

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DSCC, DCCC, and IOWA DEMOCRATIC
PARTY,

No. _____

Petitioners,

v.

**PETITION FOR JUDICIAL REVIEW OF
AGENCY ACTION**

IOWA SECRETARY OF STATE
PAUL PATE, in his official capacity,

Respondent.

COME NOW Petitioners DSCC, DCCC, and the Iowa Democratic Party (the “Petitioners”) praying for an order staying and setting aside the July 17, 2020 Emergency Election Directive (the “Directive”) issued by Respondent Iowa Secretary of State Paul Pate (the “Secretary”), who is being sued in his official capacity, on the grounds that the Directive was issued in violation of the Iowa Constitution, Iowa Code § 53.2, and the Iowa Administrative Procedure Act, § 17A.19:

NATURE OF THE AGENCY ACTION

1. This petition for review challenges the legality of the Directive, which is an agency action as defined by Iowa Code § 17A.2(2).

AGENCY ACTION CHALLENGED

2. On July 17, 2020, the Secretary issued the Directive. The Directive referenced presidential and gubernatorial proclamations related to COVID-19, identified Iowa Code § 47.1 as requiring the Secretary to “prescrib[e] uniform election practices and procedures” for elections in Iowa, and identified Iowa Code § 53.2(2)(a) as requiring the Secretary to “prescribe the official form for absentee ballot applications.” Ostensibly pursuant to these statutes, Section Two of the Directive purported to order county auditors to distribute to voters “only the blank Official

State of Iowa Absentee Ballot Request Form . . . that is promulgated by the Secretary of State's Office pursuant [to] Iowa Code § 53.2(2)(a)" for the upcoming general election.

3. As described in more detail herein, the Secretary lacks the authority to issue a directive ordering county auditors to distribute only blank ballot request forms to voters. While Iowa Code § 47.1 authorizes the Secretary to "adopt rules . . . pursuant to Chapter 17A" to fulfill his responsibility to prescribe "uniform election practices and procedures," it does not authorize him to issue immediately binding and legally enforceable election-related orders. The Directive was not a rule adopted pursuant to Chapter 17A and so cannot be enforced pursuant to Iowa Code § 47.1.

4. The Directive conflicts with county auditors' expressly granted home rule authority to "conduct elections" and protect the "rights . . . safety, health, . . . and convenience" of the counties' residents. Iowa Const. art. IV, section 39A, Iowa Code §§ 333.301(1), 331.505(1),(2).

5. The Directive conflicts with county auditors' statutorily granted authority to "solicit" and "request" absentee ballot requests from a voter "in the course of his or her employment." Iowa Code § 53.7.

6. The Directive further conflicts with county auditors' statutorily protected right to solicit and accept "preaddressed" absentee ballot requests. Iowa Code § 53.2(2)(b), (c) (expressly authorizing "preaddressed" ABRs so long as they do not direct the ballot to be delivered somewhere other than the voter's address).

7. The Directive also contravenes Iowa Code §53.2(2)(a), which states that the Secretary's official form is not required if the voter provides the necessary information on a

paper of the requisite size. County auditors have a statutory duty to accept forms with the necessary information. *Id.*

8. To the extent the Secretary attempts to ground the Directive in his emergency powers under Iowa Code § 47.1(2)(a), the requirements to exercise those emergency powers are not satisfied, and in any case the emergency powers do not authorize the Secretary's order to distribute only blank ballot request forms.

9. As a result, the auditors in Linn, Johnson, and Woodbury counties reasonably concluded that the Directive's order to distribute only the official blank ballot request form was unlawful. And they proceeded with their plan—publicly announced two weeks before the Directive—to send voters in their counties request forms preaddressed with the information required to obtain a ballot. They did so to—among other reasons—facilitate voters' ability to vote safely during a global pandemic; increase the likelihood that voters successfully return their request forms; save taxpayer money; and reduce the crushing administrative burden that HF 2643, a new state law prohibiting the use of the statewide voter registration database to help process absentee ballot requests forms that have missing, incomplete, or illegible information, would otherwise impose on their offices.

