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IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

Republican National Committee, Donald J. Trump for President, Inc., National Republican Senatorial Committee, National Republican Congressional Committee, and The Republican Party of Iowa,	)	
Plaintiffs,	)	**No. CVCV081957**
vs.	)	
Travis Weipert, Auditor of Johnson County, Iowa, in his official capacity,	)	**ORDER FOR TEMPORARY INJUNCTIVE RELIEF**
Defendant.	)	

Hearing took place on September 9, 2020, on Plaintiffs' Motion for Temporary Injunction. Attorney Alan Ostergren appeared for Plaintiffs. Defendant appeared personally, and Assistant Johnson County Attorney Susan Nehring and Attorney Jason Palmer appeared with Defendant. Also present in the courtroom on behalf of Defendant were Johnson County Attorney Janet Lyness and Assistant Johnson County Attorney Rachel Zimmermann Smith. Having considered the file, relevant case law, and written and oral arguments of counsel, the Court hereby enters the following ruling.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed a Petition for Declaratory Judgment and Injunctive Relief on August 10, 2020. Plaintiffs are political organizations with involvement and interests in the November, 2020 general election, including having candidates on the ballot at all levels of elections. Defendant is the Johnson County Auditor and local commissioner of elections. By way of background information, Plaintiffs state that on July 17, 2020 the Iowa Legislative Council met to approve an emergency election measure to promote increased participation in the 2020 general election, and approved the request of the Iowa Secretary of State to send every active registered Iowa voter an absentee ballot request (ABR) form for the 2020 general election. Plaintiffs further state that, upon receiving authorization from the Legislative Council, the Iowa Secretary of State issued an emergency election directive to carry out a statewide mailing of ABR forms to voters. Plaintiffs assert the Iowa Secretary of State announced his intention to mail every Iowa voter an ABR form for the 2020 general election "which shall be blank except for the Election Date and Type." Plaintiffs further assert that Iowa county auditors were ordered to "distribute only the blank Official State of Iowa Absentee Ballot Request Form with official instructions that is promulgated by the Secretary of State's Office pursuant to Iowa Code § 53.2(2)(a)." Plaintiffs contend auditors were permitted to "distribute blank Official State of Iowa Absentee Ballot Request Forms" without the official instructions, and the directive specifically noted that some Iowa counties did not have the financial or technical resources to send ABR forms with certain information prepopulated.

Plaintiffs claim that, shortly after the Secretary of State issued this directive, Defendant announced that he intended to mail every active registered voter in Johnson County an ABR form with all of the data on the form prepopulated, including the voter's name, voter PIN, date of birth, and other information the voter is required to provide. Plaintiffs state that Defendant followed through on this intention, and has made public statements to the effect that he knew the Secretary of State had ordered him not to do so but that he planned to ignore the directive to provide voters with only a blank ABR form. Plaintiffs further state that Defendant has mailed, or is in the process of mailing, every active voter in Johnson County a prepopulated ABR form. Plaintiffs contend that because Defendant sent the ABR forms to voters with the required security information pre-populated, there is no assurance that the ABR forms returned to his office were actually sent by the voter listed on the ABR. Plaintiffs also contend that if the Defendant mails absentee ballots in response to the prepopulated ABR forms, any of those absentee ballots that are cast would be subject to challenge and may not be counted in the 2020 general election. Plaintiffs assert that Defendant's actions have harmed and threaten to further harm their interests. Plaintiffs state they have expended resources to advocate for support and encourage turnout from voters under the uniform set of election practices and rules established by a single official who is elected on a statewide basis and derives his authority from Iowa's constitution and laws passed by the legislature. Plaintiffs allege they now are faced with a different set of election practices in Johnson County, in that most Iowa voters will not receive a prepopulated ABR form, and Plaintiffs will be required to divert resources to defend against unauthorized individuals casting ballots. Plaintiffs further allege Defendant has willfully circumvented a key election-security measure designed to ensure that the person who submits an ABR form is who he or she claims to be, and Defendant's actions threaten to disenfranchise his own constituents and dilute the votes of Iowans who live outside Johnson County.

Plaintiffs seek a declaratory judgment that Defendant has violated his duty to obey the order of the Iowa Secretary of State contained within the July 17, 2020 directive. Plaintiffs also seek an injunction ordering Defendant to obey the July 17, 2020 directive of the Iowa Secretary of State, in full; to obey all other orders and directives of the Iowa Secretary of State; ordering Defendant, with respect to any prepopulated ABR forms returned to his office, to 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; and order the injunction to Defendant to apply to him, his employees, and any third parties under his control.

The pending Motion for Temporary Injunction also was filed on August 10, 2020. Plaintiffs seek prompt relief, in the form of a temporary injunction, on the matters set forth in the Petition. Plaintiffs argue they are likely to succeed on their claims; they will be irreparably harmed without an injunction; there is no other adequate legal remedy available to them; and the balance of hardships warrants injunctive relief. Plaintiffs further argue that the Court should enter a temporary injunction to prevent additional and ongoing harm to Plaintiffs and the electoral process. Plaintiffs request the Court order Defendant to obey the July 17, 2020 directive of the Secretary of State, in full; order Defendant to obey all other orders or directives of the Secretary of State; require immediate remedial measures; and apply the injunction to the entire Johnson County Auditor's Office and any third party under Defendant's control.

