply incorrect.

But even if LULAC's reading of the law is accurate, *Bush v. Gore* itself explained that it was not addressing "whether local entities, in

the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. at 109. Variations in local practice for implementing absentee voting procedures are necessary and unavoidable in a state with ninety-nine counties. As the Minnesota Supreme Court explained in rejecting a similar challenge, the challenged "disparities"

> are the product of local jurisdictions' use of different methods to ensure compliance with the same statutory standards; that jurisdictions adopted policies they deemed necessary to ensure that absentee voting procedures would be available to their residents, in accordance with statutory requirements, given the resources available to them; and that differences in available resources, personnel, procedures, and technology necessarily affected the procedures used by local election officials in reviewing absentee ballots.

In re Contest of General Election, 767 N.W.2d 453, 465 (Minn. 2009). The district court held that "[w]hile there may be differences in resources and practices between Iowa's county auditor's offices, those differences do not render HF 2643, which is itself facially neutral, unconstitutional." Ruling P.19 09/25/20.

5. The challenged law does not violate procedural due process.

"Procedural due process" requires notice and an opportunity to be heard prior to the deprivation of a protected interest. *See Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 690-91 (Iowa 2002). LULAC argued in the district court that it is unfair to voters to require county auditors to contact them to facilitate compliance with the voters' legal duty to provide information on an absentee ballot request. In arguing that the current procedure is inadequate, LULAC did not mention that Iowa law provides a 120-day window for voters to request absentee ballots. *See* Iowa Code § 53.2(1)(b). It also did not mention that voters are instructed how to correctly fill out the absentee ballot request form on the form itself and how to obtain a voter verification number if they do not have one or do not know it. Plaintiffs' Exh. 11 to Declaration of Christopher Bryant. Voters are also encouraged to include a phone number or email address to facilitate the confirmation of any missing information. Plaintiffs' Exh. 11 to Declaration of Christopher Bryant.

Unnecessary delays in issuing an absentee ballot or correcting information on the request form do not come from the statutory process. LULAC's own record shows that the delay comes from voters

who wait until the last minute, fill the form out incorrectly, and do not provide contact information or do not answer their phone or retrieve mail in a timely fashion. *See generally* Declaration of Eitan Hersh. And even failing all of that, they are still able to go to the polls and vote. Iowa Code § 53.19 (3). LULAC believes that allowing auditors to use the voter registration database is a better idea, but "[n]o particular procedure violates due process merely because another method may seem fairer or wiser." *Bowers*, 638 N.W.2d at 691 (cleaned up); *see also* Ruling P.22 09/25/20. LULAC did not show that it is likely to succeed on its procedural due process claim.

The State has a fundamental interest in equal, fair, and consistent enforcement of its election laws. Precisely because "[v]oting is of the most fundamental significance under our constitutional structure," *Burdick v. Takushi*, 504 U.S. at 433 (1992), each state must craft a system that balances election security with access. *See Crawford*, 553 U.S. at 196-97 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters;" "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.") Too little security,

and legitimate votes are diluted by fraudulent ones. Too little access, and voter participation suffers unnecessarily. No magic formula exists, and legislatures, county auditors, and other officials must be allowed to account for a wide variety of circumstances when calibrating, as a matter of public policy, competing demands for security and access.

It is for precisely this reason that the United States Supreme Court has "repeatedly emphasized that [courts] should ordinarily not alter the election rules on the eve of an election. *Republican National Committee v. Democratic National Committee*, 140 S.Ct. 1205 (2020). Further, it has instructed that, "[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The United States Supreme Court has stayed last minute injunctions already this cycle. *See, e.g., Republication National Committee*, 140 S.Ct. at 1206; *Merrill v. People First of Alabama*, ___ S.Ct. ___, 2020 WL 3604049, at *1 (U.S. July 2, 2020). Plaintiff-Appellants' have not shown that the challenged law's

minimally burdensome requirements warrant a last-minute injunction.

House File 2643 was passed by the legislature on June 14, was signed by the Governor on June 30, and became effective on July 1, 2020. LULAC waited until July 14 to file a suit challenging the law and waited until August 10, nearly six weeks after the law took effect, to seek a temporary injunction. "A temporary injunction is a preventive remedy to maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation." *Kleman*, 373 N.W.2d at 95. The challenged law has been in effect for more than three months at the time of this filing and several elections have already taken place. County auditors across the state have been receiving absentee ballot requests for three months. County auditors are contacting their voters to obtain any missing information from those requests. This Court should not change the status quo now.

As this Court held in the *DSCC* case,

> All election laws involve some burdens. There is the burden of filling out a ballot correctly. The burden of going to a polling place. The burden of requesting an absentee ballot correctly. In this proceeding, we are not persuaded that the obligation to provide a few items of personal information on an absentee ballot application is unconstitutional, thereby

> forcing us to rewrite Iowa's election laws less than a month before the election.

DSCC, Sup. Ct. No. 20-1281, slip op. at 10. Because the "burdens" associated with H.F. 2643 do not rise above the level of "the usual burdens of voting," *Crawford*, 553 U.S. at 198, the district court did not abuse its discretion when it held that LULAC failed to show a likelihood of success on the merits and denied a temporary injunction.

CONCLUSION

A temporary injunction is an extraordinary equitable remedy, especially when sought to block a duly-enacted statute. The district court did not abuse its discretion when it denied such extraordinary relief. This Court should affirm.

COST CERTIFICATE

We certify that the cost of printing the Appellant's Brief and Argument was the sum of $ 0.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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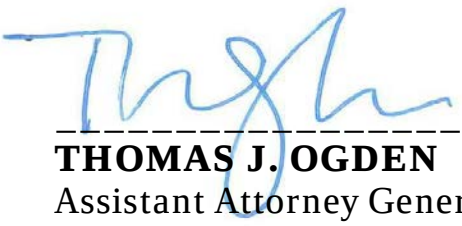

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