

SUPREME COURT No. 14-0585
POLK COUNTY CASE No. CVCV009311

IN THE
SUPREME COURT OF IOWA

AMERICAN CIVIL LIBERTIES UNION and LEAGUE OF UNITED
LATIN AMERICAN CITIZENS OF IOWA,

Petitioners-Appellees,

vs.

IOWA SECRETARY OF STATE MATT SCHULTZ,
Respondent-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE MARY PAT GUNDERSON, JUDGE (MOTION TO
DISMISS) and SCOTT D. ROSENBERG, JUDGE
(MOTION FOR RECONSIDERATION)

[CONDITIONALLY FILED] BRIEF OF *AMICUS CURIAE*
PROJECT VOTE, INC.

ANGELA CAMPBELL AT#0009086
DICKEY & CAMPBELL LAW FIRM,
PLC
301 E. WALNUT, SUITE 1
DES MOINES, IA 50309
PHONE: (515) 288-5008
FAX: (515) 288-5010
angela@dickeycampbell.com

MICHELLE E. KANTER COHEN*
PROJECT VOTE
805 Fifteenth Street NW, Suite 250
Washington, DC 20005
PHONE: (202) 546-4173
FAX: (202) 733-4762
mkantercohen@projectvote.org

*Application pending for admission
pro hac vice

Counsel for Amicus Curiae

CERTIFICATE OF FILING

I, Angela Campbell, hereby certify that I will electronically file the attached brief with the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, through the court's EDMS Electronic Filing System on September 15, 2014.

Dated: September 15, 2014

/s/ Angela L. Campbell
ANGELA CAMPBELL, AT#0009086
DICKY & CAMPBELL LAW FIRM, PLC
301 E. Walnut, Suite 1
Des Moines, IA 50309
PHONE: (515) 288-5008
FAX: (515) 288-5010
EMAIL: angela@dickeycampbell.com

CERTIFICATE OF SERVICE

I, Angela Campbell, hereby certify that on September 15, 2014, I served a copy of the attached brief on all parties to this appeal by electronically filing it through the Court's EDMS Electronic Filing System, which causes notices to be sent to the following attorneys of record:

Attorneys for Petitioners-Appellees:

JOSEPH GLAZEBROOK
Glazebrook & Moe, LLP
118 SE 4th St. Ste. 101
Des Moines, IA 50309
Phone: 515-259-1110
Fax: 515-259-1112
joseph@glazebrookmoe.com

RITA BETTIS
American Civil Liberties Union of
Iowa
505 Fifth Avenue, Suite 101
Des Moines, IA 50309-2316
Phone: 515-243-3988 x 15
Fax: 515-243-8506
rita.bettis@aclu-ia.org

Dated: September 15, 2014

Attorneys for Respondent-Appellant:

MEGHAN L. GAVIN
Assistant Attorney General
Iowa Department of Justice
Hoover State Office Bldg., 2nd Fl.
1305 East Walnut Street
Des Moines, Iowa 50319
Phone: (515) 281-6858
Email: Meghan.Gavin@iowa.gov

/s/ Angela L. Campbell
ANGELA CAMPBELL, AT#0009086
DICKEY & CAMPBELL LAW FIRM, PLC
301 E. Walnut, Suite 1
Des Moines, IA 50309
PHONE: (515) 288-5008
FAX: (515) 288-5010
EMAIL: angela@dickeycampbell.com

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Charles Ashby, <i>The Gessler 155, Zero Prosecutions of People Secretary of State Says Voted Illegally</i> , Grand Junction Sentinel (Nov. 16, 2013), http://www.gjsentinel.com/news/articles/the-gessler-155-zero-prosecutions-so-far-of-people	11, 12, 14
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U.S. Dept. of Homeland Security, Citizenship Through Parents, http://www.uscis.gov/us-citizenship/citizenship-through-parents (last visited Sept. 12, 2014)	13
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INTEREST OF AMICUS CURIAE

Project Vote is a national nonpartisan, nonprofit 501(c)(3) organization whose mission is to build an electorate that accurately represents the diversity of America's citizenry and to ensure that every eligible citizen can register, vote, and cast a ballot that counts. Project Vote has particular expertise in issues related to voter registration, and among its core organizational objectives is to ensure that voter list maintenance procedures do not remove eligible voters. Project Vote takes an interest in the important question as to the ramifications for eligible Iowa voters of the Secretary of State's proposed use of the federal Systematic Alien Verification for Entitlements ("SAVE") system for voter registration purposes as it relates to implementation of Rule 721-28.5.