10. The three auditors collectively sent more than 200,000 preaddressed request forms to their counties' active voters, and to date, they have collectively received more than 65,000 signed request forms in response. At no point has the Secretary taken legal action to stop the auditors from mailing preaddressed forms, and his publicly stated rationale for the legal bases for Directive has changed repeatedly.

11. After waiting nearly a month to take any action, during which time tens of thousands of voters signed and returned absentee ballot request forms to the Linn County,

Johnson County, and Woodbury County auditors, the Republican National Committee and other Republican plaintiffs filed lawsuits in district court against the Linn County and Johnson County auditors on August 10, 2020, and the Woodbury County auditor on August 14, 2020. In each case, they sought a temporary injunction ordering each auditor to follow the Directive and other “immediate remedial measures.”

12. DCCC and DSCC attempted to intervene in Linn County and Johnson County, but their motions to intervene were denied. In Linn County, DCCC and DSCC sought emergency interlocutory appeal, which was also denied. In Woodbury County, different intervenors representing the interests of Woodbury County voters were allowed to intervene for the limited purpose of discussing relief, not whether Secretary’s directive was lawful. The parties here have not addressed the merits of the Directive’s legality in any other proceeding, the Secretary has not been made a defendant in any other proceeding involving the Directive, the APA claim has not been presented in any other proceeding, and there is no final judgment in any other proceeding.

13. On August 27, 2020, the Linn County judge granted the Republican plaintiffs’ requested injunction against the Linn County auditor. The injunction requires, among other things, the invalidation of more than 50,000 signed and lawfully returned ballot request forms. On August 28, 2020, the Woodbury County judge did the same. On September 9, 2020, the Johnson County judge will hold a hearing on the Republican plaintiffs’ requested injunction.

14. The Directive has prejudiced Petitioners’ substantial rights. DSCC and DCCC are the official national committees of the Democratic Party devoted to supporting the election of Democratic candidates to the U.S. Senate and U.S. House, respectively, including in and from Iowa. The Directive will require DSCC and DCCC to divert substantial resources to educating tens of thousands of voters who are under the impression that they have done all they need to

request an absentee ballot by sending in preaddressed request forms. The Directive will also require additional get-out-the-vote efforts to combat the widespread voter confusion that will result if the Linn County injunction is upheld and if additional injunctions are issued. DSCC and DCCC also both participate in what is known as the “coordinated campaign,” in which they work in cooperation with the local Democratic Party to support the election of Democrats up and down the ticket. If the Directive is not invalidated, DSCC and DCCC will have to divert substantial resources to undoing the harm that it will impose on tens of thousands of Democratic voters’ ability to access absentee voting. This diversion of resources will include, in DSCC’s case in particular, additional resources that it will have to spend to assist and ensure that eligible voters are able to successfully vote absentee. This will also directly disadvantage DSCC and DCCC and the candidates that they support in the November election. The Iowa Democratic Party (“IDP”) brings this action on its own behalf and on behalf of its members who are registered voters in Iowa and reside in counties where county commissioners have sent out preaddressed absentee ballot requests and in any counties which have not done so because of the Secretary’s Directive. The Directive makes it more difficult for IDP members who plan to vote absentee to cast their ballots. The IDP must divert and expend more funds and resources than it would otherwise to combat the burdensome effects of the Directive.

15. Petitioners thus bring this petition to have the Secretary’s Directive declared unlawful and thereby prevent the potential widespread disenfranchisement caused by the Secretary’s erroneous interpretation of Iowa law; his ultra vires, unreasonable, irrational, arbitrary, and capricious actions; and his illegal rulemaking.

