IN THE SUPREME COURT OF IOWA

No. 20–1281

Submitted October 8, 2020—Filed October 14, 2020

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, and **IOWA DEMOCRATIC PARTY,**

Appellees,

vs.

IOWA SECRETARY OF STATE PAUL PATE, In His Official Capacity,

Appellant.

Appeals from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

The Secretary of State seeks interlocutory review of district court orders staying a directive concerning the 2020 general election. **DISTRICT COURT ORDERS VACATED AND CASE REMANDED.**

Per curiam. Appel, J., filed an opinion concurring specially.

Thomas J. Miller, Attorney General, Jeffrey S. Thompson, Solicitor General, Thomas J. Ogden and Matthew L. Gannon, Assistant Attorneys General, for appellant.

Gary D. Dickey, Dickey, Campbell, & Sahag Law Firm, P.L.C., Des Moines, for appellees.

PER CURIAM.

I. Factual and Procedural Background.

This case concerns a July 17, 2020 emergency election directive issued by the Secretary of State. Off. of the Iowa Sec'y of State, *Emergency Election Directive* (July 17, 2020).[1] The first paragraph of the directive states that the Secretary of State will mail a blank Official State of Iowa Absentee Ballot Request form with instructions to every Iowa voter for the November 3 general election. *Id.* However, only the second numbered paragraph is at issue. It states, "To ensure uniformity and to provide voters with consistent guidance on the absentee ballot application process, County Auditors shall distribute only the blank Official State of Iowa Absentee Ballot Request Form . . . ." *Id.*

The following Monday, July 20, county auditors in three counties—Linn, Woodbury, and Johnson—began mailing prepopulated absentee ballot applications to registered voters in those counties. These applications, contrary to the Secretary of State's directive, were prefilled with individual voter information, including date of birth, residential address, and verification number, and needed only a signature from the voter.

On August 10 and 14, various Republican campaign organizations (hereinafter RNC) filed petitions for injunctive relief against those three county auditors. District courts in Johnson, Linn, and Woodbury Counties entered injunctions on August 27, September 12, and August 28, respectively. Relying on Iowa law (as discussed below), and the second paragraph of the Secretary of State's July 17 directive, each of the three

[1]Available at https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:47f5344b-18cf-41d2-a9c5-becad82230b8#pageNum=1 [https://perma.cc/ZBF2-32LR].

district court orders enjoined the county auditor from accepting prepopulated forms. The orders further required the county auditor to notify voters whose forms were not accepted and to invite those voters to submit the approved form of absentee ballot request.

Applications for interlocutory appeal were filed in the Linn and Woodbury County cases. No effort was made to appeal the Johnson County order. On September 16, our court denied the applications for interlocutory appeal in the Linn and Woodbury County cases.

Meanwhile, on September 3, several Democratic campaign organizations (hereinafter DSCC) filed an "emergency motion to stay agency action" in Polk County.[2] Naming the Secretary of State as respondent, they sought to block enforcement of the second paragraph of the July 17 directive—the same provision that the district courts in Johnson and Woodbury Counties had already ordered enforced. Following a hearing on September 18, the Polk County District Court on October 5 granted a statewide stay of enforcement of the Secretary of State's order. Thus, the Polk County District Court purported to invalidate the very action of the Secretary of State that three district courts had already upheld in the three counties where county auditors were not following it.

The Polk County District Court also directed the Secretary of State to inform all ninety-nine Iowa county auditors of its stay order within one business day. Before that deadline, we received an application for interlocutory appeal and stay from the Secretary of State. On October 6, we "stayed the stay" and ordered an expedited response from the petitioners. We received that response on October 8. We now grant the

[2]There were two district court cases filed and two case numbers—CVCV060641 and CVCV060642. Both cases were assigned to the same district court judge and virtually identical orders were entered simultaneously in both cases. We will treat them hereafter as one case. This decision applies to both case numbers.

Secretary of State's application for interlocutory review and because of the need for prompt action, move directly to the merits based on the briefing already submitted by the parties.

We review the Polk County District Court's ruling for abuse of discretion. *Grinnell Coll. v. Osborn*, 751 N.W.2d 396, 398 (Iowa 2008).[3] For the reasons set forth herein, we conclude that the district court abused its discretion in issuing the October 5 stay.[4]

II. Iowa Code Section 53.2 Authorized the Secretary of State's Directive.

Iowa Code chapter 53 (2020) governs absentee ballots. Relevant here, Iowa Code section 53.2(2)(*a*) provides that "[t]he state commissioner [i.e., the Secretary of State] shall prescribe a form for absentee ballot applications." Also, Iowa Code section 53.2(4)(*a*), as amended in the 2020 legislative sessions, states,

> To request an absentee ballot, *a registered voter shall provide*:
> (1) The name and signature of the registered voter.
> (2) The registered voter's date of birth.
> (3) The address at which the voter is registered to vote.
> (4) The registered voter's voter verification number.
> (5) The name or date of the election for which the absentee ballot is requested.
> (6) Such other information as may be necessary to determine the correct absentee ballot for the registered voter.

2020 Iowa Acts. ch. 1121, § 123 (to be codified at Iowa Code § 53.2(4)(*a*) (2021)) (emphasis added). If any information is missing from an

[3]The district court treated its order as a stay of agency action under Iowa Code section 17A.19(5)(*d*) (2020). We assume without deciding that chapter 17A, and specifically section 17A.19, would apply to an action seeking review of the Secretary of State's July 17 order.

[4]Our court has also today granted interlocutory review *in League of United Latin American Citizens of Iowa v. Secretary of State*, Case No. 12–2049. Rather than delay issuing this ruling until we have also decided that case, we are issuing this ruling today.

application, Iowa Code section 53.2(4)(*b*) requires the county auditor to contact the applicant within twenty-four hours to obtain the missing information. Further, Iowa Code section 53.2(4)(*b*) forbids county auditors from using the voter registration system to complete the missing information themselves.

In the Johnson, Linn, and Woodbury County cases, the district courts concluded that these laws give the Secretary of State authority to prescribe a standard form for absentee ballot applications that requires the voter to fill in their own personal information and to override any plan by local election officials to use prepopulated forms. We agree. Section 53.2 unmistakably requires *the applicant* to provide the required personal information. *See* Iowa Code § 53.2(4)(*a*)–*b*). It would be inconsistent with that law for *a county auditor* to prefill that for the applicant.