SUMMARY OF ARGUMENT

In Iowa, as in nearly all states, voter registration is a prerequisite to exercising the most fundamental right in American democracy: the right to vote. Secretary Schultz's Rule 721-28.5 threatens that sacred right by erecting barriers to the ability of eligible citizens to remain on the voter registration rolls and cast ballots that count. Consequently, a decision to uphold Rule 721-28.5 ("the Rule" or "the Voter Removal Rule") will have significant negative ramifications for eligible Iowa voters.

Specifically, Respondent-Appellant's proposed use of the federal Systematic Alien Verification for Entitlements (SAVE) system will disenfranchise and deter eligible citizens from voting. First, as an initial step, identifying the list of names to be checked against the SAVE system, the Secretary's process requires flawed data-matching procedures likely to introduce errors. Second, it relies far too heavily on the assumed accuracy of the SAVE system, a demonstrably ill-fitting and limited tool for identifying the citizenship status of registered voters. Because of SAVE's shortcomings, the potential for erroneous challenge or removal from the voter rolls is large, and the process unfairly imposes these unjust hurdles for naturalized and other new citizens—and only these citizens—to remain registered to vote and to vote. Moreover, the procedures impose a de facto

documentary proof of citizenship requirement—found nowhere in Iowa law—on some citizens. As a result, when used as planned, the Secretary’s procedures will unfairly pose a substantial risk of erroneously depriving qualified voters in Iowa of their fundamental right to vote.

ARGUMENT

I. THE SECRETARY’S PROCESS STARTS WITH INHERENTLY FLAWED MATCH PROCEDURES LIKELY TO INTRODUCE ERRORS

The Voter Removal Rule begins with the requirement that officials first match the voter roll with drivers’ license data to identify lists of potential noncitizen registered voters.¹ As a result, notoriously unreliable database matching programs are introduced into the list maintenance procedures from the outset.

This initial match is an unavoidable step in using the SAVE system to purportedly verify the citizenship of voter registration applicants, because SAVE is not a database that can simply be compared to the voter registration roll using unique fields. Nor can officials look up registrants in SAVE using a voter’s name, date of birth, or Social Security number or other unique

¹ Iowa Admin. Code r. 721-28.5(47,48A)(1) (2013) (requiring that the initial match be “based a combination of a registrant’s name, driver’s license number, date of birth or last four digits of the registrant’s social security number.”)

identifier found on the voter roll.² Instead, the information contained in SAVE can only be used by entering an immigration-specific numeric identifier such as an “alien number” or “A-number” to query the system.³ These numbers are not required to register to vote in Iowa⁴ and can only be obtained from drivers’ license databases or other information that is not generally contained in the voter roll.

Thus, to obtain the information necessary to query SAVE for information regarding citizenship, a match must be conducted between the voter roll and the DMV data, introducing likely errors in numerous ways. The Rule is especially vague regarding the matching process, because it requires the initial match to be “based a combination of a registrant’s name, driver’s license number, date of birth *or* last four digits of the registrant’s social security number.”⁵ By failing to identify precisely the required matching criteria, the Secretary significantly increases the risk for misidentification errors to be introduced into the process before the voter data is even compared with SAVE. If insufficient unique criteria are used for comparison to identify matches, one registered voter’s record could be

² See Email from Raymond Raynder to Jim Gibbons, Petitioners’ Appendix of Exhibits Filed Aug. 26, 2013, at 44, Exhibit 12 (App. at ____).

³ *Id.*

⁴ See Iowa Code § 48A.11(8) (2014).

⁵ Iowa Admin. Code r. 721-28.5(1) (emphasis added).

paired with a completely different person's record in SAVE, resulting in a false match. Any information obtained would then have no value regarding that registrant.

