



**Republican  
National  
Committee**  
Counsel's Office

**BY EMAIL**

July 27, 2020

The Honorable Paul Pate  
Iowa Secretary of State  
1007 East Grand Avenue  
Room 105, State Capitol  
Des Moines, IA 50319

RE: County Auditors' Decision to Illegally Distribute  
Pre-Completed Absentee Ballot Request Forms

Dear Secretary Pate:

We understand from recent press accounts that two county auditors will imminently be distributing, or already have distributed, absentee ballot request forms with the statutorily required information pre-populated based on data obtained from government records. Linn County Auditor Joel Miller and Johnson County Auditor Travis Weipert are distributing forms with the voter's name, address, date of birth, and voter identification number (*i.e.*, driver's license number or last four digits of the voter's social security number) already filled out. This reckless act is not only a severe breach of security (particularly for confidential information like a person's date of birth and voter identification PIN), but likely violates both the U.S. Constitution's Equal Protection Clause and Iowa law. We respectfully request that you exercise your authority as State Commissioner of Elections, *see* Iowa Code § 47.1(1)-(4); *see also id.* § 53.1A, to issue an order prohibiting County Auditors and other election officials from distributing absentee ballot request forms with voter information filled out.

As an initial matter, we recognize the unique challenges that COVID-19 poses to voting and the conduct of elections, and commend the aggressive steps your office has taken to protect voting rights while preserving the integrity of the electoral process. Last week, on July 17, the Legislative Council approved your proposal to automatically distribute blank absentee ballot forms to each registered voter in the state. Requiring each voter to supply their own confidential information, including their date of birth and voter identification number, serves as a "check" to ensure that absentee ballot request forms are completed by the voters themselves, rather than

unscrupulous third parties. Moreover, having voters fill in their own information maximizes the likelihood that it is accurate and up-to-date, rather than allowing voters to simply sign a form with only a momentary cursory perusal. As you know, a voter can update his or her registration address or name on record when completing the absentee ballot request form. § 53.2(8) Your decision to send blank forms to all registered voters alleviates the need for, and preempts, county auditors' decisions to distribute pre-completed forms revealing voters' confidential information.

The Linn and Johnson County Auditors' decision to indiscriminately distribute confidential voter information not only undermines those voters' privacy and jeopardizes the integrity of the electoral process, but raises at least four serious legal concerns, as well. **First**, their decision likely violates the U.S. Constitution's Equal Protection Clause, U.S. Const., amend. XIV, § 1, because it affords "arbitrary and disparate treatment" to voters participating in the same statewide election in November. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). Applying this principle, courts across the nation have invalidated election-related actions and policies when political subdivisions within a state treated their respective residents substantially differently in the context of statewide elections. For example, it is likely unconstitutional for counties within a state to adopt different voting systems with materially different error rates. *See, e.g., Common Cause v. Jones*, 213 F. Supp. 2d 1106, 1107 (C.D. Cal. 2001), *reconsid. den'd*, 213 F. Supp. 2d 1110 (C.D. Cal. 2002); *Black v. McGuffage*, 209 F. Supp. 2d 889, 892 (N.D. Ill. 2002) (same); *see also Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *vacated and reh'g en banc granted*, No. 05-3044, 2006 U.S. App. LEXIS 32545 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007). Courts have likewise held that the Equal Protection Clause requires counties to have substantially uniform policies concerning issues like third-party ballot harvesting, *see Pierce v. Allegheny County Bd. of Elections*, 324 F. Supp. 2d 684, 706 (W.D. Pa. 2003); acceptance of electronic signatures, *Mullins v. Cole*, 218 F. Supp. 3d 488, 490 (S.D. W. Va. 2016); or inclusion of a citizenship checkbox on voting-related forms, *Bryanton v. Johnson*, 902 F. Supp. 2d 983, 999 (E.D. Mich. 2012).

Here, auditors in two counties are sending their citizens absentee ballot request forms with their names, addresses, birthdates, and voter identification numbers already populated based on government records. Thus, government officials are selectively revealing only to some voters exactly the information from the statewide voter registration database that election officials would deem legally sufficient to entitle them to receive an absentee ballot. Other voters, in contrast, are left to fill out the forms themselves, subjecting them to the possibility that their information will be declared incorrect or a "mismatch." This system unfairly guarantees that only some voters will receive an absentee ballot simply by signing the request form, while others face the potential for rejection. The Equal Protection Clause prohibits government officials from according such disparate treatment to voters participating in the same election. Your office's decision to distribute blank absentee ballot request forms to all voters throughout the state, in contrast, satisfies Equal Protection restrictions by placing all voters on a level playing field, according everyone an equal opportunity to apply for, receive and cast absentee ballots.

This situation is similar to *Bryanton v. Johnson*, 902 F. Supp. 2d at 989, in which the Michigan Secretary of State directed county election officials to add a citizenship checkbox to voter registration forms and absentee ballot request forms. The order emphasized that, even if voters failed to check the box, they should still be permitted to vote. Election officials in several counties, believing the order was invalid, refused to add checkboxes to the registration and

absentee ballot request forms they distributed to voters. The U.S. District Court for the Eastern District of Michigan held that the Equal Protection Clause prohibited election officials in some counties from distributing forms with citizenship checkboxes while officials in other counties did not. *Id.* at 999 (“[I]nconsistent administration of the citizenship verification question will lead to extensive arbitrary and disparate treatment during the November 6, 2012 general election . . . .”). The court went on to specifically emphasize, “[N]on-uniformity is already inherent in the system with regard to absentee voter applications . . . .” Likewise, here, voters in different counties will be receiving materially different absentee ballot request forms. Some forms will have pre-populated information taken directly from governmental databases that precludes them from being rejected due to inaccuracies or mismatches. Others are blank, subjecting voters to the risk of rejection. Such non-uniformity and inconsistent administration is constitutionally intolerable.