The Iowa General Assembly has authority over elections in Iowa. Notably, with regard to federal elections in our state, the United States Constitution expressly confers such authority on the Iowa legislature. *See* U.S. Const. art. I, § 4, cl. 1 (stating that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof"); *id.* art. II, § 1, cl. 2 (providing that presidential electors shall be chosen in each state "in such Manner as the Legislature thereof may direct").

Acting pursuant to that authority, the general assembly has enacted Iowa Code section 53.2. The Secretary of State then issued his July 17 directive pursuant to the general authority in section 47.1. But the second paragraph was meant to implement section 53.2. Section 53.2 overrides any home rule authority of county auditors. *See* Iowa Const. art. III, § 39A (stating that counties "are granted home rule power and authority, not inconsistent with the laws of the general assembly").

In its ruling, the Polk County District Court said that the Secretary of State exceeded his authority under Iowa Code section 47.1. But the district court did not discuss section 53.2, which provides the relevant authority for the second paragraph.

DSCC argues that under Iowa Code section 47.1(2) and Iowa Administrative Code rule 72—21.1, the Secretary of State is limited in his ability to *suspend* election laws in the event of an emergency. But the second paragraph of the Secretary of State's July 17 directive addressed a different problem—the announced plans of certain county auditors not to *follow* section 53.2. Nothing in Iowa law restricts the Secretary of State's ability to take prompt action when county auditors in specific counties are not *following* state election laws—section 53.2.

III. The Other Grounds Do Not Support the District Court's Ruling.

Additionally, in its ruling, the district court expressed the following concerns about paragraph 2 of the Secretary of State's July 17 directive:

> The Court also has great difficulty understanding how the fairness and uniformity of the absentee ballot application process would be promoted by Section 2 of the Directive. The Court concludes that any concern Respondent has about the fairness and uniformity of the absentee ballot application process is far outweighed by the public's interest in maximizing voter participation in the upcoming general election and, in particular, doing so by making absentee voting as easy and widely available as possible. The subject provision of Secretary Pate's Directive would clearly work counter to that interest.
>
> As set forth above, to his credit Secretary Pate originally strongly urged Iowans to vote absentee by mail in the June 2, 2020 primary elections because it was the safest way to vote in light of the global pandemic. He caused absentee ballot request forms to be mailed to every active voter in Iowa prior to the primary, resulting in record voter turnout. The seemingly contradictory limitations and restrictions reflected in Section 2 of Secretary Pate's Directive, with no apparent evidence of any fraud or other issues with the primary election

> process, represents a complete "about face" by Secretary Pate and is more than perplexing to this Court. Section 2 of the Directive appears to be, as is sometimes said, a solution in search of a problem.

Respectfully, we cannot agree that this reasoning supports the order entered by the district court.

Clearly, reasonable people can disagree on whether sending out blank or prepopulated absentee ballot request forms is better policy. Arguably, blank forms help ensure that the person submitting the request is the actual voter. 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.

Iowa law, unlike the laws of some other states, does not require the absentee ballot to be *returned* by the voter (or a member of the voter's family). *See* Iowa Code § 53.17(1)(*a*). Outside parties are allowed to turn in absentee ballots. *Id.*; *see also id.* § 53.9 (describing who may not receive absentee ballots on behalf of voters). Thus, 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. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 197, 130 S. Ct. 2811, 2819 (2010) (upholding Washington law requiring the disclosure of petition and stating, "The State's interest in preserving the integrity of the electoral process is undoubtedly important."); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196, 128 S. Ct. 1610, 1619 (2008) (Stevens J., plurality opinion) (upholding Indiana voter ID law and stating, "There is no question about the

legitimacy or importance of the State's interest in counting only the votes of eligible voters.").[5]

More importantly, 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.

Constitutional rights, of course, must be jealously guarded, but the only constitutional provision cited in the Polk County District Court's ruling is article III, section 39A, which states that county governments are granted home rule power and authority "not inconsistent with the laws of the general assembly." Iowa Const. art. III, § 39A. As we have already discussed, the general assembly here passed legislation—Iowa Code section 53.2—that empowers the Secretary of State to do what he did. Accordingly, there is no violation of article III, section 39A, as the district courts in Johnson, Linn, and Woodbury Counties previously found.

DSCC argues that the Secretary of State's July 17 directive impermissibly burdens voting, in violation of article II, section 1 of the Iowa Constitution, the due process clause, and the equal protection clause.

---

[5]As the United States Supreme Court said unanimously a few years back:

> 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. "[T]he 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." Countering the State's compelling interest in preventing voter fraud is the plaintiffs' strong interest in exercising the "fundamental political right" to vote.

Purcell v. Gonzalez, 549 U.S. 1, 4, 127 S. Ct. 5, 7 (2006) (alteration in original) (citations omitted).

These claims should be put in perspective. Iowa is one of only eleven states where the government mailed an absentee ballot application to every registered voter. *See* Nat'l Conf. of State Legislatures, *Absentee and Mail Voting Policies in Effect for the 2020 Election* (Oct. 9, 2020).[6] 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 for 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. The burdens cited by DSCC—to the extent they exist—have resulted not from the Secretary of State's directive per se, but from the decisions of three county auditors not to follow that directive or Iowa Code section 53.2.

DSCC argues that individuals who returned the prepopulated application forms in Johnson, Linn, and Woodbury Counties are having their right to vote burdened because they now have to complete and return the statutorily approved form of the absentee ballot application. Thus, DSCC maintains that these voters have "to take additional steps to receive their ballots." But these additional steps are the same ones that voters in the other ninety-six counties must take and that are required by Iowa Code section 53.2.

"Election laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 2063 (1992) (upholding Hawaii's ban on write-in voting).

> Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly

[6]Available at https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election-aspx [https://perma.cc/4DFT-8DGJ].

> tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.

Id. Rather, election laws are weighed under a balancing approach, in which "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are generally not considered "invidious." *Crawford*, 553 U.S. at 189–90, 128 S. Ct. at 1616 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9, 103 S. Ct. 1564, 1570 n.9 (1983)).