In support of the Motion, Plaintiffs have submitted the July 17, 2020 Emergency Election Directive; news, blog, and Twitter information regarding statements made by Defendant and the Linn County Auditor about the ABR forms; and a Declaration from J. Justin Riemer, Chief Counsel to the Republican National Committee, along with a July 27, 2020 letter from Mr. Riemer to the Iowa Secretary of State.

Defendant resists the Motion, and in support of his Resistance has filed his own declaration (Exhibit A); Secretary Pate's Emergency Election Directive (Exhibit B); a declaration from Todd Donovan, who is a professor of political science at Western Washington University (Exhibit C); and a declaration of Anthony Gaughan, a professor of law at Drake University Law School. By way of background facts, Defendant states that the challenged document is only a request form that a Johnson County voter may submit in order to obtain the actual absentee ballot. Defendant states that he is tasked with, among other responsibilities, maintaining the voter file in Johnson County through the Iowa Secretary of State's I-Voters software and processing ABRs and ensuring the accuracy of the personal voter information contained in the request. Defendant further states that Johnson County has 92,496 registered "active" voters, which means that voter has voted in at least one of the two prior general elections.

Defendant points out that, prior to the primary election that took place on June 2, 2020, the Iowa Secretary of State issued ABRs to all registered voters in Iowa, in an attempt to make voting safer and easier for Iowans during the COVID-19 public health emergency. Defendant claims the move was a massive success, and resulted in historic voter turnout, yet the Iowa Legislature immediately sought to limit the Secretary of State's emergency powers over elections by passing HF 2486, which required the Iowa Secretary of State to obtain approval from the Legislative Council before issuing any new directives under the Secretary's emergency powers, and which permitted the Legislative Council to "veto" any of the Secretary of State's proposed emergency directives and to permit the Legislative Council to create its own directives if it chose to do so. Defendant acknowledges that on July 17, 2020, the Secretary of State issued a document entitled "Emergency Election Directive" stating that the Secretary of State would send out "Official State of Iowa Absentee Ballot Requests" and mandated that county auditors shall only distribute blank forms, with Iowa voters responsible for filling in certain information in order to obtain an ABR, including the voter's name, address, birthdate, and voter ID number. Defendant states the voter ID number is typically the identification number on the voter's state-issued identification card (typically a driver's license), but may be a four-digit number issued by the State, if the voter did not have a driver's license or other state-issued identification card. Due to COVID-19, Defendant expects a drastic increase in the number of voters who will choose to vote by absentee ballot. Defendant states that Iowa has a strict requirement as to when a voter must submit an absentee ballot in order for it to be counted in the election, and if the ballot is not received by the specified date, the ballot will not be counted in the election.

Defendant has found that voters often fail to include all of the voter information necessary to obtain their ballot, or they include illegible or inaccurate voter information. Prior to the enactment of HF 2486, county auditors could access I-Voters to insert and/or correct any missing or inaccurate voter information. Defendant asserts the process required by HF 2486

takes considerably longer to use than I-Voters, and the timelines are not realistic for larger counties with large populations, or for smaller counties with limited staff under normal conditions and almost impossible during a pandemic when people are trying to vote by mail to be safe. Defendant believes there will be an unprecedented amount of missing/incorrect voter information for the auditor's offices to correct, and the auditors will not have an efficient means of correcting the missing/inaccurate information in a timely manner. Defendant also believes it will be incredibly difficult, or even impossible, for auditors to ensure that each voter who requested an absentee ballot will receive his or her respective ballot in time to submit it so that it can be counted in the general election. Defendant contends that this poses a significant threat to thousands of Iowans who will be faced with a difficult decision, i.e., risk contracting COVID-19 by voting in person, or be disenfranchised.

Defendant claims he made the responsible decision to send Johnson County voters an ABR form that was prepopulated with all of the personal voter information required under Iowa law for a voter to obtain an absentee ballot, which would reduce or eliminate the issue of correcting huge increases in missing and/or inaccurate voter information and ensure that all Johnson County voters who wish to vote via absentee ballot will not be disenfranchised. Defendant also claims his office took numerous measures to safeguard against voter fraud, including sending a postcard to each registered voter in March, 2020, requesting the voter inform the office if the voter had moved (if the mail was unable to be delivered, the voter would be removed from the active registered voter list); maintain the address library for I-Voters for all registered voters and launching an investigation any time a registered voter attempts to use an address that does not match the address contained in the I-Voters database; using a function of I-Voters to purge any duplicate voters so that a voter cannot vote in two different counties; reviewing Johnson County obituaries every day and removing any registered voters who have died; and relying upon the "death list" provided by the Secretary of State to remove any deceased voters. Defendant asserts that his office undertook additional efforts to ensure the accuracy and security of the voter information it used to prepopulate the ABRs, including sending the file of every active registered voter to the County's vendor for ABR printing through a secure, encrypted file; the vendor compared the list of voter addresses to the most-updated list from the United States Post Office, and any voters whose addresses on the two lists did not match were not sent a prepopulated form and the Johnson County Auditor's Office is working to contact these voters to confirm current addresses; and once the ABR form is received by the voter, the voter must still confirm the information, sign the form, and place the form back in the mail. Defendants states that, as of the filing of his legal argument on September 3, 2020, over 10,000 Johnson County voters have submitted the prepopulated request forms sent to them by the Johnson County Auditor's Office.