As an example of the potential for faulty list matching, statistical research demonstrates that many individuals share a last name, first name, and birthdate.⁶ “In a sufficiently large population, two entries listing the same name and birthdate [when comparing two different voter rolls] are likely to demonstrate statistical coincidence....”⁷ Using this information alone to “match” two different sets of records—which cannot be ruled out under the vague language of the Rule—would inevitably lead to false positives.⁸

In another example, county election officials in Ada County, Idaho recently had to reinstate more than 750 voters due to a faulty match with other states' data using only name and birthdate.⁹ The county realized its error after legitimate voters who were still eligible Idaho residents began

⁶ See generally Michael P. McDonald and Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 Election L. J. 111 (2008).

⁷ See McDonald and Levitt, *id.* at 112.

⁸ See McDonald and Levitt, *id.* at 121-122 and n.42.

⁹ Cynthia Sewell, *Ada County Mistakenly Revokes 765 Voter Registrations*, Idaho Statesman (Aug. 29, 2014), http://www.idahostatesman.com/2014/08/29/3346833_ada-mistakenly-revokes-765-voter.html?rh=1.

calling the county to dispute the cancellations.¹⁰ The county subsequently “realized staff had not taken the extra step of crosschecking middle names and partial Social Security numbers, resulting in 765 names identified as matches that were not [actually the same person].”¹¹ Unfortunately, such problems are not unique, and they are not always corrected in time for an election. In 2000, an infamous voter list purge in Florida based in part on faulty matching criteria wrongly swept thousands of eligible voters onto purge lists.¹²

Data entry errors can also result in individuals falsely matching, so that two individuals will be identified as the same person when in fact they are not. Surnames of foreign-born or language minority citizens can be especially vulnerable to database input error.

For these reasons, the Secretary’s procedures risk false positive matches between the voter roll and driver’s license information. As a result, there is a significant risk the Secretary would check the wrong person’s “A-

¹⁰ *Id.*

¹¹ *Id.*

¹² Myrna Pérez, Brennan Center for Justice, *Voter Purges*, at 3 (2008), available at <http://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf>

number” in SAVE, and any result of that check could not actually provide any information about whether the registrant is or is not a citizen.

II. THE INFORMATION CONTAINED IN SAVE IS INACCURATE AND INCOMPLETE

Once the data match is run between the DMV information and the voter rolls, the Secretary’s proposed process would use SAVE to “verify” information that the registrant is not a citizen.¹³ But the SAVE data itself is incomplete and outdated and thus provides an unreliable basis for the demands placed on voters in the subsequent steps in the Secretary’s process.

Designed to verify immigration status in order to determine one’s eligibility for various public benefits, SAVE is a massive compilation of records from numerous databases about individuals who have interacted with the immigration system over the years, such as legal immigrants who have obtained green cards or visas, and those who have become naturalized citizens.¹⁴ It is not a definitive or accurate list of U.S. citizens.¹⁵ SAVE is

¹³ See Iowa Admin. Code r. 721-28.5(2).

¹⁴ See Corrected Declaration and Expert Report of Daniel A. Smith ¶ 42 n.19, *Arcia v. Detzner*, No. 13-CV-4095-EFM-TJJ, Dkt. No. 76-1 (S.D. Fla. Sept. 24, 2012).

¹⁵ See *id.*; U.S. Dept. of Homeland Security, Privacy Impact Assessment for the Systematic Alien Verification for Entitlements (SAVE) Program, at 3, Aug. 26, 2011, *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_save.pdf.

not a universal citizen database and does not purport to be complete or to include many individuals.¹⁶ Indeed, SAVE does not contain information on citizens born in the United States and thus cannot provide information on any voters other than naturalized citizens (and some derived citizens,¹⁷ see below) whose information may be collected in SAVE.¹⁸ As a result, under the Voter Removal Rule, only Iowa's naturalized and derived citizens would be at risk of receiving letters indicating that their right to vote may be challenged, and only these citizens would be subjected to a de facto documentary proof of citizenship requirement—not found in Iowa law—in order to fight such challenges, ensure their registrations are not cancelled, and cast a valid ballot. Ultimately, this process will unnecessarily result in treating naturalized and other new citizens differently from those born in the United States.

Another source of inaccuracy is that SAVE cannot verify derived citizens, individuals who acquired U.S. citizenship by virtue of their parents'

¹⁶ *See id.*

¹⁷ Derived citizenship is “citizenship conveyed to children through the naturalization of parents or, under certain circumstances, to foreign-born children adopted by U.S. citizen parents, provided certain conditions are met.” U.S. Citizenship and Immig. Servs., Glossary: Derivative Citizenship, <http://www.uscis.gov/tools/glossary/derivative-citizenship> (last visited Sept. 12, 2014).