PARTIES

16. The DSCC and DCCC are political organizations involved in the upcoming 2020 general election. DSCC is the official national senatorial committee of the Democratic Party as defined and recognized by federal law. 52 U.S.C. § 30101(14). Its mission is to elect candidates of the Democratic Party to the United States Senate, including in Iowa. DSCC works to accomplish its mission across the country and in Iowa by, among other things, making expenditures for, and contributions to, Democratic candidates for U.S. Senate and assisting state parties throughout the country, including in Iowa. DCCC is the official national congressional committee of the Democratic Party as defined and recognized by federal law. 52 U.S.C. § 30101(14). DCCC's mission is to elect Democratic candidates to the U.S. House of Representatives from across the United States, including from Iowa's four congressional districts. DCCC works to accomplish its mission by, among other things, assisting state parties throughout the country, including in Iowa. DCCC intends to expend significant resources to support Democratic candidates in 2020, including specifically in Iowa.

17. The IDP is a political party as defined by Iowa Code § 42.3. Its purposes are (1) to bring people together to develop public policies and positions favorable to IDP members and the public generally, (2) to identify candidates who will support and defend those policies and positions, and (3) to persuade voters to cast their ballots for those candidates. The IDP has members in every county in Iowa.

18. Respondent Paul Pate is the Iowa Secretary of State and is named in his official capacity. He is the chief election official, the state commissioner of elections, and the state registrar of voters of Iowa.

JURISDICTION, VENUE, AND EXHAUSTION

19. Pursuant to Iowa Code § 17A.19, the Court has exclusive jurisdiction for Petitioners to seek judicial review of the lawfulness of Secretary's Directive, which is an "agency action" as defined in Iowa Code § 17A.2(2). Venue is appropriate in Polk County pursuant to Iowa Code § 17A.19(2).

20. Petitioners do not need to exhaust administrative remedies because they would suffer "irreparable injury resulting from following the administrative process." *Salsbury Labs. v. Iowa Dep't of Env'tl. Quality*, 276 N.W.2d 830, 837 (Iowa 1979). This action involves potential disenfranchisement, through no fault of the voter, in an election that is just around the corner. The Iowa Constitution protects the "right of suffrage," see Art. II, § 1, and that right would be lost if the Petitioners were forced to delay this lawsuit. Nor would monetary damages would not provide Petitioners an adequate remedy for the loss of their voting rights. See *Riley v. Boxa*, 542 N.W.2d 519, 521 (Iowa 1996). Exhaustion is also futile, as evidenced by the fact that, in the face of ongoing lawsuits and injunctions issued by Linn and Woodbury County judges, the Secretary has neither clarified or walked back his Directive. Regardless, on August 31, Plaintiffs requested that the Secretary stay his Directive by September 1.

GROUND FOR RELIEF

21. The Secretary's Directive is an agency action under Chapter 17A of the Iowa code, but is procedurally deficient, an unlawful interpretation of Iowa Code §53.2(2)(a), and arbitrary, capricious, and unreasonable under Iowa Code § 17A.19.

22. Iowa Code § 47.1(2) permits the Secretary of State to "exercise emergency powers over any election being held in a district in which either a natural or other disaster or extremely inclement weather has occurred," but the Secretary must exercise those emergency

powers pursuant to Iowa Administrative Code § 721-21.1(47) and the relevant provisions of the Iowa Administrative Procedure Act.

23. The Secretary did not invoke his emergency powers under Iowa Code § 47.1(2) when he issued the Directive. *See* Directive (referencing only the power to supervise activities of county commissioners and prescribe uniform election practices and procedures contained in Iowa Code § 47.1(a)). Accordingly, the process by which he issued the Directive was subject to Iowa Code § 17.4A's rulemaking procedures, including the period of notice and comment. *See* Iowa Code § 17A.2(11) (defining "rule" as "each agency statement of general applicability that implements, interprets, or prescribes law or policy"); *id.* § 17A.4(1) (describing mandatory notice and comment requirements for adopting a rule). The Secretary failed to comply with these required procedures. Even if the Secretary *had* invoked his emergency powers under Iowa Code § 47.1(2), the Directive exceeds the scope of the emergency powers, and the Secretary failed to follow the required rules for invoking and exercising that power. Administrative Code § 721-21.1(1) (defining covered emergencies); *id.* § 721-21.1(2), (3) (identifying required notice and declarations); *id.* § 721-21.1(4) (describing a consultation process involving county auditors). Moreover, the Secretary's emergency powers are further limited during federal elections, and the Secretary's Directive exceeds those limitations. *Id.* § 721-21.1(12) (limiting powers to modify election procedures to enumerated changes).