Defendant's first legal argument is that Plaintiffs lack standing to bring these claims against him. Defendant contends that Plaintiffs' claims are based solely on the allegations that the prepopulated ABRs may lead to voter fraud in Johnson County and may "dilute" the votes of Iowans living outside Johnson County. Defendant claims these injuries are not sufficient to provide Plaintiffs standing on the challenge to the sending of prepopulated ABR forms to Johnson County voters, as the alleged injuries are purely hypothetical and conjectural, and are not sufficiently concrete to provide Plaintiffs with standing.

Defendant's next argument is that the Secretary of State's emergency directive is unenforceable because it was issued pursuant to an unconstitutional provision of Iowa law. Defendant asserts that Iowa Code § 47.1(2) violates Article III, § 40 of the Iowa Constitution, in that the Iowa Constitution provides the mechanism for which the Secretary of State's administrative rules may be nullified, which is majority approval by both houses of the Iowa Legislature. Defendant contends § 47.1(2) violates this constitutional provision by providing the Legislative Council with the authority exclusively reserved for the Secretary of State. Defendant further asserts that § 47.1(2) violates the separation of powers set forth in Article III, § 1 of the Iowa Constitution by providing the Legislative Council rule-making authority and veto powers over the Executive Branch. Defendant also claims that the Secretary of State's Emergency Directive cannot be enforced because Iowa Code § 47.1(2)(a), created through HF 2486, is unconstitutional because enforcement thereof is prohibited under Iowa Code chapter 17A, and because it cannot be separated from the "stain of the unconstitutional actions of the Iowa Legislature."

Next, Defendant argues that, prior to filing their claims, Plaintiffs were required to first pursue administrative remedies with the Iowa Secretary of State. Defendant contends there is an administrative remedy for the proposed wrong, and there is an administrative code provision (found at Iowa Admin. Code r. 721-21.101(47)) that explicitly or implicitly requires exhaustion to occur prior to seeking review from the courts.

Defendant next argues that even if Plaintiffs are found to have standing and are found to not have been required to file a complaint with the Secretary of State, Plaintiffs have failed to demonstrate that a temporary injunction is warranted in this case. Defendant asserts that a temporary injunction would substitute the Court's discretion in matters assigned to Johnson County under the Iowa Constitution. Defendant further asserts that Plaintiffs will not succeed on the merits of their claim for injunctive relief because the Iowa Secretary of State's emergency directive was beyond the scope of the Secretary of State's emergency powers enumerated in the Iowa Administrative Code; Defendant was legally permitted under Johnson County's home rule authority to send the prepopulated ABRs to Johnson County voters; and the Secretary of State's emergency directive requiring only blank ABRs was unlawful and was done in an arbitrary and capricious manner. Defendant contends that Plaintiffs will not suffer any irreparable harm if their request for injunctive relief is not granted, and the interests in granting Plaintiffs' claims are far outweighed by the harm that would be suffered by the voters of Johnson County. Defendant seeks a significant bond if a temporary injunction is entered, asserting that the total cost to Johnson County likely will be a minimum of $176,843.93 if ABRs must be resent.

Plaintiffs have filed a Reply, supported by a declaration from Attorney Ostergren, stating that they have standing as political parties and as a candidate in the November, 2020 general election. Plaintiffs argue that the Secretary of State's emergency directive was constitutionally adopted and specifically authorized by statute. Plaintiffs further argue that a county official does not have standing to challenge the constitutionality of a statute, and the emergency directive was not a "rule" under the Iowa Administrative Procedures Act, thus there is no inconsistency with the constitutional power of the entire legislature to nullify an administrative rule. Plaintiffs contend the Legislative Council's approval of the directive did not violate separation of powers principles, and there is no administrative procedure for Plaintiffs to have exhausted before filing

this action. Plaintiffs also contend county home rule authority does not authorize the mailing of prepopulated ABRs. Plaintiffs assert the home rule authority of a county is exercised by the board of supervisors enacting legislation, and a county's home rule authority applies to matters of local concerns, whereas election administration is a state issue. Plaintiffs further assert Defendant did not have the discretion to distribute prepopulated ABR forms, and election integrity is a legitimate concern. Plaintiffs claim that inaction, not an injunction, will threaten the constitutional rights of Johnson County voters, in that the constitutional right to vote is not implicated by absentee ballot rules, and injunctions already have been entered in two other counties. Plaintiffs also claim that only a nominal bond should be required, as the request made by Defendant regarding bond would be tantamount to depriving Plaintiffs of meaningful access to the courts, and not all Johnson County ABRs have been sent out yet.