**Second**, the county auditors’ actions appear to violate Iowa’s absentee voting statute, as well. State law was recently amended to specify that “*a registered voter shall provide*” various pieces of information on their absentee ballot application, including their name, address, date of birth, and voter identification number. Iowa Stat. § 53.2(4)(a)(1)-(6). The statute goes on to provide, “If insufficient information has been provided,” election officials will attempt to notify the voter. *Id.* § 53.2(4)(b). State law expressly requires the *voter* to provide the requested information. This conclusion is even more apparent when the newly enacted version of the statute, *see* 2020 H.F. 2643, §§ 123-25 (eff. July 1, 2020), is compared to the previous version. Prior to the recent amendment, this provision was written in the passive voice, specifying only that each absentee ballot application “shall contain” the specified information. Iowa Stat. § 53.2(4)(a) (2018). The legislature’s decision to specifically change § 53.2(4)(a)’s language demonstrates that the voter must play some active role in “provid[ing]” the information on his or her application. The counties’ prepopulated forms violate § 52.3(4)(a) because the only thing they require voters to provide is their signatures.

**Third**, the county auditors’ actions likely also violate Iowa’s election emergency statute, Iowa Code § 47.1(2)(a). That provision allows the state commissioner of elections—you—to “exercise emergency powers over any election being held” when a natural disaster or other crises occurs. Iowa Code § 47.1(2)(a). The law specifies, “The state commissioner’s decision to alter any conduct for an election using emergency powers must be approved by the legislative council.” *Id.* It further empowers the commissioner to “adopt rules describing the emergency powers and the situations in which the powers will be exercised.” *Id.*

The county auditors violated this statute by taking it upon themselves to exercise emergency powers without authorization from either your office or the Legislative Council. When you, in your capacity as state commissioner of elections, wished to distribute *blank* absentee ballot forms to voters, you were required to seek authorization from the Legislative Council, *see* Sec’y of State Paul D. Pate, *Emergency Election Directive* (July 16, 2020) (attached as Exhibit 1), and the Council approved it, *see* Letter from W. Charles Smithson, Secretary of the Iowa Senate, to Paul Pate, Secretary of State, *Notice of Legislative Council Decision on July 17 Emergency Election Directive* (July 20, 2020) (attached as Exhibit 2). It would be patently absurd and completely undermine the legislature’s express intentions to construe § 47.1 as requiring you to seek permission from the Legislative Council to distribute *blank* absentee ballot request forms, yet

allowing county officials to unilaterally distribute *prepopulated* forms without authorization from either your office or the council.

Moreover, § 47.1 expressly grants you the authority to address election emergencies such as COVID. You have appropriately exercised that authority by obtaining the Legislative Council's approval to distribute blank absentee ballot request forms to voters throughout the state. The county auditors are infringing on your emergency powers under § 47.1 by second-guessing your judgment and unilaterally disseminating pre-populated forms instead. Since state law does not grant county auditors election emergency authority to "alter any conduct for an election," and their actions directly contravene your judgment in responding to the emergency, they are illegal.

**Finally**, the county auditors' decision to distribute pre-populated absentee ballot request forms without authorization may violate Iowa's prohibition on solicitation by public employees. Iowa law provides that, with certain inapplicable exceptions, it is unlawful for any state, county, or municipal employee to solicit either applications, or requests for applications, for absentee ballots, or to take affidavits in connection with absentee ballots, in the course of their employment. Iowa Code § 53.7(1). It is likewise illegal for any public officer or employee to require a public employee to either "solicit an application or request an application for an absentee ballot" or "take an affidavit or request for an affidavit in connection with an absentee ballot application." *Id.* § 53.7(2). Distributing pre-completed absentee ballot request forms, and encouraging voters to simply sign and return them, appears to constitute solicitation of an application for absentee ballots in violation of these provisions. Again, your office had to receive specific permission from the Legislative Council before circulating blank forms. The County Auditors, in contrast, have no such legal authorization for such *ultra vires* actions.

In conclusion, we respectfully request that you immediately issue an emergency rule, order, directive, or other appropriate instrument:

- prohibiting all county auditors from distributing absentee ballot request forms that are pre-populated with any information specified in Iowa Code § 53.2(4)(a);
- requiring county auditors to discontinue any such activity;
- directing any county auditors that have distributed absentee ballot request forms prepopulated with any of the information specified in Iowa Code § 53.2(4)(a) to:
  - individually notify each voter by mail and e-mail that the prepopulated form is invalid and may not be used to request absentee ballot; and
  - send a replacement blank absentee ballot request form to each voter who received a prepopulated form.
- directing any county auditor who receives a prepopulated absentee ballot request form back from a voter with the voter's signature shall:

- disregard any prepopulated information on the form for purposes of determining compliance with Iowa Code § 53.2(4)(a);
- declare the form legally insufficient for transmitting an absentee ballot to the voter; and
- proceed under Iowa Code § 53.2(4)(b)'s provisions for when “insufficient information has been provided.”

Please do not hesitate to contact me at if you have any questions. I look forward to the opportunity to resolve this issue without the need for litigation. The auditors of Linn and Johnson Counties have given their voters an unconstitutional advantage in the November election; blatantly violated state law provisions governing absentee voting, election emergencies, and solicitation of absentee ballot applications; undermined the authority of both your office and the Legislative Council; and needlessly circumvented crucial safeguards on the integrity of the absentee voting process. I look forward to receiving your response at your earliest convenience.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Justin Riemer", with a long horizontal flourish extending to the right.

J. Justin Riemer  
Chief Counsel  
Republican National Committee