Also, the district court decisions in those counties were tailored to protect voters. For example, the Linn County District Court directed as follows on August 27, over a month before the commencement of the absentee voting period:

> [W]ith respect to any prepopulated ABR forms returned to his office, Defendant shall contact the sender in writing to inform the sender that the prepopulated ABR form should not have been sent in the form provided by Defendant, inform the sender that Defendant is unable to act on the prepopulated ABR form, and invite the sender to submit an ABR form in the manner prescribed by the Iowa Secretary of State.

On September 8, the Linn County Auditor announced that the office would be mailing new absentee request forms to all voters affected by the district court decision.

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. *See Republican Nat'l Comm. v. Democratic Natl' Comm.*, 589 U.S. ___, ___, 140 S. Ct. 1205, 1207 (2020) ("This Court has repeatedly

emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.").[7]

The Polk County District Court is rightly concerned about the individual voter. Looking back in hindsight, which courts often get to do, it would have been preferable if the Secretary of State's directive had been issued earlier and both RNC and DSCC had brought their respective lawsuits earlier. It also would have been better if the county auditors in Johnson, Linn, and Woodbury Counties had sought clearance from a court *before* deciding not to follow a directive of the Secretary of State. But courts do not get to remake the past. We can only deal with a lawsuit when it gets before us. From where we stand today, we are not persuaded that the Polk County District Court's order would reduce the risk of confusion. Rather, we think it would increase that risk. *See Republican Nat'l Comm.*, 589 U.S. at ___, 140 S. Ct. at 1207 (warning about the danger of "judicially created confusion").

In light of the text of Iowa Code section 53.2, the Secretary of State's July 17 directive, the August 27, August 28, and September 12 rulings from Johnson, Linn, and Woodbury Counties, and our September 16 denials of interlocutory review, we believe it had been clear that prefilled absentee ballot applications could not be used for the 2020 election. The Polk County District Court's October 5 order throws that prior clarity into doubt, particularly in light of its late timing. What should the auditors

[7]*Erickson v. Blair*, 670 P.2d 749, 754 (Colo. 1983) (en banc), cited by the special concurrence, reaffirms the principle that courts should defer to legislatures. In that case, the Colorado Supreme Court applied a substantial-compliance standard to the counting of certain absentee ballots. *Id.* at 755. But it didn't do so on constitutional grounds. *Id.* Rather, the court followed several Colorado statutes, stating that "courts reviewing controversies arising out of special district elections shall decide the issues 'with a view to obtaining substantial compliance' with the election provisions of the act." *Id.* (quoting Colo. Rev. Stat. § 32-1-830(1) (1982 Supp.) (repealed 1993)).

and voters in Johnson, Linn, and Woodbury Counties do now? Will the auditors in those counties need to send out a third mailing?

In that regard, the Polk County District Court's order is in effect a collateral attack on orders previously entered in Johnson, Linn, and Woodbury Counties. Those are the only three counties that sent out prepopulated absentee ballot request forms. It is inappropriate for a district court in one county to be issuing an order that, in effect, countermands orders entered by three district courts in other counties. Our court system works through a system of appeals, which would be undermined if parties could travel to another district court to try to undo what one district court has already done. *See* 42 Am. Jur. 2d *Injunctions* § 178, at 790 (2020) ("[T]he injunction of proceedings in one court by another court of coordinate jurisdiction is ordinarily improper."). Rule 1.1510 of the Iowa Rules of Civil Procedure favors comity and noninterference among district courts:

> An action seeking to enjoin proceedings in a civil action, or on a judgment or final order, must be brought in the county and court where such proceedings are pending or such judgment or order was obtained, unless that be the supreme court, in which case the action must be brought in the court from which appeal was taken.

See also Gunn v. Wagner, 242 Iowa 1001, 1005, 48 N.W.2d 292, 294 (1951) ("A court will not litigate matters finally determined in another court nor interfere with proceedings therein nor process therefrom."). In substance, the Polk County District Court's order was intended to dissolve three prior injunctions of three other district courts.[8] Although DSCC raised other issues below, the Polk County District Court's stay and order primarily relied on grounds that had already been litigated in the other district

[8]The Polk County District Court acknowledged that "it does not have authority to dissolve injunctions ordered in other counties," but anticipated that its stay and order would lead to the dissolution of those injunctions.

courts. Essentially, that court took a different view of the Secretary of State's statutory authority than the other courts had.

IV. Conclusion.

For the reasons stated, we grant the Secretary of State's application for an interlocutory appeal, vacate the emergency stay and orders issued by the district court, and remand for further proceedings consistent with this opinion.

DISTRICT COURT ORDERS VACATED AND CASE REMANDED.

This opinion shall be published.

All justices concur except Appel, J., who concurs in result only and files a special concurrence.

APPEL, Justice (specially concurring).

I. Introduction.

I concur in result but regard this as a close case that requires further explanation.

As properly recognized by the majority, the resolution of emergency election law cases is difficult. Given the short time frame presented, resolving election law issues in a timely and appropriate fashion is a challenge under the best of circumstances. Further, the litigation over the recent legislative changes in Iowa affecting absentee ballots enacted prior to the November 2020 election has proceeded piecemeal. In the first wave of cases, plaintiffs associated with the Republican Party sued three county auditors. These earlier cases raised state law questions about the authority of the Secretary of State to prescribe absentee ballot request forms and the power of the county auditors to depart from the Secretary of State's form by prepopulating voter information on the absentee ballot request forms sent to voters.

In this case, entities associated with the Democratic Party have sued a different defendant, the Secretary of State, and have raised a host of issues different from those in the prior litigation. Here, the petitioners launch challenges of a "directive" of the Secretary of State prohibiting local county auditors from sending prefilled absentee ballot applications to registered voters on state law and state and federal constitutional grounds that were not considered in the prior litigation. And, in yet another emergency voting rights case pending before this court, a party attacks the constitutionality of recent legislation regarding back-end repairs to incomplete absentee ballot applications, namely, a statutory provision prohibiting county auditors from using "the best means available" to cure

absentee ballot requests with incomplete information, including resorting to an I-Voters database maintained by the state to find information about a voter such as a voter PIN number. The challenge before this court has been how to handle these matters in a fashion that creates a coherent framework for the upcoming general election notwithstanding the piecemeal presentation.

II. Factual Background.

A. Introduction. For decades in Iowa, voters have generally been able to cast absentee votes in a general election. Historically, of course, voter interest in general elections during a Presidential year ordinarily exceeds that of other elections.