¹⁸ Email from Raymond Raynder to Jim Gibbons, Petitioners' Appendix of Exhibits Filed Aug. 26, 2013, at 44, Exhibit 12 (App. at ____).

naturalization while they were minors, unless they applied for Certificates of Citizenship.¹⁹ However, a Certificate of Citizenship is an optional form: a person who automatically obtains citizenship is not required to file an Application for Certificate of Citizenship.²⁰ As a result, new young citizens are at high risk for being unfairly required to prove citizenship in order to remain registered and vote.²¹

Because of all of these inaccuracies, an accurate list maintenance program cannot and should not rely on SAVE to challenge voters or flag them for documentary proof of citizenship, even if such proof were required by Iowa law.

Indeed, the Department of Homeland Security (“DHS”), which administers SAVE, itself acknowledges that the SAVE system is a non-definitive source for determining citizenship. For example, information provided to the Secretary by DHS states, “the use of the SAVE program for

¹⁹ Petitioners’ Appendix of Exhibits Filed Aug. 26, 2013, at 44, 49, Exhibit 12 (App. at ____). (“USCIS only has comprehensive records on naturalized, and, *to the extent they have acquired Certificates of Citizenship*, derived U.S. Citizens.” (emphasis added)).

²⁰ U.S. Citizenship and Immig. Servs. Policy Manual, vol. 12, pt. H, ch. 4 (D.) *available at* <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter4.html>.

²¹ *See* Petitioners’ Appendix of Exhibits Filed Aug. 26, 2013, at 44, 49, Exhibit 12 (App. at ____).

verifying the citizenship status of voters has significant limitations.”²² The agency’s August 2013 agreement with Iowa, which allowed the state permission to access SAVE, indicates that “[t]he inability of the SAVE Program to verify [a person’s] citizenship does not necessarily mean that [the person is] not a citizen of the United States and [is] ineligible to vote.”²³ The DHS-Iowa MOA further acknowledges that the information in SAVE may need to be corrected. It requires users to:

[p]rovide all registrants who do not verify as a citizen under the terms of the MOA with adequate written notice that their citizenship could not be verified and the information necessary to contact DHS- USCIS...so that such individuals may obtain a copy of their Naturalization Certificate or Certificate of Citizenship *or correct their records in a timely manner, if necessary*

and further requires users to “[p]rovide all registrants who are not verified as citizens based solely or in part on the SAVE response with the opportunity....*to contact DHS-USCIS to correct their records prior to a final decision, if necessary.*”²⁴ By requiring the opportunity to “correct their records prior to a final decision,” DHS-USCIS acknowledges that errors

²² Email from Raymond Raynder to Jim Gibbons, Petitioners’ Appendix of Exhibits Filed Aug. 26, 2013, at 44, Exhibit 12 (App. at ____).

²³ Fact Sheet, Attachment to Memorandum of Agreement Between the Dept. of Homeland Security and U.S. Citizenship and Immig. Servs. And The Iowa Sec’y of State (Aug. 5, 2013) (hereinafter, “DHS-Iowa MOA”), Petitioners’ Appendix of Exhibits Filed Aug. 26, 2013, Exhibit 4 (hereinafter “Pet. Aug. 26 Exhibits”), at 19 (App. at ____).

²⁴ DHS-Iowa MOA at 5, Pet. Aug. 26 Exhibits, Exhibit 4, at 13 (App. at ____) (emphasis added).

exist in the information SAVE provides.²⁵ This document thus demonstrates that SAVE should not be relied upon to challenge voters' registrations and stop them from casting valid ballots.