Attorney Ostergren later filed a second declaration that includes a technical infraction issued by the Secretary of State to Defendant.

Defendant filed a Supplemental Resistance on September 9, 2020, resisting submission of rulings from other counties; correcting the factual record to address the scope of authority of the legislative council; asserting that home rule is not limited to a board of supervisors enacting legislation; and asserting the Court can consider the constitutionality of Legislative Council approval.

Additionally, Attorney Nehring has submitted a declaration that includes copies of the sample prepopulated ballot from Defendant; press releases from the Secretary of State on March 20, 23, and 31, 2020; and an affidavit from Defendant.

Following the hearing, Defendant submitted a declaration from Iowa State Senator Pam Jochum, who serves on the Legislative Council. The affidavit sets forth Senator Jochum's description of Legislative Council activities, as well as her recollections regarding the Council's actions on the ABR forms in July, 2020.

CONCLUSIONS OF LAW

Iowa Rule of Civil Procedure 1.1502 allows temporary injunctions "under any of the following circumstances:

> 1.1502(1) When the petition, supported by affidavit, shows the plaintiff is entitled to relief which includes restraining the commission or continuance of some act which would greatly or irreparably injure the plaintiff.
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> 1.1502(2) Where, during the litigation, it appears that a party is doing, procuring or suffering to be done, or threatens or is about to do, an act violating the other party's rights respecting the subject of the action and tending to make the judgment ineffectual.
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> 1.1502(3) In any case especially authorized by statute."

I.R.Civ.P. 1.1502. "A petition seeking a temporary injunction shall state, or the attorney shall certify thereon, whether a petition for the same relief, or part thereof, has been previously

presented to and refused by any court or justice, and if so, by whom and when." I.R.Civ.P. 1.1504.

"'A temporary injunction is a preventive remedy to maintain the status quo of the parties prior to the final judgment and to protect the subject of the litigation.'" Lewis Investments, Inc. v. City of Iowa City, 703 N.W.2d 180, 184 (Iowa 2005) (citing Kleman v. Charles City Police Dep't, 373 N.W.2d 90, 95 (Iowa 1985)). "'The issuance or refusal of temporary injunction rests largely in the sound discretion of the trial court, dependent upon the circumstances of the particular case.'" Id. (citing Kent Prods. v. Hoegh, 245 Iowa 205, 211, 61 N.W.2d 711, 714 (1953)). "One requirement for the issuance of a temporary injunction is a showing of the likelihood or probability of success on the merits of the underlying claim." Id.

The Iowa Supreme Court has "often noted that '[a]n injunction is an extraordinary remedy which should be granted with caution and only when clearly required to avoid irreparable damage.'" Sear v. Clayton County Zoning Board of Adjustment, 590 N.W.2d 512, 515 (Iowa 1999). "The party seeking the injunction must establish: (1) an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for an injunction is granted; and (3) that there is no adequate legal remedy available." Id. "When considering the appropriateness of an injunction 'the court should carefully weigh the relative hardship which would be suffered by the enjoined party upon awarding injunctive relief." Id. Another factor to be considered is the public interest in granting injunctive relief. Mid-America Real Estate Co. v. Iowa Realty Co., Inc., 406 F.3d 969, 972 (8th Cir. 2005). A party is not entitled to injunctive relief when it has an adequate remedy at law. Lewis, 703 N.W.2d at 185.

With respect to Defendant's objection to the submission by Plaintiffs of rulings on related issues from other counties, the parties are advised that, while the Court has read (and in one instance, authored) the rulings, some of the issues presented by this case and separate and distinct from those cases, and the Court enters this Ruling independent of the rulings entered in the other cases. The Court acknowledges, however, that due to the undersigned having authored a related Linn County decision, some of the conclusions in this Ruling will be identical to those included in the Linn County ruling, as the Court has not reached different conclusions on some of the issues presented by this case.

The only issue before the Court at this time is whether Plaintiffs are entitled to temporary injunctive relief pending the outcome of this lawsuit. The Court first considers whether Plaintiffs are likely to succeed on their claims. At the outset, Defendant has challenged Plaintiffs' standing to bring this action. The Iowa Supreme Court has discussed the issue and previous authorities related to standing in detail in Alons v. Iowa Dist. Court for Woodbury County, 698 N.W.2d 858, 863-64 (Iowa 2005). There, the Court stated as follows:

> In Citizens for Responsible Choices v. City of Shenandoah, we said that standing to sue means "a party must have 'sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'" 686 N.W.2d 470, 475 (Iowa 2004) (citations omitted); accord Sanchez v. State, 692 N.W.2d 812, 821 (Iowa 2005). As far as Iowa law is concerned, this means "that a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected." Id. Having a

legal interest in the litigation and being injuriously affected are separate requirements for standing. Id.

Standing is a doctrine courts employ to

> refuse to determine the merits of a legal controversy irrespective of its correctness, where the party advancing it is not properly situated to prosecute the action. When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded.

59 Am. Jur. 2d Parties § 36, at 442 (2002) (footnotes omitted); see also Hawkeye Bancorporation v. Iowa Coll. Aid Comm'n, 360 N.W.2d 798, 802 (Iowa 1985) ("standing is a self-imposed rule of restraint").