In the upcoming general election, interest in absentee voting, in particular, is driven by the serious health concerns arising from the COVID-19 pandemic. During the primary election, Iowa Secretary of State Paul Pate advised voters that "[t]he safest way to vote will be by mail." Press Release, Office of the Iowa Sec'y of State, Secretary Pate to Mail Absentee Ballot Request Form to Every Registered Voter (March 31, 2020).[9] Since the June primary, the dangers of the COVID-19 pandemic in Iowa have, if anything increased. A CDC task force in early September issued "dire warnings" to Iowa, which had the highest case rate in the country during the week of August 23. Betsy Klein, *Task Force Report Shows Dire Warning to Iowa, the State with the Highest Case Rate this Week*, CNN (Sept. 1, 2020).[10] Predictions of a record absentee turnout in the upcoming general election seem quite likely to occur.

---

[9]Available at https://sos.iowa.gov/news/2020_03_31.html.

[10]Available at https://edition.cnn.com/2020/09/01/politics/iowa-task-force-report-coronavirus/index.html [https://perma.cc/GF4R-7UL3].

B. Framework for Absentee Voting.

1. *General framework.* In order to vote absentee, a voter must apply to the county auditor for an absentee ballot. Iowa Code § 53.2(1)(*b*)(2020). The application submitted by the voter must contain:

> (1) The name and signature of the registered voter.
>
> (2) The registered voter's date of birth.
>
> (3) The address at which the voter is registered to vote.
>
> (4) The registered voter's voter verification number.
>
> (5) The name or date of the election for which an absentee ballot is requested.
>
> (6) Such other information as may be necessary to determine the correct absentee ballot for registered voters.

Id. § 53.2(4)(*a*). The voter verification number is either the voter's driver's license number, the number of the voter's nonoperator ID issued by the Iowa Department of Transportation, or a voter PIN number issued by the Iowa Secretary of State. *Id.* § 53.2(4)(*c*).

The Secretary of State as state commissioner of elections is required to "prescribe" a form for absentee ballot applications. *Id.* § 53.2(2)(*a*). A registered voter, however, may craft their own application on a sheet of paper no smaller than three by five inches that includes all of the information required in Iowa Code section 53.2(4). *Id.* § 53.2(2)(*b*). Once an application with the required information has been presented to the county auditor, the auditor mails an absentee ballot to the registered voter at the address indicated on the application within twenty-four hours of receipt. *Id.* § 53.8.

When the registered voter receives the absentee ballot, the registered voter is instructed to mark the ballot, place it in a secrecy envelope, and place the secrecy envelope containing the marked ballot into an unsealed

envelope. *Id.* §§ 53.8(*a*)(2), .16. An affidavit prescribed by the commissioner of elections must be signed by the voter on the unsealed envelope. *Id.* § 53.16.

The sealed envelope containing the completed ballot and the voter affidavit must then be returned to the county auditor either by physical delivery to the county auditor's office or by mail. *Id.* § 53.17(1). If a registered voter uses mail to deliver a completed ballot, the return envelope must be received by the county auditor before the polls close on election day or be clearly postmarked by an officially authorized postal service not later than the day before the election *and* received by the commissioner not later than noon on the Monday following the election. *Id.* § 52.17(2).

2. *Procedure for processing applications with insufficient or erroneous information.* Applications for absentee ballots submitted by registered voters are sometimes incomplete. For instance, an application from a registered voter who does not have a driver's license or state issued nonoperator ID is required to provide their voter PIN number issued by the Iowa Secretary of State. Many voters have misplaced the card indicating their voter PIN number and simply do not remember them.

In the past, local county auditors have addressed the problem of missing PIN numbers in two ways: a front-end solution and a back-end solution. According to the evidence offered at the hearing in this case, some county auditors adopted a front-end solution by sending absentee voter applications to registered voters with the registered voter's name, address, and voter PIN already populated on the form. When the voters returned the applications, there would be no issue of an absent PIN or other information because it was already printed on the application form.

In addition to this front-end approach to help ensure voters properly complete their requests, there is also a back-end approach. Under the

back-end approach, where an absentee ballot request was received with "insufficient information," the county auditor was permitted to obtain the additional necessary information by "the best means available." *Id.* § 53.2(4) (2019). The record in this case establishes that where there were missing voter PIN numbers, county auditors would use as "the best means available" a secure, computerized statewide I-Voters database to obtain the proper number and enter it onto the application. An absent voter PIN (or other minor errors such as inverted numerals on an address) could be quickly obtained with a minimum of fuss.

3. *Elimination of "best means available" back-end solution.* After the primary election in June 2020, the Iowa legislature enacted H.F. 2643. 2020 Iowa Acts ch. 1121, §§ 123–24 (to be codified at Iowa Code § 53.2(4)(*b*) (2021)). The new legislation eliminated the language in Iowa Code section 53.2(4) which permitted county auditors to use "the best means available" to obtain information necessary for a completed absentee ballot form. *Id.*

Instead, the legislature required the county auditor to follow new procedures when an absentee ballot application was received with insufficient information. Under the new statute, the county auditor is required to attempt to contact the registered voter by phone or email within twenty-four hours of receipt of the flawed absentee ballot information. *Id.* If no contact is made through phone or email, the county auditor is directed to notify the registered voter of the problem by mail. *Id.* While the statute requires phone and email to be attempted within twenty-four hours of receipt of the flawed ballot request, the statute provides no indication of the time frame in which a letter must be sent to the registered voter. *See id.*

The new back-end approach to obtaining required information clearly is less efficient than resorting to the I-Voters database and imposes substantial administrative burdens on county auditors. Phone numbers and email addresses are not required information for absentee ballot applications and the record shows that many voters do not provide them, no doubt for privacy reasons. The voters are likely tired of four times a day political calls, texts, and emails in election season and don't want to encourage repetitive undesired calls by putting their contact information in the public record to be mined by political organizations.

If the commissioner cannot contact the voter by telephone or email, and a voter is notified by mail, it will take some days before the voter learns that their application contains insufficient information. Once the voter learns of the problem by receipt of the mail (assuming it is received), the situation may be resolved with the county commissioner. Only then, however, will the commissioner send a ballot to the registered voter. For voters applying for absentee ballots as Election Day nears, there may not be sufficient time for multiple mailings and processing to permit the registered voter to cast a vote using the absentee ballot.