Colorado's failed use of SAVE to identify and prosecute non-citizen voters demonstrates SAVE's inaccuracies, and it therefore reveals the dangers of relying on SAVE to challenge or ultimately cancel voter registrations as proposed in Iowa. Records obtained through a public records request by Project Vote, as well as a 2013 report by the Grand Junction Sentinel, reveal that relying on the SAVE system for voter citizenship information leads to erroneous identification of eligible citizens as non-citizen registrants.²⁶

Colorado followed a similar process to the one proposed in Iowa, first matching the voter list with division of motor vehicles (DMV) data, and then using that information in turn to query the SAVE system.²⁷ Out of the 7,000 people that the state believed were noncitizens based on DMV data, only 299 came back "as either non-citizens or had incomplete records" in

²⁵ *See id.*

²⁶ *See* Charles Ashby, *The Gessler 155, Zero Prosecutions of People Secretary of State Says Voted Illegally*, Grand Junction Sentinel (Nov. 16, 2013), <http://www.gjsentinel.com/news/articles/the-gessler-155-zero-prosecutions-so-far-of-people>.

²⁷ *See id.* The information obtained by Project Vote does not include the precise matching criteria used when comparing the voter lists with department of motor vehicles data.

SAVE.²⁸ Letters were sent to these individuals asking them to verify their citizenship status. Most were citizens, though a handful of noncitizens subsequently requested removal from the rolls.²⁹ The 155 individuals who did not respond were referred to prosecutors.³⁰

After investigation, the district attorneys reported that the bulk of the referred individuals were legal citizens with U.S. passports.³¹ A small number of individuals, who had indicated they were not citizens on registration forms, mistakenly believed they were allowed to vote when election officials erroneously sent them registration cards.³²

In particular, the experience of the registered voters referred to the District Attorney for the 20th Judicial District, located in Boulder, demonstrates SAVE's weaknesses, illustrating the dangers of relying on the SAVE program to impose additional hurdles on registered voters before they can vote. Seventeen voters (of the 155 registrants referred to prosecutors statewide) were referred to the district attorney in Boulder for investigation as noncitizen voters.³³ The county attorney cleared all seventeen of these

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See Erica Meltzer, *Boulder County DA Stan Garnett Clears All 17 Suspected Illegal Voters*, Boulder Daily Camera (Aug. 14, 2013),

individuals.³⁴ The majority of these were young derived citizens who had automatically become citizens as minors when their parents were naturalized.³⁵ Naturalized citizens who had become citizens through other processes were also caught up in the prosecution efforts.³⁶ If these procedures had been used prior to the election to deprive these citizens of their ability to remain registered and vote a valid ballot—based solely on being identified in SAVE, and with the burden shifted to the voter rather than on an investigating prosecutor—it is highly questionable whether all of them would have been able to respond in time and with sufficient documentation to have their votes counted. Moreover, they would have been forced to go through the process needlessly.

http://www.dailycamera.com/news/boulder/ci_23864751/boulder-da-stan-garnett-clears-illegal-voters-gessler.

³⁴ *See id.*

³⁵ Public Records Request Response to Project Vote Regarding Investigations by Colorado 20th Judicial District (received Nov. 18, 2013) (“Boulder Records”) (Redacted Excerpts), *available at* http://www.projectvote.org/images/publications/Litigation/Pub_Recs_Req_CO_20th_Jud_Dist_Excerpts.pdf. If an individual who was born outside the U.S. and turned 18 after February 27, 2001 has at least one parent who a U.S. citizen, and the child is currently under 18 and residing in the U.S. in the legal and physical custody of the U.S. citizen parent pursuant to lawful admission for permanent residence, the child automatically obtains U.S. citizenship. U.S. Dept. of Homeland Security, *Citizenship Through Parents*, <http://www.uscis.gov/us-citizenship/citizenship-through-parents> (last visited Sept. 12, 2014). Additional but different rules allow for children who turned 18 before February 26, 2001 to naturalize automatically as well. *Id.*

³⁶ *See* Boulder Records.

Apart from the experience in Boulder, district attorneys in at least two other Colorado districts reported that voters who similarly became U.S. citizens as minors when their parents were naturalized, and then subsequently registered to vote, were caught up in the sweep.³⁷ These instances, in which SAVE swept these citizens into this process, demonstrate that SAVE contains incomplete and outdated information that should not be used as proposed by the Secretary to deny the right to vote.