In short, the focus is on the party, not on the claim. 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3531, at 339 (1984) [hereinafter Wright]. Even if the claim could be meritorious, the court will not hear the claim if the party bringing it lacks standing. See Citizens, 686 N.W.2d at 475 ("Whether litigants have standing does not depend on the legal merit of their claims, but rather whether, if the wrong alleged produces a legally cognizable injury, they are among those who have sustained it.").

Alons v. Iowa Dist. Court for Woodbury County, 698 N.W.2d 858, 863-64 (Iowa 2005).

The Court concludes that, as entities with involvement and interests in the outcome of the November, 2020 general election, including with respect to voter registration and mobilization and having representatives of their political party on the ballot, Plaintiffs have shown a likelihood of being found to have a specific personal or legal interest in this litigation, and shown a likelihood of being injuriously affected, due at least in part to the fact that not all counties in Iowa have the finances to create prepopulated ABRs. When the focus is placed on the party, not the claim, Plaintiffs have shown that, if the claims alleged produce a legally cognizable injury, they are among those who have sustained it. Alons, 698 N.W.2d at 864. Thus, Plaintiffs pass the hurdle of standing, when it comes to applying the standards for considering whether a temporary injunction is appropriate.

The Court next considers Plaintiffs' likelihood of success on the merits of their stated claim, i.e., a declaration that Defendant has violated his duty to obey the order of the Iowa Secretary of State contained within the July 17, 2020 directive, and obtain resulting injunctive relief.

Iowa Code § 53.2(4)(a)(1)-(6) is titled "Application for ballot," and sets forth requirements as to what an application for an absentee ballot must include (name and signature, date of birth, address where voter is registered to vote, voter verification number, name or date of the election, and any other information necessary to determine the correct absentee ballot for the voter). Although § 53.2 does not specifically state that the application has to be completed by

the voter, the fact that it is titled "Application for ballot," uses the phrase "apply" for such a ballot, and requires the signature of the voter implies that the Iowa Legislature intended for the information to be included on an application for an absentee ballot to be provided by the voter himself or herself. Moreover, Iowa Code § 53.2(4)(b) provides that if insufficient information is provided, the commissioner of elections is to obtain the missing information. This section was very recently amended to require this contact be *with the applicant*, and provides:

> If insufficient information has been provided, including the absence of a voter verification number, either on the prescribed form or on an application created by the applicant, the commissioner shall, within twenty-four hours after the receipt of the absentee ballot request, contact the applicant by telephone and electronic mail, if such information has been provided by the applicant. If the commissioner is unable to contact the applicant by telephone or electronic mail, the commissioner shall send a notice to the applicant at the address where the applicant is registered to vote, or to the applicant's mailing address if it is different from the residential address. If the applicant has requested the ballot to be sent to an address that is not the applicant's residential or mailing address, the commissioner shall send an additional notice to the address where the applicant requested the ballot to be sent. A commissioner shall not use the voter registration system to obtain additional necessary information. A voter requesting or casting a ballot pursuant to section 53.22 shall not be required to provide a voter verification number.

Iowa Code § 53.2(4)(b) (2019) (effective July 1, 2020).

It is implausible to conclude that near total completion of an absentee ballot application by the auditor is authorized under Iowa law where the legislature has specifically forbidden government officials from partially completing the same document. This interpretation is bolstered by the fact that emergency legislative authorization, through the Iowa Legislative Council, was required before the Secretary of State could prepopulate "blank" ABRs with "the Election Date and Type." Moreover, as a partial justification for his decision to prepopulate ABRs contrary to the Secretary of State's directive, Defendant states that, in his experience, applicants often fail to include all of the voter information necessary to obtain their absentee ballot, or they include illegible or inaccurate voter information on the application. Thus, Defendant admits he prepopulated the ABRs to preemptively correct and/or complete otherwise defective ABRs. Under Section 53.2(4)(b), Defendant is specifically forbidden from undertaking this type of corrective action. The Court concludes that Plaintiffs have a likelihood of showing that the voter himself or herself must complete the ABR form, and that county auditors cannot prepopulate the ABR form for voters.

For the purposes of this case and the pending request for injunctive relief, the real dispute between the parties is the construction and application of Iowa Code § 47.1(2). Iowa Code § 47.1(1) designates the Iowa Secretary of State as the state commissioner of elections, and gives him/her supervisory authority over the activities of county commissioners of elections. The Secretary of State also has the authority to prescribe uniform election practices and procedures, as well as forms, and may exercise emergency powers. See Iowa Code §§ 47.1(1) and (2) (2019). These sections provide, in their entirety:

> 1. The secretary of state is designated as the state commissioner of elections and shall supervise the activities of the county commissioners of elections. There is established within the office of the secretary of state a division of elections which shall be under the direction of the state commissioner of elections. The state commissioner of elections may appoint a person to be in charge of the division of elections who shall perform the duties assigned by the state commissioner of elections. The state commissioner of elections shall prescribe uniform election practices and procedures, shall prescribe the necessary forms required for the conduct of elections, shall assign a number to each proposed constitutional amendment and statewide public measure for identification purposes, and shall adopt rules, pursuant to chapter 17A, to carry out this section.
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> 2. a. The state commissioner of elections may 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. The state commissioner's decision to alter any conduct for an election using emergency powers must be approved by the legislative council. If the legislative council does not approve the secretary of state's use of emergency powers to conduct an election, the legislative council may choose to present and approve its own election procedures or choose to take no further action. The state commissioner of elections may also exercise emergency powers during an armed conflict involving United States armed forces, or mobilization of those forces, or if an election contest court finds that there were errors in the conduct of an election making it impossible to determine the result.
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> b. If an emergency exists in all precincts of a county, the number of polling places shall not be reduced by more than thirty-five percent. The polling places allowed to open shall be equitably distributed in the county based on the ratio of regular polling places located in unincorporated areas in the county to regular polling places in incorporated areas in the county.

Iowa Code § 47.1(1) and (2) (2019) (effective July 1, 2020).

With respect to this case, the Iowa Secretary of State, *with the authority of the legislature*, has specifically ordered county auditors to distribute only blank absentee ballot request forms, which the Court finds to be appropriate, pursuant to the authority granted to the Secretary of State in Iowa Code chapter 47, the provisions of chapter 53 regarding application for an absentee ballot, and the Iowa Legislative Council's July 17, 2020 approval. Plaintiffs have a likelihood of showing that Defendant's actions are directly contrary to the statutory directives of the legislature. Plaintiffs correctly point out that the United States Supreme Court has held that "lower federal courts should ordinarily not alter the election rules on the eve of an election." Republican National Committee v. Democratic National Committee, --- U.S. ---, 140 S.Ct. 1205, 1207, 206 L.Ed.2d 452 (2020). However, as Plaintiffs also point out, they are seeking to enforce an election statute with which Defendant has indicated, through his actions of mailing prepopulated ballots, he will not comply. The Iowa Secretary of State, who has supervisory authority over the county commissioners of elections, issued an emergency directive regarding the mailing of ABRs, pursuant to the express authority provided by the legislature, and neither

Defendant nor any other county auditor (to the Court's knowledge) challenged the directive as unconstitutional in a court proceeding prior to proceeding with the mailing of prepopulated ABRs.

Defendant has argued that the Secretary of State's Emergency Directive is unenforceable because it was issued pursuant to an unconstitutional provision of Iowa law. The Iowa Supreme Court has held:

> Our standard of review with regard to constitutional challenges to statutes is well established,
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> > We review constitutional challenges to a statute de novo. In doing so, we must remember that statutes are cloaked with a presumption of constitutionality. The challenger bears a heavy burden, because it must prove the unconstitutionality beyond a reasonable doubt. Moreover, "the challenger must refute every reasonable basis upon which the statute could be found to be constitutional." Furthermore, if the statute is capable of being construed in more than one manner, one of which is constitutional, we must adopt that construction.

Iowa State Educ. Ass'n v. State, 928 N.W.2d 11, 15 (Iowa 2019) (citing State v. Seering, 701 N.W.2d 655, 661 (Iowa 2005) (quoting State v. Hernandez-Lopez, 639 N.W.2d 226, 233 (Iowa 2002)), *superseded by statute on other grounds*, 2009 Iowa Acts ch. 119, § 3 (codified at Iowa Code § 692A.103 (Supp. 2009)), *as recognized in* In re T.H., 913 N.W.2d 578, 588 (Iowa 2018). Courts can employ the remedy of "severing statutory provisions…if the excised statute (1) does not substantially impair the legislative purpose, (2) remains capable of fulfilling the apparent legislative intent, and (3) can be given effect without the excised language." State v. Louisell, 865 N.W.2d 590, 600 (Iowa 2015).

There are two bases for Defendant's argument regarding the unconstitutionality of § 47.1(2)(a). One is that it violates the separation of powers under Article III, Section 1 of the Iowa Constitution. Defendant contends that if the Legislative Council does not approve certain actions of the Secretary of State, the Legislative Council can choose, pursuant to § 47.1(2)(a), to present and approve its own election procedures. Defendant argues that this violates the separation of powers because the Legislative Council is essentially taking power away from the Secretary of State and keeping it for itself.

The burden of proving unconstitutionality is a high hurdle. There is a presumption that § 47.1(2)(a) is constitutional, the Court must adopt any construction that renders the statute capable of being construed as constitutional, and the Court also has the ability and the duty to excise constitutionally offensive portions of the statute to substantially preserve the legislative intent of the statute as a whole. The Court concludes that Plaintiffs have shown a likelihood of success on the question of whether the actions of the Secretary of State were specifically authorized by Iowa Code § 47.1(2)(a), as amended by HF 2486, and there is not a likelihood that § 47.1(2)(a) will be found unconstitutional.