The new legislation introduced inconsistencies into Iowa law. A voter who votes "early" by visiting the commissioner's office prior to the election but does not know their voter PIN receives it on a printed out ballot form. Iowa Code § 53.10 (2020).

4. *Attempt to prevent front-end solution.* The 2020 legislation also modified Iowa Code section 53.2(4)(*a*) (2019). While the prior language indicated that "each application shall contain" the necessary information, the amended statute declared that "[t]o request an absentee ballot, the voter shall provide" the information. *Compare* Iowa Code § 53.2(4)(*a*)

(2020) *with* 2020 Iowa Acts ch. 1121, § 123 (to be codified at Iowa Code § 53.2(4)(*a*) (2021).

On July 1, 2020, the Iowa Legislative Council rejected a proposal by Iowa Secretary of State Paul Pate to send absentee ballot applications to every registered Iowa voter prior to the general election using Coronavirus Aid, Relief, and Economic Security (CARES) Act funds. After the legislative counsel rejected the proposal, a number of county auditors, mostly from Democratic leaning counties, announced their intention to send absentee ballot applications to all registered voters in their county. Auditors from Johnson, Linn, and Woodbury Counties announced that they would be using prefilled ballot application forms sent to a voter's last known address in order to facilitate absentee voting and to lessen administrative expenses.

On July 17, the legislative council reversed its position and authorized the Secretary of State to send absentee voter applications statewide. In an apparent effort to head off the state auditors of Johnson, Linn, and Woodbury Counties, the Secretary of State, also on July 17, issued what was labeled a "directive." The first section authorized the Secretary to send the absentee ballot applications as approved by the legislative counsel. The second section purported to forbid county auditors from using prefilled absentee ballot request forms.

C. Litigation Related to Absentee Ballot Requests.

1. *First wave of litigation related to front-end approach to voter information.* The county auditors in Johnson, Linn, and Woodbury Counties proceeded to mail out prefilled absentee ballot requests. The Secretary of State took no action against the county auditors. But on August 10 and 14, the Republican National Committee and other Republican plaintiffs brought an action in the Johnson, Linn, and Woodbury county courts against the three auditors. They sought a

temporary injunction preventing the auditors from using prefilled absentee voting applications and to claw back the forms of voters who had completed them and returned them to the county auditors. The district courts decided the cases based on interpretation of the statute governing absentee ballots, concluding under state law that the county auditors were not authorized to use a prefilled absentee ballot request form. The first wave of litigation focused on whether the "front-end" solution to the incomplete voter identification problem, advocated by the county auditors, was permitted by the absentee statute.

It is important to note that no constitutional issues were raised by the county officials, who ordinarily cannot challenge the constitutionality of state statutes. *See In re A.W.*, 741 N.W.2d 793, 804–05 (Iowa 2007) ("[N]either the attorney general nor a county may challenge the constitutionality of a state statute while acting as a litigant. . . . [C]ounties, as creatures of statute, have no standing to challenge the constitutionality of state statutory provisions.") And, the district courts in the Linn and Johnson County cases refused to allow intervention by the current plaintiffs who could have raised constitutional challenges in the litigation. A similar result occurred in the Woodbury County case, where the League of United Latin American Citizens of Iowa (LULAC) and Majority Forward were denied intervention except on the question of appropriate remedy. Thus, due to no fault of the current plaintiffs, the prior litigation did not consider constitutional issues. Based on statutory interpretation alone, the district courts held that the relevant absentee ballot statutes do not authorize county auditors to use prefilled absentee voter application forms and granted the plaintiffs expansive injunctive relief. We denied emergency relief and applications for interlocutory appeal in these statutory cases.

2. *Litigation related to back-end solution.* In *League of United Latin American Citizens of Iowa v. Iowa Secretary of State Paul Pate*, plaintiffs challenged the amendment to H.F. 2643, which eliminated the "best means available" back-end approach to insufficient information on constitutional grounds. No. CVCV081901, (Iowa Dist. Ct. Johnson Cty. Sept. 25, 2020). In that case, LULAC claims that the new legislation prohibits county auditors from resolving omissions or errors by referring to the statewide I-Voters database. County auditors claim that the "best means available" approach permitted them to efficiently resolve absentee voter issues and that they will be overwhelmed if they are required to attempt to contact voters by phone or email, mail them a notice if they are not available, and finally later mail them a ballot after the issue has been resolved. The claim is raised that many absentee ballot applications will not be timely processed under this new procedure, thereby disenfranchising thousands of Iowa voters.

The district court in Johnson County denied the plaintiff's application for temporary injunctive relief. The plaintiffs filed an application in this court for an emergency stay and for interlocutory relief.

This matter is still pending before the court. In my view, because the issues raised in both cases are interrelated, the best manner of proceeding would have been to consider the cases together rather one at a time. Specifically, it is difficult to determine the full extent of the harm caused by the directive of the Secretary of State without knowing whether an efficient back-end solution is available for when a registered voter omits certain information or mistakenly inverts numbers in an address or birth date. At present, however, the current law in effect does not permit a "best means available" solution and, as a result, the full measure of harm from

the Secretary's directive includes those arising from lack of an effective back door remedy.

3. *The present action.* The present action involves two cases arising out of Polk County District Court. In both cases, the district court enjoined enforcement of the Secretary of State's directive that county auditors not use prepopulated absentee ballot applications and directed the Secretary of State to advise county auditors of the ruling within one business day. The district court granted the plaintiffs relief and entered an order (1) enjoining the Secretary of State from enforcing its directive and (2) requiring the Secretary of State to notify county auditors of the injunction within one business day. We granted an emergency stay of the district court rulings, granted interlocutory review, and the matter is now before this court.

III. Preliminary Matters.

A. Mootness. The doctrine of mootness does not apply in this case because different parties in different litigation advanced different theories in support of a claim for the same remedy. Moreover, many absentee ballot applications will be submitted to county auditors between now and the election. Of course, the court must move swiftly to preserve the potential remedy, the scope of which declines on a daily basis. The timing of the case is obviously not ideal. But I do not think the dispute is moot. Indeed, it seems to me that hundreds if not thousands of votes by absentee ballot could be affected by today's decision.