III. THE MATCH PROCEDURE AND THE USE OF SAVE AMOUNTS TO A BURDENSOME DE FACTO DOCUMENTARY PROOF OF CITIZENSHIP REQUIREMENT FOR CERTAIN CITIZENS

Thinly disguised within the Secretary's procedures is the requirement that, contrary to Iowa law, some voters provide documentary proof of citizenship in order to remain registered to vote. The forms to be returned from voters who receive a letter questioning the person's eligibility based on citizenship includes options for citizens either to (1) enclose a copy of proof of U.S. citizenship, or (2) indicate that the person "need[s] more time to provide proof of U.S. citizenship because" the person is "currently seeking

³⁷ See Charles Ashby, *The Gessler 155, Zero Prosecutions of People Secretary of State Says Voted Illegally*, Grand Junction Sentinel (Nov. 16, 2013), <http://www.gjsentinel.com/news/articles/the-gessler-155-zero-prosecutions-so-far-of-people>.

records review or correction, or replacement copy of the documentation or record in support of [the person's] U.S. citizenship....”³⁸ The form does not allow the person to affirm U.S. citizenship under penalty of perjury, nor does it contemplate that a person might be unable to obtain the necessary documentation.³⁹ Similarly, the accompanying letter instructs recipients to include in their response a “copy of any document that either shows that you are not the person identified in this letter, that you are a U.S. citizen or that your immigration status has otherwise changed.”⁴⁰ The Rule then provides, “[i]n the event a registrant indicates that the registrant needs more time to provide a response, the secretary of state shall not proceed under subrule 28.5(3) [involving subsequent challenge to the voter's eligibility] for a minimum of 60 days from the date the letter was originally mailed.”⁴¹ Given the time it often takes to acquire proof of citizenship documentation, these safeguards are not adequate.

³⁸ Admission or Denial of Non-U.S. Citizen Status Return Form 1, Exhibit C to Decl. of Sarah Reisetter (filed Sept. 6, 2012) (App. at ____); Admission or Denial of Non-U.S. Citizen Status Return Form 2, Exhibit E to Decl. of Sarah Reisetter (filed Sept. 6, 2012) (App. at ____). These forms and letters were filed by the Secretary in 2012, but there is no indication that this aspect of the procedure changed when the final rule was adopted in 2013.

³⁹ *Id.*

⁴⁰ Letter of Potential Ineligibility (Non-U.S. Citizen to Registrant Form 1), Exhibit B. to Decl. of Sarah Reisetter (filed Sept. 6, 2012) (App. at ____).

⁴¹ Iowa Admin. Code r. 721-28.5(2).

Registered voters who do not respond to the correspondence have their registrations challenged.⁴² Although challenges filed less than 70 days before a regularly-scheduled election cannot be processed until after the pending election, there is an exception for newly registered voters or registrants who received update their existing registrations.⁴³

Neither the Rule nor the statutory challenge provisions specifically describe the means by which voters can defeat the challenge to their eligibility and prevent the cancellation of their registrations.⁴⁴ The statute merely requires that hearings be held between 20 and 30 days after the date of the challenge and that “[o]n the basis of the evidence submitted, the commissioner shall either reject the challenge or cancel the registration of the challenged registrant.”⁴⁵ This ambiguity is likely to lead to varying application of the Rule across the state, and it strongly risks that at least some election officials will require documentary proof of citizenship in order for the voter to prevent cancellation of his or her registration. Moreover, challenged registrants who do not personally appear at the hearing may have their registrations cancelled.⁴⁶

⁴² Iowa Admin. Code r. 721-28.5(3).

⁴³ See Iowa Code § 48A.14.4 (2014).

⁴⁴ See Iowa Code §§ 48A.14-16 (2014); Iowa Admin. Code r. 721-28.5.

⁴⁵ Iowa Code §§ 48A.14, 48A.16.

⁴⁶ See Iowa Code § 48A.16.

Thus, Secretary Schultz's procedures under the Rule do not appear to allow a person to "cure" his or her challenged status and remain registered to vote absent documentary proof of citizenship. No procedure appears to provide the voter the opportunity to simply complete an affidavit affirming under penalty of perjury that the person is a citizen. This de facto documentary proof of citizenship requirement for voter registration is burdensome, falls disproportionately on naturalized citizens, and is contrary to Iowa law.

