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Dear Representatives Kaufmann, Nielsen, & Young,

Recounts are important. Fair, neutral rules developed well before an election are essential before a close election arises. And reforming recount law requires careful consideration to ensure that it is solving problems, not creating them.

I write this letter to express some concerns about House File 356. As written, H.F. 356 would not improve many of the present problems relating to recounts, and, in some cases, may make some problems worse.

I am a law professor at the University of Iowa College of Law. I teach and write in the area of election law. I have written more than two dozen articles on election law, in addition to giving many presentations and publishing many opinion pieces on election law. I have testified before Congress on election law, and I have filed amicus briefs before the United States Supreme Court on election law. Importantly, I volunteered on behalf of Representative-Elect Mariannette Miller-Meeks on the Johnson County Recount Board in November 2020, where I helped recount 84,197 ballots as a part of the closest certified election result in the history of the United States House of Representatives.

Iowa law has several flaws that risk making recounts unreliable, inconsistent, and slow. Those flaws include:

- Allowing local recount boards to make decisions inconsistent with other recount boards across the state, which risks treating similarly-situated voters differently.
- Decentralizing recounts at the county level, when uniformity demands statewide standards.
- Allowing non-viable challengers to request a recount and depending on challengers to choose their preferred recount path.
- Dictating that recounts occur with either a machine recount or a hand tally, rather than more targeted and superior methods of recounting.

- Treating recounts as adversarial contests rather than ministerial tasks in a fashion similar to the canvass or an administrative audit.

In some matters, H.F. 356 gets things right. To name a few:

1. Section 10 and Section 11 amend Iowa Code § 50.24 to eliminate the "Monday or" language, which needlessly created confusing deadlines.

2. Sections 12 and following bring greater uniformity by ensuring a recount occurs in all precincts in a county and that the method of recount is the same across counties.

3. Section 15 includes clear deadlines, with recognition that recounts for some offices are more pressing to complete in a timely fashion than others.

But H.F. 356 does not address many of the flaws listed above. In some places, it makes the concerns worse. To name some:

1. Section 12 continues to require candidates to initiate recounts. This does not specify which candidates may or may not initiate recounts, and it is possible for a candidate who received 1% of the vote to request a costly and time-consuming recount. Recounts should occur *automatically* if less than 0.1% of the total votes cast separate the apparent winner and the second-place finisher, or if 10 votes separate them, whichever is greater. This avoids uncertainty, prevents frivolous recounts, and allows the Secretary of State to prepare for a recount immediately after the canvass rather than waiting on the conduct of the parties. This margin is more than sufficient to address the kinds of elections that merit a recount—it is very difficult to see the margin of victory change very much at all in a recount, and 0.1% is more than enough to ensure that reasonably close elections get a recount.

2. Section 12 requires recounts to be initiated at the county level. There are ninety-nine counties in Iowa. In a statewide election or an election that spans more than one county, it is a waste of resources to require candidates to go from county to county to request recounts. If recounts occur automatically, no county-based requests are needed. Furthermore, it would allow the Secretary of State to instruct the counties, on a uniform basis, which recounts need to occur, and to coordinate races in elections that cross county lines.

3. Section 12 requires candidates to request the same type of recount, whether by machine or by hand, across counties. Likewise, Section 13 includes the cumbersome (and trivial) mechanic of enforcing this by assessing a $100 fine for failure to request the same count in every county.

   But the decision of how to recount ballots should not be left the choice of a challenging candidate. It is not a choose your own adventure game, where the candidate gets to decide what method she thinks is most likely to benefit herself, then request that method everywhere. Instead, a single, fixed method should be used—and that method should not be a hand count, which is slow,

costly, and unreliable. Human errors in trying to stack and tabulate paper ballots are common.

It is well known that the optical scan ballot systems in Iowa are extremely reliable. In my experience in the 2020 recount, I found that the machines missed fewer than 1 in 10,000 ballots, and those that the machines missed were almost indiscernible even to the human eye. But the machines did not know how to discern the intent of "overvotes," or ballots where a voter marked for one candidate, then crossed it out and voted for another; or where a voter made a small mark on one oval, then changed his mind and voted for another candidate.

If the machines are extremely reliable but there are a small batch of "undervotes" and "overvotes" that the machine may miss, the law should be amended to require a "machine assisted tally." (This requires changing Section 14, which presently requires the same program to be used in the tabulation. The programming in terms of calibration should be the same, e.g., the logic and accuracy testing should remain fixed as it was before the election. But the sorting mechanism of the machine should be altered.) The machines can be reprogrammed to separate overvotes, undervotes, and write-ins from a single office when the ballots are run through the machine. Human observers can take the machine tally, but "amend" the tally if they identify any overvotes or undervotes in the separated piles that should be counted for the candidates. This ensures the reliability of the machine tally with the assistance of humans. Conversations with county auditors and the Secretary of State are essential to determine what existing technology could be used to ensure this kind of recount could be achieved.

4. The mechanism in Section 14 to make "piles" is unworkable. Putting "over or under count" ballots in one pile, for instance, is inconsistent with the requirements of how to report ballots (overvotes and undervotes are each tabulated separately). It is also not clear how this works when there are literally tens of thousands of ballots in some counties.

5. Several sections (e.g., Section 12, Section 13, & Section 14) erroneously refer to a "hand recount." There has not been a hand *count* yet, so there cannot be a hand *re*count. *See* Iowa Code § 50.51 (describing a "hand count" during an election audit); Iowa Admin. Code § 721-26.105(2) ("In counties with electronically tabulated optical scan ballots, the recount board may request that the ballots be *recounted* by machine, may *count* the ballots by hand, or may do both.") (emphasis added).

6. Section 14 admirably tries to ease recounts by increasing the size of the board in larger counties. But this misconceives the problem. Many disputes that arose and took time to discuss would take much longer with a 7-member team than a 3-member team. And while we sometimes divided the work, we would also double-check each other's work, particularly one candidate's designee checking the work of another designee. Finally, when three members are

physically sorting ballots, it requires coordination in a small space to ensure that the ballots are stacked and tabulated appropriately. Larger teams like this do not move more efficiently. Instead, a superior method is to expedite the *mechanism* of the recount (see (3), above), which reduces the workload for a recount board and even allows a three-member board to operate efficiently and quickly.

7. Section 14 also preserves the mechanism of each candidate choosing people to be on the recount board, then the choice of another member. Instead, the recount should look much like the canvass—two members of the election board, who are not members of the same political party. Likewise, the third member should be a member of the county auditor's office. This ensures that the recount is a mechanical process designed to tabulate the results, not an adversarial process of two candidates vying for a preferred outcome.

8. The bill should include mechanics (1) to compensate county auditors offices, which otherwise must take existing personnel out of other duties for the recount without any budgeted ability to do so, and (2) to compensate recount board officials in a similar fashion to how precinct election officials are compensated.

Amending Iowa's recount law should be a rare event. The problems that arose in the 2020 election do merit the legislature's consideration. But there are many ways to improve H.F. 356 to avoid the pitfalls listed above.

Feel free to contact me if I can be of any small help in this process.

Sincerely,



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