B. Collateral Attack. The defendants assert that the claim in this case is an impermissible collateral attack on orders entered in the first wave of front-end litigation. I find the argument unpersuasive. It is true, as is contended, that a collateral attack on a final judgment by a party to the first action is impermissible. *Fetters v. Degnan*, 250 N.W.2d 25, 30

(Iowa 1977). But, for starters, there was no final judgment in the first wave actions. Further, the theories advanced in the three first wave cases were different from those presented here. And, the parties were different. The parties and the majority have found no case where a party was prohibited from litigating based upon the entry of a temporary injunction in another case involving other parties on different theories simply because the relief sought was related to the same subject matter. I have also not discovered such a case.

In my view, the defendant has little chance of prevailing as a matter of law on the collateral attack theory. It would be especially inappropriate to impose some collateral bar against a nonparty who attempted to intervene in of the cases but was denied, and where another court denied intervention to similar entities. Finally, I also note that under Iowa Code section 17A.19(2), venue for the challenge to agency action is in Polk County or where the petitioner resides or has its principle place of business. There is nothing in the record to suggest that any of the entities resided in the three counties where first wave litigation commenced. So they had to bring their Iowa Code chapter 17A action in Polk County, not in some other county.

The majority suggests that the district court orders in this case violated Iowa Rule of Civil Procedure 1.1510. This rule provides that "[a]n action seeking to enjoin proceedings in a civil action, or on a judgment or final order, must be brought in the county or a court where such proceedings are pending." Iowa R. Civ. P. 1.1510.

There are multiple problems with this theory. First, the defendants did not raise the rule in its briefing. Second, case law demonstrates what logic dictates, namely, that rule 1.1510 does not apply to a nonparty. *Gunn v. Wagner*, 242 Iowa 1001, 1005, 48 N.W.2d 292, 294–95 (1951)

(noting that predecessor rule that plaintiff not a party to the prior litigation was not covered by the rule). Finally, the district court orders do not enjoin any court from doing anything or engaging in any court proceedings.

Yet, there are temporary injunctions in place in Woodbury, Linn, and Johnson County prohibiting county auditors from using prefilled ballots and requiring them to take corrective action with respect to those registered voters. The temporary injunction in this case creates a tension between the various court orders. But the fact that there is tension between the court orders in the first wave litigation and the current court orders is not a bar to the litigation. I agree, however, that the tension or conflict may, however, be a discretionary factor to consider when evaluating whether to grant the petitioners the relief they seek in this case.

C. Application of *Purcell* Approach. Petitioners urge us not to permit the district court temporary injunction to stand in this case because it makes a change in election law on the eve of the election. *Purcell v. Gonzales*, 549 U.S. 1, 5–6, 127 S. Ct. 5, 7–8 (2006) (per curiam). *Purcell*, of course, is infused with federalism concerns, arising from the notion that federal courts should show a degree of caution before they intervene in state created election procedures that could bollix up the management of an election by state officials. There is, of course, no federalism consideration in this case.

Further, as was noted by Justice Ginsburg, *Purcell* merely held that courts "must take careful account of considerations specific to election cases, not that election cases are exempt from traditional stay standards." *Veasey v. Perry*, 135 S. Ct. 9, 10 (2014) (Ginsburg, J., dissenting) (citation omitted). *Purcell* should not overshadow the fact that pre-election litigation is better than postelection litigation. Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 Stan. L. Rev. 1, 37 (2007). *Purcell*

plainly should not be regarded as a per se bar or even a deterrent to necessary litigation, but only a reminder that a reviewing court should be attentive to the potential of voter confusion and the burdens that may be imposed on election administrators in considering equitable relief in voting rights cases. As noted by Justice Ginsburg, the other traditional factors for equitable relief remain in play. *See Veasey*, 135 S. Ct. at 10; Richard L. Hasen, *Reining in the Purcell Principle*, 43 Fla. St. U.L. Rev. 427, 464 (2016). For example, where ballots with candidates listed have already been printed and substantial numbers of votes cast, it may not be possible to backtrack and add to the ballot a candidate improperly omitted from the ballot. *See Williams v. Rhodes*, 393 U.S. 23, 34–45, 89 S. Ct. 5, 12–18 (1968).

While attention to practical impacts is important, however, a reviewing court must be attentive to vindicating the rights of voters who seek to cast absentee ballots free from unnecessarily burdensome regulation. In this case, affirmance of the district court order is, in some ways, at least by way of result, in tension with prior holdings in Linn, Woodbury, and Johnson Counties. It does not seem that affirming the district court order would substantially increase the burdens on election administrators.

IV. Overview of the Merits of Temporary Relief in this Case.

Although the cases before us involve a number of challenges under the Iowa Administrative Procedure Act, the elephant in the room is the potential impact of Iowa law and the actions of the Secretary of State on the right of qualified voters to vote in the upcoming general election.

At the outset, I accept much of the plaintiffs' constitutional framework for voting rights cases. With respect to state constitutional claims under article II, section 1, we have stated that the right to vote is a

fundamental right. *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 848 (Iowa 2014). In my view, there is little doubt that the fundamental right to vote includes the right to vote absentee. As the Colorado Supreme Court stated decades ago:

> We believe the time has come to interpret absentee voting legislation in light of the realities of modern life and the fundamental character of the right of suffrage. We live in a society which, to a great extent, depends upon mobility as an indispensable condition of progress. Many persons for legitimate reasons cannot be physically present at a polling place to cast their ballots on the day of election. These electors, 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. Moreover, the right to vote is a fundamental right of the first order.

Erickson v. Blair, 670 P.2d 749, 754 (Colo. 1983) (en banc).

In addition, the Colorado court considered the proper approach to evaluating challenges to election regulations. According to the Colorado court:

> Absentee voting legislation should not be construed in a manner that unduly interferes with the exercise of this right by those otherwise qualified to vote. Nor should the exercise of the voting right be conditioned upon compliance with a degree of precision that in many cases may be a source of more confusion than enlightenment to interested voters, A rule of strict compliance, especially in the absence of any showing of fraud, undue influence, or intentional wrongdoing, results in the needless disenfranchisement of absent voters for unintended and insubstantial irregularities without any demonstrable social benefit.

Id. at 754–55 (Colo. 1983) (citation omitted).