As Plaintiffs point out, the statute was passed during the ongoing COVID-19 public health emergency, and the Court agrees with Plaintiffs that it is not possible that the Legislative Council was unaware that it was crafting a rule for the 2020 general election, during the COVID-19 pandemic. Defendant does not seriously contest that COVID-19 presents an emergency situation. The Legislative Council is authorized by Iowa Code § 2.42 to conduct the business of the legislature during intersession periods, and is a bipartisan council. See Iowa Code § 2.41 (2019). With respect to the application of § 47.1(2)(a) to the actions of the Legislative Council in this case, the Legislative Council never actually got to the point of taking away powers of the Secretary of State and keeping them for itself. In a "worst case scenario," the Court could potentially excise out that portion of the statute about which Defendant complains, and even absent the removal of allegedly unconstitutional portions of the statute, the purported unconstitutional action was not actually taken by the Legislative Council in this case. The prior version of § 47.1 gave the Secretary of State emergency powers, but did not include the requirement that the Legislative Council had to approve any emergency powers exercised by the Secretary of State. The action complained of in this case (i.e., Defendant's alleged failure to following the emergency directive of the Secretary of State) stems from a directive of the Secretary of State, and for purposes of considering injunctive relief, it is irrelevant that the Legislative Council approved the directive, because the approval did not take away from the authority of the Secretary of State to issue the directive in the first place. It was within the Secretary of State's authority provided by Iowa Code chapter 47 to issue the directive to county auditors to only send their voters blank ABR forms.

Defendant's other argument regarding the unconstitutionality of § 47.1(2)(a) is that the actions of the Legislative Council are unconstitutional because they nullify an administrative rule, in violation of Article I, Section 40 of the Iowa Constitution. In support of this argument, Defendant relies on Iowa Admin. Code r. 721-21.1(47), addressing emergency election procedures, and Iowa Admin. Code r. 721-21.4(49), addressing changes of address at the polls (the Court takes Defendant's reliance on these sections from page 12 of his brief). However, Iowa Code § 47.1(2)(a) is not an administrative rule; it is a statute that creates one-time procedures applying to unique and emergent situations which, in this case, is the effects of the COVID-19 pandemic on the November, 2020 general election. This is not a permanent change to the administrative code rules applying the Secretary of State, and the Legislative Council's approval of the Secretary of State's emergency directive does not equate with legislative rulemaking. Iowa Code § 47.1(2)(a) does not create an exhaustive list of things the Secretary of State may or may not do; it simply provides that, in an emergency situation, the state commissioner of elections may exercise emergency powers.

Moreover, the Supreme Court has recognized that "neither the attorney general nor a county may challenge the constitutionality of a state statute while acting as a litigant." In re A.W., 741 N.W.2d 793, 804 (Iowa 2007). The Court in In re A.W. addressed a county attorney's challenge to the constitutionality of a state statute while representing the State in litigation, finding "[i]t would be illogical to allow a constitutional challenge of a statute by a county attorney representing the State in district court, while precluding the attorney general handling the same case on appeal from making the same argument." Id. While the case before this Court involves the Johnson County Auditor as a party, not the Johnson County Attorney, the Iowa Supreme Court has "also held counties, as creatures of statute, have no standing to challenge the

constitutionality of state statutory provisions." Id. Defendant argued at hearing that, while a government official cannot challenge the constitutionality of a statute as an initial argument, i.e., one brought by the official himself, the official can raise the argument in response to a claim stated against him. However, the Court construes In re A.W. as applying at any time a county official is "acting as a litigant," and thus Defendant would be unlikely to successfully argue, in these proceedings, that § 47.1(2)(a) is unconstitutional.

The Court is not persuaded, at this stage of litigation, that the actions of the Secretary of State implicate the Administrative Procedure Act; that the Administrative Procedure Act overrides the explicit authority granted to the Legislative Council under Iowa Code § 47.1(2)(a); that there has been any violation of separation of powers principles by the Legislative Council; or that there was any administrative procedure for Plaintiffs to exhaust before seeking their relief in this action. Even if the Emergency Directive is a "rule" for the purposes of the Administrative Procedure Act, the Court agrees with Plaintiffs that the emergency nature of the directive, due to the circumstances presented by the COVID-19 public health emergency, was an action that has been intended to apply to only the specific set of facts present with respect to the 2020 general election. See Iowa Code § 17A.2(11)(b) (2019). Plaintiffs are likely to prevail on their own claims as stated in the Petition, i.e., the allegation that Defendant violated the directive of the Secretary of State and that there is a need for uniformity in statewide elections, despite the constitutional challenges raised by Defendant.

Defendant also has argued that he was legally permitted under Johnson County's home rule authority to send the prepopulated absentee ballot request forms to Johnson County voters. Article III, § 39A of the Iowa Constitution grants counties home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government. "A county may, except as expressly limited by the Constitution of the State of Iowa, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents." Iowa Code § 331.301(1) (2019). Under such home rule, the legislature retains the power to trump or preempt local law. Baker v. City of Iowa City, 750 N.W.2d 93, 99 (Iowa 2008). Iowa Code § 331.101(10) defines "ordinance" as "a county law of a general and permanent nature." A local ordinance is inconsistent "with a law of the general assembly and, therefore, preempted by it when the ordinance 'prohibits an act permitted by a statute, or permits an act prohibited by a statute.'" City of Des Moines v. Gruen, 457 N.W.2d 340, 342 (Iowa 1990) (citing City of Council Bluffs v. Cain, 342 N.W.2d 810, 812 (Iowa 1983)).