Moreover, not all voters have citizenship documentation, and those who do not disproportionately include poor, rural and minority citizens. Most Americans do not have a passport: for instance, in the United States in 2012, 113,431,943 passports were in circulation, but the number of eligible voters was 215,081,000, and some passport holders are children who are not eligible to vote.⁴⁷ Nationwide survey data also suggest that requirements to

⁴⁷ U.S. Dept. of State, Passport Statistics, <http://travel.state.gov/content/passports/english/passports/statistics.html> (select: Valid Passports in Circulation by Year); U.S. Census, Table 1 Reported Voting and Registration, by Sex and Single Years of Age: November 2012, [http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/TTable01.xls](http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/Table01.xls). Therefore, assuming every passport in circulation in 2012 was provided to a citizen of voting age, the number of passports in circulation would only account for 53% of the voting eligible population. In reality, however, the percentage of the voting eligible population with a passport is likely well below 53% because of passports issued to minors. Children

prove citizenship with documentary evidence disproportionately burden certain voting groups. For example, a 2006 survey estimated that 5.7% of U.S.-born citizens—*i.e.*, 11 million citizens—do not have a passport or birth certificate available.⁴⁸ Such citizens were disproportionately found in certain segments of society, including older individuals, poorer citizens, African-Americans, and rural residents:⁴⁹

Population Segment	Percent of Segment Surveyed Who Lack a Passport or Birth Certificate	Estimated Number of U.S. Citizens Who Lack a Passport or Birth Certificate
65 or Older	7.4%	2.3 million
Earn Less than \$25,000 per Year	8.1%	3 million
African Americans	8.9%	2 million
Rural Residents	9.1%	4.5 million

under 18 constitute more than 20% of the U.S. population. *See* U.S. Census, State and County QuickFacts, USA, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Sept. 12, 2014).

⁴⁸ Greenstein et al., *Survey Indicates House Bill Could Deny Voting Rights to Millions of U.S. Citizens* 1, 3 (2006), available at <http://www.cbpp.org/files/9-22-06id.pdf> (finding that 5.7% of citizens do not have a passport or birth certificate available); *see also* Brennan Center for Justice, *Citizens Without Proof* 2 (2006), available at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf (finding that 7% of those surveyed “do not have ready access to U.S. passports, naturalization papers, or birth certificates”).

⁴⁹ Greenstein at 1-3. The survey also found that 9.2% of citizens who did not earn a high school diploma also lacked a passport or birth certificate. *Id.* at 1.

Citizens in the Midwest were also disproportionately likely to lack such documents.⁵⁰

Other citizens may possess as documentation of their citizenship only their certificate of naturalization; however, if a naturalization certificate is lost, a replacement copy costs \$345, and the wait time for processing can be up to six months, far longer than the Secretary's process gives individuals to respond before it calls for the person's eligibility to vote to be challenged.⁵¹

The available data thus indicate that for voters caught up in the Secretary's proposed citizenship "verification" process, even for those voters who are able to navigate the process and are not deterred by administrative hurdles and the time required to navigate them, a significant number of them may not be able to prove their citizenship with documentary evidence. This runs a substantial risk of leading to unjust challenges to the individuals' ballots and/or voter registrations that ultimately prevent legitimate citizens from casting a ballot that is counted.

⁵⁰ *Id.* at 3.

⁵¹ See Iowa Admin. Code r. 721-28.5; U.S. Citizenship and Immig. Servs., Form N-565, Application for Replacement Naturalization/Citizenship Document, *available at* <http://www.uscis.gov/n-565> (cost); U.S. Citizenship and Immig. Servs., USCIS Processing Time Info. for the Neb. Serv. Ctr., Form N-565, Posted August 7, 2014, <https://egov.uscis.gov/cris/processTimesDisplayInit.do> (select: Nebraska Service Center, Processing Times).

Even citizens who do possess documentary proof of citizenship may have their documents stored in a safe deposit box or, especially in the case of college students, with a parent who may not even live in the same state. The investigatory record in the Boulder, Colorado cases discussed above, in addition to demonstrating the flaws in SAVE, also demonstrates some of the burdens of proving citizenship, especially for younger voters. In several cases, the investigator was required to speak with a young person's parent who was in possession of information regarding the individual's citizenship.⁵² The experiences of those voters demonstrate that, especially for younger voters, locating and providing documentary proof regarding their citizenship may be time-consuming and not within their immediate control.