24. To the extent the Directive was based on the Secretary's interpretation of Iowa Code § 53.2(2)(a), that interpretation was erroneous. The Secretary has only the limited authority to prescribe "a form" (not *the only* form) for absentee ballot applications. In other words, the Secretary has authority to prescribe a form that voters *can* use to request their absentee ballots, but not the form that voters—or county auditors *must* use. The legislature has not granted the

Secretary authority to prevent other entities from creating or sending other absentee ballot request forms to registered voters.

25. The Secretary's interpretation of § 53.2(2)(a) also unconstitutionally intrudes on Linn, Johnson, and Woodbury Counties' home rule authority. Iowa counties have authority to "preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents" unless such action would be inconsistent "with the laws of the general assembly." Iowa Const. art. III, § 39A; Iowa Code § 331.301(1). Statutes implementing Iowa's county home rule expressly designate the county auditor to serve as the county commissioner of elections and to conduct all elections held within the county. Iowa Code § 331.505(1) and (2). The actions the auditors took here were well within their home rule authority, and the Secretary's Directive intruded upon that home rule authority.

26. The Secretary's interpretation of § 53.2(2)(a) also conflicts with voters' rights to request absentee ballot request forms in whatever manner they wish, so long as the "application [is] on a sheet of paper no smaller than three by five inches in size that includes all of the information required in this section," and to vote absentee. *See id.*; *see also* Iowa Const. art. II, § 1.

27. Accordingly, the Directive must be set aside because it is in violation of Iowa Code §§ 17A.19(10)(a) ("Unconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied."), 17A.19(10)(b) ("Beyond the authority delegated to the agency by any provision of law or in violation of any provision of law"), 17A.19(10)(c) ("Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency."), 17A.19(10)(d) ("Based upon a procedure or decision-making process prohibited by law or was

taken without following the prescribed procedure or decision-making process.”), 17A.19(10)(i) (“The product of reasoning that is so illogical as to render it wholly irrational”), and 17A.19(10)(j) (“The product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action.”)

RELIEF SOUGHT

28. WHEREFORE, Petitioners respectfully request that this Court enter the following relief against the Respondent:

- A. Entering a temporary and permanent injunction requiring the Secretary to withdraw the Directive and to immediately inform all auditors that to the extent the Directive forbid them from sending out or accepting preaddressed absentee ballot requests, it is withdrawn and cannot be given any effect;
- B. An order entering a stay of the Directive during the pendency of judicial review;
- C. An order declaring that Secretary Pate did not have the authority to issue the Directive;
- D. An order declaring that Secretary Pate did not follow APA requirements in issuing the Directive;
- E. An order that the Directive was arbitrary and capricious;
- F. An order declaring that all preaddressed absentee ballot request forms that were returned are not inherently invalid and directing county auditors to process them in the normal course;

- G. An order enjoining the Secretary, his respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them from implementing, enforcing, or giving any effect to the challenged Directive;
- H. An order awarding Petitioners their costs, disbursements, and reasonable attorneys' fees incurred in bringing this action pursuant; and
- I. Such other and further relief as the Court deems just and proper.

Dated: August 31, 2020

Respectfully submitted



Gary Dickey
**DICKEY, CAMPBELL, & SAHAG
LAW FIRM, PLC**
301 East Walnut, Suite 1
Des Moines, Iowa 50309
Tel: (515) 288-5008 Fax: (515) 288-5010
gary@iowajustice.com

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

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

Matthew J. Mertens (*pro hac vice pending*)
PERKINS COIE, LLP
1120 NW Couch Street, 10th Floor
Portland, O.R. 97209-4128
MMertens@perkinscoie.com

Counsel for the Petitioners