Further, if there is any residual doubt, the right to vote absentee is even more important in the time of a national pandemic. Voters at high risk of serious problems or death should they become infected with Coronavirus should not be presented with the choice of voting in-person or not voting at all. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*,

140 S. Ct. 1205, 1208–09 (2020) (Ginsburg, J., dissenting) (noting impact of pandemic on importance of absentee voting). As noted by the Tennessee Supreme Court,

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

Fisher v. Hargett, 604 S.W.3d 381, 401 (Tenn. 2020); *see also Thomas v. Andino*, ___ F. Supp. 3d ___, ___, 2020 WL 2617329, at *17 n.20 (D.S.C. May 25, 2020) (noting that "during this pandemic, absentee voting is the safest tool through which voters can use to effectuate their fundamental right to vote. To the extent that access to that tool is unduly burdened, then no matter the label, 'denial of the absentee ballot is effectively an absolute denial of the franchise [and fundamental right to vote].' As such, in these circumstances, absentee voting impacts voters' fundamental right to vote." (alteration in original) (citation omitted) (misquoting *O'Brien v. Skinner*, 414 U.S. 524, 533, 94 S. Ct. 740, 745 (1974) (Marshall, J., concurring))); *Jones v. U.S. Postal Serv.*, ___ F. Supp. 3d ___, ___, 2020 WL 5627002, at *2 (S.D.N.Y. Sept. 21, 2020) (noting that requiring in-person voting during the pandemic creates "an untenable choice: risk contracting a fatal illness by voting in-person, or foregoing their right to vote in a presidential election").

At a minimum, regulations of absentee ballot procedures for this election should be examined with heightened scrutiny if not strict scrutiny. *See State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002) (stating that strict scrutiny applies where the asserted right is fundamental). Here, however, while the plaintiffs cite provisions of the Iowa Constitution

(including the voting rights provision of article II, section 1, the due process provision of article I, section 6, and the equal protection provision of article I, section 9), the plaintiffs do not advance an approach independent from the applicable federal constitutional framework for parallel constitutional provisions. When advocacy is so limited, we generally follow the federal framework for the purposes of the case but reserve the right to apply the standard in a fashion different from federal courts. *See, e.g.*, *State v. Short*, 851 N.W.2d 474, 481–92 (Iowa 2014) (describing the independent analysis of illegal searches under the Iowa Constitution and that the United States Constitution is considered as persuasive guidance); *State v. Ochoa*, 792 N.W.2d 260, 264–67 (Iowa 2010) (describing "[t]he independence of state courts in interpreting their own constitutions" differently from federal law); *see also State v. Baldon*, 829 N.W.2d 785, 803–34 (Iowa 2013) (Appel, J., concurring) (reserving the "right to construe [Iowa's] state constitution independently of decisions of the United States Supreme Court interpreting parallel provisions of the Federal Constitution").

The federal courts ordinarily review voter regulations with greater scrutiny than a minimal rational basis test. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 & n.9, 103 S. Ct. 1564, 1569–70 & n.9 (1983) (establishing a more flexible standard of scrutiny for election law cases that weighs "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule"); *see also Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 2063–64 (1992) (building on *Anderson* to create a spectrum of the standard of scrutiny to apply based on whether the restriction on the right to vote is severe). Under *Anderson-Burdick*, where voting rights are subject to "severe" restrictions, the

regulations must be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063 (quoting *Norman v. Reed*, 502 U.S. 279, 289, 112 S. Ct. 698, 705 (1992)). When a state law imposes reasonable and nondiscriminatory restrictions, " 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.*, 504 U.S. at 434, 112 S. Ct. at 2064 (quoting *Anderson*, 460 U.S. at 788, 103 S. Ct. at 1570). It is important to note, however, that most cases fall between the two polar extremes. *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012); *see also Guare v. State*, 117 A.3d 731, 736 (N.H. 2015). Further, even restrictions that may appear to impose only "slight" burdens must be justified by relevant and legitimate state interests "sufficiently weighty to justify the limitation." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191, 128 S. Ct. 1610, 1616 (2008) (quoting *Norman*, 502 U.S. at 288–89, 112 S. Ct. at 705). *See generally* Sal H. Lee, Note, *Judicial Review of Absentee Voting Laws: How Courts Should Balance State Interests Against the Fundamental Right to Vote Going Forward*, 105 Iowa L. Rev. 799 (2020) [hereinafter Lee].

The burden of proof when an absentee ballot restriction is challenged on right to vote grounds rests with the state. *See, e.g., Crawford*, 553 U.S. 190, 128 S. Ct. 1616 ("[W]e concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands."); Lee, 105 Iowa L. Rev. at 821–23. Some cases note that mere incantations of "fraud" are not sufficient to justify restrictions on absentee voting. *See, e.g.*, *Fish v. Schwab*, 957 F.3d 1105, 1133 (10th Cir. 2020) (noting that the state, when asserting voter fraud, must produce evidence "that such an interest made it necessary to burden voters' rights"), *cert. docketed*, No. 20–109 (U.S.

Aug. 3, 2020); *Common Cause Ind. v. Lawson*, 2020 WL 5798148, at *17 (S.D. Ind. Sept. 29, 2020) (noting states " 'may not simply invoke the phrase election integrity' without further explanation and expect those incantations to carry the day") (quoting *Common Cause Ind. v. Lawson*, ___ F. Supp. 3d __, __, 2020 WL 5671506, at *6 (S.D. Ind. Sept. 22, 2020)), *appeal docketed*, No. 20–2911 (7th Cir. Oct. 5, 2020); *Middleton v. Andino*, ___ F. Supp. 3d ___, ___, 2020 WL 5591590, at *31 (D.S.C. 2020) ("But courts are not required to blindly accept a state's assertion that its interests are enough to outweigh a burden . . . . [T]he sole evidence of the state's purported 'important law-enforcement investigatory function' is the short declaration of Lieutenant Logan. Yet the court is not required to take the state's conclusory assertions at face value simply because one veteran law enforcement officer describes the Witness Requirement as providing a 'significant' lead in fraud investigations." (Citations omitted.)); *Thomas*, 2020 WL 2617329, at *20 (quoting *Fish*'s rationale, the court found the state "ha[d] not offered any evidence of voter fraud in South Carolina other than SCEC's fleeting mention, during the May 15, 2020 hearing, of a voter-buying scandal from the 1980s" (footnote omitted)).