The record in this case is consistent with these risks. As the lower court recognized in its September 13, 2012 Temporary Injunction order, the rule imposes a:

fairly heavy burden on any allegedly ineligible voter who receives notice under this rule to show they are in fact a qualified voter. Such a burden has the potential to fall more heavily on any newly admitted citizens who may not fully understand how to prove their citizenship, and/or on lower income individuals who may not have the time or resources required to refute such claims. Petitioners have already identified inaccuracies on the DOT list of individuals who obtained a driver's license while not a citizen and subsequently became citizens

⁵² See Boulder Records, Investigative Reports re Harrington, Tewari.

and registered to vote. Further, if they simply do not have the time or resources to challenge the notice, or fail to get the notice within [the specified time period], they will be subject to removal from the voter registration lists despite being qualified voters. In the alternative they may be forced to show additional proof of citizenship at the polling place; an activity which could easily be seen as having a chilling effect on Iowa residents who are qualified electors.⁵³

These findings are consistent with the significant and disproportionate impact the process proposed by the Secretary would have on the voting rights of qualified citizens not born in the United States.

IV. THE SECRETARY'S PROPOSED PROCESS IS LIKELY TO DETER ELIGIBLE CITIZENS FROM REGISTERING AND VOTING

In addition to the many errors inherent in the Secretary's proposed process that will likely disenfranchise eligible voters, implementing the rule will also deter and intimidate Iowa citizens from registering to vote and from engaging in the electoral process because of fear of negative interactions with immigration or law enforcement personnel, intimidating interactions with election officials, difficult-to-navigate procedures, and the costs of obtaining documentation and taking the time to respond to the inquiry. The district court's Temporary Injunction order recognized the potential for these ramifications, noting the rule deters qualified Iowa citizens "from registering

⁵³ Iowa Dist. Ct., Temporary Injunction Order at 10 (Sept. 13, 2012) (App. at ____).

to vote for fear of erroneous identification, and if that occurs they will have to endure the time, financial costs, and possible reputational harm from a wrongful criminal investigation into their legal status.”⁵⁴ These observations are consistent with the record in this case and with the likely chilling effect on legitimate voters if the Rule’s burdensome and inaccurate processes are implemented.⁵⁵

CONCLUSION

For the reasons discussed above, the Voter Removal Rule has significant ramifications for the fundamental rights and freedoms of Iowa citizens, and *amicus* Project Vote respectfully requests that this Court affirm the decision of the district court to permanently enjoin it.

Dated: September 15, 2014

/s/ Angela L. Campbell
ANGELA CAMPBELL, AT#0009086
DICKEY & CAMPBELL LAW FIRM, PLC
301 E. Walnut, Suite 1
Des Moines, IA 50309
PHONE: (515) 288-5008
FAX: (515) 288-5010
EMAIL: angela@dickeycampbell.com

⁵⁴ Iowa Dist. Ct., Temporary Injunction Order at 9 (App. at ____).

⁵⁵ See, e.g., Affidavit of Della M. Arriaga in Support of Resistance to Motion to Dismiss, Exhibit 11 ¶ 8, Pet. Aug. 26 Exhibits at 40 (App. at ____); Affidavit of Joseph G. Henry in Support of Resistance to Motion to Dismiss ¶ 8 (Aug. 19, 2012) (App. at ____).

MICHELLE E. KANTER COHEN*

PROJECT VOTE, INC.

805 15th Street, NW, Suite 250

Washington, DC 20005

PHONE: (202) 546-4173 Ext. 309

FAX: (202) 733-4762

EMAIL: mkantercohen@projectvote.org

*Application pending for admission *pro hac vice*

Attorneys for Amicus Curiae Project Vote, Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 4,807 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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Dated: September 15, 2014

/s/ Angela L. Campbell
ANGELA CAMPBELL, AT#0009086
DICKEY & CAMPBELL LAW FIRM, PLC
301 E. Walnut, Suite 1
Des Moines, IA 50309
PHONE: (515) 288-5008
FAX: (515) 288-5010
EMAIL: angela@dickeycampbell.com

MICHELLE E. KANTER COHEN*
PROJECT VOTE, INC.
805 15th Street, NW, Suite 250
Washington, DC 20005
PHONE: (202) 546-4173 Ext. 309
FAX: (202) 733-4762
EMAIL: mkantercohen@projectvote.org
*Application pending for admission *pro hac vice*