The Court agrees with Plaintiffs that the general principles of home rule authority relied on by Defendant do not belong to him, but belong to the Johnson County Board of Supervisors. It is the Board of Supervisors that would have authority to enact any ordinance falling within home rule status, and in this case, no ordinance requiring prepopulated ABRs has been passed by the Johnson County Board of Supervisors. There do not appear to be any independent home rule powers delegated to a county auditor, and the Court already has found that the directive issued by the Secretary of State was within his statutory authority. HF 2643 clearly requires county auditors to contact voters by telephone, email, or letter to obtain information regarding an

incomplete ABR. While the parties may dispute the merits of election integrity and whether it is a real concern, the fact remains that the Iowa Legislature has set forth specific parameters for completion of ABRs, and Defendant's actions fall outside of those parameters.

Plaintiffs have shown that they have a likelihood of success on the merits of their claim.

Plaintiffs also have demonstrated that they will suffer irreparable harm if an injunction is not entered, since not every county can afford the prepopulated request forms utilized by Defendant, and since different actions by different county auditors will require different actions by Plaintiffs when it comes to things like voter registration, voter mobilization, and the overall integrity of the votes cast. Plaintiffs also have no other adequate legal remedy, because a damages award at a later stage of litigation will do nothing to remedy the potential violation of Iowa law by Defendant. Finally, in balancing the hardships faced by the parties, the Court finds that relief is warranted in favor of Plaintiffs because Plaintiffs are attempting to enforce the valid exercise of power by the Secretary of State and specific statutory directives of the legislature. It is true that significant remedial measures will have to be undertaken by Defendant and his staff to correct the ABRs that were mailed in contradiction to the directive. However, as the Court already has found, Defendant's actions in mailing out the prepopulated ABRs show he was aware of the risk he was taking, and the remedial measures are a direct consequence of the risk knowingly taken by Defendant. Granting temporary injunctive relief does not mean that Johnson County voters who choose to vote by absentee ballot will lose their right to vote; they simply cannot use the prepopulated ABRs mailed by Defendant, but may acquire an absentee ballot in another manner permitted by Iowa law. In fact, ordering Defendant to provide new ABRs to voters, without the prepopulated information, will serve to preserve the integrity of any ballot ultimately cast by the voter, because the prepopulated ABR form could not later be used as a basis to challenge a ballot that already has been cast. Said differently, correcting this error before any ballot is cast preserves every Johnson County voter's right to have his or her vote counted. The Court also acknowledges that an injunction is an extraordinary remedy which should be granted with caution, but in this case, the Iowa Secretary of State, the individual responsible for supervising the activities of county commissioners of elections, issued a clear directive authorized by the legislature, and Defendant violated that directive. The Court finds this is the type of extraordinary situation in which temporary injunctive relief is appropriate.

Finally, there is the question of bond. Iowa Rule of Civil Procedure 1.1508 provides:

> The order directing a temporary injunction must require that before the writ issues, a bond be filed, with a penalty to be specified in the order, which shall be 125 percent of the probable liability to be incurred. Such bond with sureties to be approved by the clerk shall be conditioned to pay all damages which may be adjudged against the petitioner by reason of the injunction. But in actions for dissolution of marriage, separate maintenance, annulment of marriage, or domestic abuse, the court in its discretion may waive any bond, or fix its penalty in any amount deemed just and reasonable.

I.R.Civ.P. 1.1508. The Court construes the language of Rule 1.1508 as requiring a bond of 125% of the probable liability to be incurred. The Court finds that this amount should be nominal, as the "probable liability" to be incurred is not the potential costs borne by Johnson

County taxpayers to remedy Defendant's knowing and intentional defiance of the Secretary of State's directive, rather, the probable liability in this case seems essentially to be the costs of the action, i.e., court costs and filing fees. The Court concludes that a bond amount of $500.00 is sufficient to cover these amounts and meet the requirements of Rule 1.1508. Defendant's request for a higher bond amount is denied.

The Motion for Temporary Injunction should be granted.

RULING

IT IS THEREFORE ORDERED that Plaintiff's Motion for Temporary Injunction is **GRANTED**. Defendant is temporarily ordered to obey the provisions of Iowa Code § 53.2 and the July 17, 2020 directive of the Iowa Secretary of State, in full, and with 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. This injunction applies to Defendant, his employees, and any third parties under his control. Plaintiffs shall immediately post a cash or surety bond in the amount of $500.00. Plaintiffs shall contact the Clerk of Court to determine the most appropriate method for effectuating this process. Once bond has been approved, the Clerk of Court shall issue notice of receipt.

Clerk to notify.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV081957	REPUBLICAN NATIONAL COMMITTEE, ET AL VS WEIPERT, AUDITOR

So Ordered

Ian K. Thornhill, District Court Judge,
Sixth Judicial District of Iowa