The plaintiffs assert there has been no evidence of any problem of fraud with respect to absentee ballots in Iowa that would be addressed in a meaningful way by prohibition of prefilled ballots. The county auditors send the prefilled absentee ballots to addresses obtained from the I-Voters database. There is no suggestion in the record that some third party has penetrated the I-Voters database in a way that would permit fake ballots using I-Voters database information to be sent to registered voters. Further, persons who submit absentee ballot requests sign affidavits under penalty of perjury that the information provided is accurate. After they receive the ballots, the registered voter again signs an affidavit under

penalty of perjury. Prior to the enactment of H.F. 2643, the Iowa Secretary of State's office received an award in 2019 for Iowa's efforts to promote voter security.

The district court concluded that H.F. 2643 was a solution in search of a problem. According to the record in this case, young and minority voters often do not have an official state ID and do not remember their PIN number. But if a voter does not know their voter PIN number, they may contact the county commissioner of election, who will provide the voter that information to them if the caller provides two items of identification, e.g., name, address, or birth date. So the burden is relatively slight.

The voter security benefit, however, is also slight. The items of identification required to retrieve a PIN number are available from public voter registration lists. One wonders why a voter who has forgotten or misplaced a PIN number may simply obtain it from the county auditor by providing publically available information, but the county auditor cannot send the number to the registered voter at his voting address on a prefilled absentee ballot request.

Moreover, the provisions of Iowa law regarding absentee ballots have a cumulative effect on voters who seek to vote absentee. Both the front-end and back-end approaches to incomplete voter information are limited by present Iowa law. If the front-end solution to the problem—using prefilled forms where the information is confirmed by the voter and submitted to the county auditor under penalty of perjury—is not permitted, then the back-end resolution permitting the county auditor to use "the best means available" to cure minor defects increases in importance.

In this case, however, the plaintiffs have not challenged the constitutionality of the statutory framework involving the manner in which

county auditors obtain additional information when absentee ballot applications submitted by the voter are incomplete. The plaintiffs attack only the directive of the Secretary of State. The posture of the case is thus materially different from *League of United Latin American Citizens of Iowa*, an emergency voting case also pending before this court. In *League of United Latin American Citizens of Iowa*, the plaintiff raised the question of whether the elimination of the "best means available" back-end provision imposed an unconstitutional burden on the right to vote. The district court denied injunctive relief, and an emergency motion for stay and interlocutory relief is pending before this court. The constitutionality of the absentee ballot provision preventing the use of prefilled absentee voter requests would be enhanced if there were an effective and prompt back-end solution. In this litigation, however, only the lawfulness of the secretary's directive related to a frontend solution to incomplete voter applications is addressed. But we must decide specific cases based on the four corners of the pleadings and the scope of the underlying litigation. Constitutional issues were not before the courts in the first wave of litigation.

In my view, the constitutional challenges made in this case are of greater concern than the statutory challenges made in the prior proceedings. The technical requirements imposed by Iowa law that prevent county auditors from providing registered voters with prefilled applications for them to review and verify under penalty of perjury is arguably contrary to the spirit, if not the letter, of *Erickson v. Blair*.

> A rule of strict compliance especially in the absence of any showing of fraud, undue influence, or intentional wrongdoing, results in the needless disenfranchisement of absent voters for unintended and insubstantial irregularities without any demonstrable social benefit.

Erickson, 670 P.2d at 754–55; *see also 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 the birthdate and address fields for an absentee vote to count was invalid because the state failed to substantiate its asserted interest in voter fraud); *Obama for Am.*, 697 F.3d at 433 (burden on voting practices is not slight even though it did not prevent early voters from voting). Further, the caselaw provides that programmatic harms to political organization are an injury to be considered in election law matters. *See Ne. Ohio Coal. for the Homeless*, 837 F.3d at 624 ("That is not simply the 'effort and expense' associated with advising voters how to 'comport' with the law, but an overhaul of the get-out-the-vote strategy of an organization that uses its limited resources helping homeless voters cast ballots. Their injury is imminent, as well as concrete and particularized." (Citation omitted.)); *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 9, 13 (D.C. Cir. 2016) ("[T]hose new obstacles unquestionably make it more difficult for the Leagues to accomplish their primary mission of registering voters, they provide injury for purposes both of standing and irreparable harm.").

In this interlocutory appeal, we are considering whether to reverse temporary relief granted by the district court. On the merits, I think there is a question as to whether the burden on the applicant to fill in an absentee voter application with at least some identifying information such as name, address, and birthdate outweighs the benefits to voter security. I am most concerned about the narrower set of voters who have no driver's license or ID number and must instead provide a voter identification PIN number. I have no doubt that many registered voters do not know what a voter PIN is, let alone their assigned number. Further, while the use of voter PIN numbers helps prevent double voting, I am not sure it has much

value as a voter security measure, particularly when the identifying information required to obtain a PIN number is publically available.

Yet, voters who do not know their voter PIN have a relatively easy remedy, namely, a call to the county auditor's office to resolve the problem. The lesser the burden on voters, the lesser the required showing of the state to support the regulation.

Moreover, we do not face the question here regarding what happens when a voter omits or inaccurately states information on an absentee voter application that is submitted to the county auditor. The only right to vote issue before us is whether a directive requiring that absentee ballot forms not be prepopulated with the necessary voter information unduly burdens that right. Nothing more.

Although I disagree with the analysis in the per curiam opinion, I also think a factor in this case involving temporary relief is the existence of orders in Linn, Johnson, and Woodbury Counties that seem to cut in the opposite direction from that of the decision of the district court. The issues and parties were different, of course, but county auditors and participants in the electoral process have likely relied on the initial results of litigation, at least for purposes of this election cycle. Further, I doubt that any county auditor is contemplating sending populated forms to voters in the narrow window between now and the deadline for requesting absentee ballots in the 2020 general election. Thus, on a going forward basis, it is unlikely that the temporary injunction in this case would have any practical impact on the future use of populated forms by county auditors in this election cycle.

The question of what should be done if an application for an absentee ballot omits some information or contains errors is a question raised in the *League of United Latin American Citizens of Iowa* case. These

issues are not before the court. Nor do we reach a final decision on any of the issues raised in the litigation. It may well be that the landscape looks different when a full-blown evidentiary record is developed and there is an opportunity to more thoroughly vet the issues.

Given all the above, I consider this a very close case. The issue of temporary relief often involves questions of judgment. But as I consider the totality of circumstances, I reluctantly concur in the result reached today.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
20-1281	Democratic Senatorial Campaign Committee v. Pate

So Ordered

Electronically signed on 2020-10-14 16:27:05